Ricci Tyrrell Johnson & Grey

ATTORNEYS AT LAW

Quarterly Newsletter / April 2017 / Volume 9

In this Issue:

News and Events

On April 27, 2017, **Ricci Tyrrell** Members **John E. Tyrrell, Francis J. Grey, Rebecca Leonard and Patrick McStravick** will conduct a day long Mock trial and educational presentation at the annual Product Liability Seminar of the Association of Equipment Manufacturers (AEM). This year's AEM Product Liability Seminar will be held in Cincinnati, Ohio. The annual AEM seminar generally consists of presentations by product liability defense practitioners and by expert witnesses. This year's seminar will consist entirely of the Mock Trial being presented by Ricci Tyrrell lawyers. AEM is an industry organization of more than 900 members across more than 200 product lines providing services to equipment manufacturers and service providers in the agricultural, construction, forestry, mining and utility industries.

William J. Ricci is the co-author of the featured article in the February 2017 edition of CounterPoint, an official publication of the Pennsylvania Defense Institute (PDI). The article is entitled, "Pennsylvania Supreme Court Overrules Azzarello in Landmark Tincher Decision, Only To Have Suggested Jury Instructions Seek Azzarello's Reinstatement". Ricci Tyrrell Member **Francis P. Burns III** is an acknowledged contributor to the article. PDI is an association of defense lawyers and Insurance executives, managers and supervisors.


John E. Tyrrell


Francis J. Grey


Rebecca Leonard


Patrick McStravick


William J. Ricci


Frances P. Burns III

Summary Judgment Granted Based Upon Absence of An Explicit Waiver of the Pennsylvania's Workers' Compensation Act

On February 16, 2017, Ricci Tyrrell client Commerce Construction Corporation obtained Summary Judgment in the Philadelphia Court of Common Pleas in *Morant v. Merck Sharp & Dohme Corp. and Merck & Co., Inc., et. al.*, August Term 2014 No. 3780.

The lawsuit arose out of a construction accident on August 3, 2012. Commerce Construction had been retained by Frank V. Radomski & Sons, Inc., as a subcontractor on a construction project. During that project, Plaintiff, Matthew Morant, claimed that he sustained injuries while operating a micro pile drill in his capacity as an employee of Commerce Construction.

In Pennsylvania, the Workers' Compensation Act is the sole and exclusive means of recovery for employees against employers for all injuries occurring within the

course of employment. 77 P.S. §481(a). As such, Morant pursued a Workers Compensation claim against Commerce, which was ultimately resolved on June 17, 2014. The Act further provides that in the event an injury to an employee is caused by a third party, the employee or their representative may bring an action against the third party, but the employer shall not be liable to a third party for damages, contribution or indemnity unless liability is expressly provided for in a written contact. 77 P.S. §481(b).

Morant initiated the Philadelphia civil suit on November 28, 2014, where he brought claims against multiple defendants, including Radomski. Radomski filed a Joinder Complaint on March 2, 2015 against Commerce alleging multiple claims including Commerce had waived its protections under the Workers' Compensation Act.

An employer may, consistent with the indemnification provision in the Act, 77 P.S. §481(b), enter into an indemnity contract with a third party; the employer may, expressly assume liability for the negligence of a third party which results in injury to the employer's employee. *Snare v. Ebensburg Power Co.*, 637 A.2d 296, 298 (Pa. Super 1993). In order for an employer to be held liable in indemnification for injuries to its own employees caused by the negligence of the indemnitee, there must be an express provision for this contingency in the indemnification clause. Absent this level of specificity in the language employed in the contract of indemnification, the Workers' Compensation Act precludes any liability on the part of the employer. *Bester v. Essex Crane Rental Corp.*, 422 Pa. Super. 178, 619 A.2d 304, 308-309 (1993).

In its Motion for Summary Judgement, Commerce argued that its subcontract with Radomski did not contain an explicit waiver as required under Pennsylvania law and thus did not express Commerce's intent to indemnify Radomski for damages caused to Commerce's own employees. The Court entered an Order granting in full Commerce's Motion, thus affirming that Radomski's Complaint was barred by the Workers' Compensation Act.

James W. Johnson *was lead counsel in the Morant case, assisted by* ***Jonathan A. Delgado,*** *an Associate at Ricci Tyrrell Johnson & Grey.*

Coverage Corner:
Punitive Damages; Four Corner's Rule; Discovery of Underwriting Records

In this installment we report on recent decisions in three critical areas: coverage

for punitive damages, erosion of the four corners rule that ostensibly controls the duty to defend, and discovery of underwriting records in a duty-to-defend coverage action.

Punitive Damages. Although the Pennsylvania Supreme Court has never addressed the issue, precedential decisions of the Pennsylvania Superior Court and the federal Third Circuit Court of Appeals have held that Pennsylvania public policy allows coverage of punitive damages where the insured is *vicariously* liable for such damages.[1] Coverage for punitive damages tied to a finding of *direct liability* is prohibited to prevent a tortfeasor from shifting the financial burden and escape the underlying objectives of punitive damages - namely, punishing the tortfeasor and deterring others from engaging in outrageous behavior.

In Bensalem Racing Association, Inc. et al v. Ace Property & Casualty Insurance Co., 2017 Phila. Ct. Com. Pl. LEXIS 11 (2017) the court held that a corporate insured was not entitled to reimbursement of that portion of a post-verdict settlement paid to satisfy a jury's award of punitive damages.[2]

The underlying tort action arose out of fatal injury to a rider thrown from a horse at the Parx Racetrack in Bucks County, Pennsylvania. The decedent was exercising the horse when a chicken ran onto the racetrack and spooked the horse.[3] The rider's estate filed a wrongful death and survival action alleging negligence in allowing chickens to roam freely on the premises. No employee of the racetrack was identified as a defendant but a track employee did testify to facts arguably supporting a finding of employee negligence as a cause of the accident. The action was settled following a verdict that included $5,000,000 in punitive damages.

The insured settled the punitive award for $2,647,374.36 and sued Ace for breach of contract and bad faith arguing that an employee's testimony showed the jury verdict was based on vicarious liability. The Court, however, reviewed the trial record and found it "filled with evidence of Parx's own direct negligence based on its knowledge [what was known by the chief of security and other high ranking officials] of the chickens' presence and the company's failure to address the problem." Even though the policy did not contain a punitive damages exclusion, the court held that public policy excluded coverage for punitive damages unless the insured's liability stems *solely* from vicarious liability. Finding that the verdict was solidly based on evidence of outrageous conduct directly tied to the insured, the action for reimbursement was dismissed on the insurer's Motion for Summary Judgment. A notice of appeal to the Pennsylvania Superior Court was filed on January 31, 2017.

Erosion of the Four Corner's Rule. In March 2016 we highlighted the decision in *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660 (3d Cir. 2016). The Third Circuit addressed coverage for a premises owner qualifying as an additional insured under ISO endorsement CG20330704 in the familiar context of a workplace accident during construction operations alleged to be the cause of bodily injury to a contractor's employee. The most prominent feature of the decision was its holding that for purposes of a "duty to defend" analysis liberal construction of an underlying Complaint requires taking account of the plaintiff's

reluctance to plead his employer's negligence due to the exclusive remedy provision in the Pennsylvania Workers' Compensation Act. The *Ramara* decision proved pivotal to the recent disposition of a coverage battle between two insurers in *Zurich American Insurance Co. v. Indian Harbor Insurance Co.*, 2017 U.S. Dist. LEXIS 24379 (E.D. Pa. February 21, 2017).[4]

The underlying tort action - *Milton Carado v. Rittenhouse Claridge, LP and Mio Mechanical Corporation* - was commenced by an employee of a company under contract to provide window washing services at an apartment building. Mr. Carado fell and was seriously injured. Suit was brought against the building owner and the manufacturer of a "rope grab" (defendant *Mio*). The commercial agreement between the building owner and the contractor required the contractor to "take all necessary precautions and erect safeguards for the safety of its employees..."

Mr. Carado's complaint did not allege any casual negligence on the part of his employer. The services contract obliged plaintiff's employer, insured by Indian Harbor, to add the building owner as an additional insured. The additional insured coverage as written applied only to liability for bodily injury caused, in whole or in part, by the contractor's acts or omissions, or the acts or omissions of those acting on its behalf, in the performance of the contractor's ongoing operations for the apartment building. Zurich insured the owner.

Zurich commenced a coverage action in federal court seeking a declaration that Indian Harbor was obliged to defend the building owner as an additional insured. Indian Harbor argued it had no duty to defend because the underlying complaint explicitly alleged the "sole negligence" of the building owner and no fault on the part of the contractor (plaintiff's employer) was alleged.[5] Zurich countered that even though the plaintiff's employer was not mentioned in the underlying complaint there were reasons to imply a casual contribution by the employer: (1) plaintiff alleged his injuries were caused by the building owner's "agents, servants, workers, or employees" - of which the contractor was one and by implication its conduct was potentially a proximate cause; (2) the purchase order for services provided that the contractor was to "take all necessary precautions and erect safeguards for the safety of its employees..."; and (3) the underlying tort action allegations must be construed by taking into account that an injured employee, like Mr. Carado, would not be inclined to allege his employer's negligence because the Workers' Compensation Act grants immunity to employers for on-the-job injury claims of employees.[6]

The position Zurich successfully pressed is significant for the way in which it extended, and arguably weakens, the prevailing rule in Pennsylvania that the duty to defend must be determined solely by comparing factual allegations in the underlying complaint with the applicable insurance policy. Only if the allegations, taken as true - i.e., assuming ultimate acceptance by the trier of fact, would give rise to a duty to indemnify does the duty to defend arise. In *Zurich v. Indian Harbor* the facts needed to activate the additional insured coverage for the building owner were extrinsic to Mr. Carado's complaint. Specifically, contract terms borrowed from a purchase order foreign to the text of the complaint and speculation about the plaintiff's subjective reasons for omitting any explicit

mention of his employer's causal contribution, if any, were essential links supplied by the court and ultimately determinative in the analysis.[7]

A related finding by the district court also should be mentioned. Recall that the Indian Harbor policy by its express terms extended coverage to an additional insured only for injury caused in whole or in part by the named insured or those acting on behalf of the named insured. A corollary provision restricted the coverage by providing that "no coverage shall be afforded...for any loss, cost or expense arising out of the sole negligence of any additional insured." Zürich argued that because plaintiff alleged liability of the rope manufacturer, the sole negligence clause did not apply. Indian Harbor countered with a narrower view: allegations against the product defendant should be ignored because the "sole negligence" language looks only to the named insured (contractor) and the putative additional insured (building owner). The court found its own path. Because the complaint had been construed to allege a possibility that the contractor's acts or omissions were a proximate cause of Mr. Carado's injuries the "sole negligence" clause did not preclude coverage. The court passed on the broader question posed by the insurers - namely, whether any claim against multiple defendants would render the "sole cause" provision inapplicable as a bar to additional insured coverage.

Discovery of Underwriting Records. In a professional liability insurance coverage action commenced by an insurer against a law firm and seeking a declaration of no duty to defend a federal district court recently held that the insurer's underwriting manual and underwriting file were discoverable. *Westport Insurance Corp. v. Hippo*, 2017 U.S. Dist. LEXIS 31659 (W.D. Pa. March 7, 2017). Finding the available case law equivocal on the subject, the Court limited its ruling to the facts of the case. Although the action pending did not include any express underwriting claim, the insured asserted claims for bad faith and breach of contract against Westport. In particular, the insured pointed to premium increases imposed because of the underlying malpractice action. Absent a claim of privilege or undue burden the court ordered production of the insurer's underwriting manual and underwriting file for the account.

[1] *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. 1996), appeal denied, 683 A.2d 875 (Pa. 1996); *Wolfe v. Allstate Property & Casualty Insurance Co.*, 790 F.3d 487 (3d Cir. 2015).
[2] The decision comes from the Commerce Court division of the Philadelphia Court of Common Pleas. Judges assigned to Commerce Court routinely hear complex disputes involving, but not limited to: corporate shareholders, company members and partners; sales, mergers and dissolutions of businesses; commercial real estate transactions; construction and other business contracts; **commercial insurance policies**; legal, accounting and other professional (non-medical) malpractice; unfair competition, corporate fraud and theft of trade secrets; and negotiable instruments.
[3] The case report does not identify by whom the decedent was employed.
[4] The district court's opinion and order were docketed on February 22, 2017. No notice of appeal has been filed to date.
[5] Indian Harbor argued in the alternative that if a duty to defend was triggered then Zurich shared that responsibility equally. The district court ruled against Indian Harbor on this point too, but that ruling will not be examined in detail.
[6] The district court did not discuss and Zurich apparently did not raise whether negligence on the part of Mr. Carado himself could be imputed to his employer for purposes of the coverage analysis.

[7] Having first said that a plaintiff would "not be inclined" to plead his employer's negligence, the court nevertheless found the complaint intended to imply such negligence in the attribution to the named defendant of imputed liability for the acts of its agents, servants or employees. Unexplained is how the employer's negligence would or could be proven in the underlying action to ultimately activate a duty to indemnify. The plaintiff himself would not introduce such evidence for the very same reasons he would not plead it. The employer cannot be joined as an additional defendant for the same reason it cannot be sued in the first place. Raising the employer's casual fault as a sole alternative cause defense cannot trigger a duty to defend because it is the plaintiff's complaint that controls, not the defendant's answer and affirmative defenses.

Francis P. Burns III *is a Member of Ricci Tyrrell Johnson & Grey and head of its Insurance Coverage practice.*

PROTECTING INTERNATIONAL PATENT RIGHTS

I am routinely asked by my clients what can be done to secure international patent protection, in addition to obtaining a United States patent through the United States Patent and Trademark Office (USPTO). The answer to this question requires consideration of several options.

The traditional method of seeking foreign patent protection is to file and prosecute a separate patent application in each country in which the protection is desired. An applicant can also file a single application in a regional office, such as the European Patent Office, which covers a number of European countries. However, such a regional application is of no assistance to the applicant if patent protection is required outside of Europe.

While readily available, these approaches to securing international patent protection can be quite expensive, since each country has its own unique requirements and fees for a patent application and the ongoing patenting process. As a result, significant expense will be incurred in preparing and filing applications in individual countries, especially when protection is sought in a number of countries. The applicant will be required to advance substantial funds before the patentability of the invention is even determined and before its commercial value has been evaluated.

There is another, more effective way of seeking international patent protection. By filing a patent application under the Patent Cooperation Treaty (PCT), the applicant is provided a simple, relatively inexpensive way to preserve patent rights in most of the industrialized countries in the world. The PCT is an international treaty which has been ratified by 151 countries, all of whom have agreed to recognize the patent rights preserved in applications originally filed in any one of these member countries.

In accordance with the PCT, an international patent application generally must be filed within one year of the date the United States patent application was initially filed with the USPTO. The PCT application can designate specific countries or all PCT countries in which patent protection is contemplated. The applicant merely needs to file a single copy of the original application in the format prescribed by the PCT, a format all the member countries have agreed to accept, in order to preserve patent rights in the designated countries. Thus, a PCT filing provides a significant cost advantage to the applicant.

Moreover, the PCT application allows the applicant a period of two and a half years after the original U.S. application is filed to decide whether or not to proceed with the applications in the previously designated countries. Only at that time must the applicant expend money to provide copies of the application and translations to regional or country specific patent offices.

Since the applicant has up to two and a half years after the original application filing to decide whether or not to proceed in designated countries, he or she will be able to make a more informed decision as to whether and how to proceed. During this period, several office actions from the USPTO application should have been received and, as a result, the applicant will have a better idea of whether the subject invention is patentable. This timing will also allow the applicant to determine whether the invention itself is commercially viable.

While the PCT application process does afford an applicant certain monetary and commercial benefits, I caution my clients to be aware that it is still an expensive process. The initial PCT filing usually costs between $4,000.00 and $5,000.00, most of this expense consisting of PCT fees. Careful consideration should also be given as to whether or not to even proceed with a PCT or other international application. As a practical matter, a U.S. patent grants to the patentee the right to preclude others from making, using, selling and distributing the invention in the United States. This means that a patent holder's cause of action for patent infringement is available: (1) if the invention is made and sold in the U.S.; (2) if the invention is made outside the U.S. and sold in the U.S.; or (3) if the invention is made in the U.S. and sold outside the U.S. If any of these situations are present, a foreign filing may not be necessary in order to enforce patent rights.

Stuart Goldstein *is head of Ricci Tyrrell's Intellectual Property practice.*

PENNSYLVANIA SUPERIOR COURT DRAWS A LINE IN THE SAND: LANDOWNERS AND BUSINESS OPERATORS DO NOT HAVE A DUTY TO PROTECT BUSINESS INVITEES AGAINST DANGERS ON

ADJOINING ROADWAYS

In a welcome decision to the defense Bar, the Pennsylvania Superior Court recently ruled that landowners and business operators do not have a duty to protect its invitees against dangers associated with adjoining roadways. *Newell v. Montana West*, 2017 Pa. Super. 15 (Pa. Super. Jan. 19, 2017 Bowes, J., Ott, J., Solano, J.) (Op. by Solano, J.).

In *Newell*, the Plaintiff attended a concert at the Defendants' restaurant/bar/nightclub. The Plaintiff parked his vehicle on a property that was located across a highway from Defendants' facility. After leaving Defendants' premises, Plaintiff was struck and killed by an automobile while crossing the highway to return to his vehicle. A civil action complaint was filed on behalf of Plaintiff charging the landowner and business operator with negligence. With respect to the business owner, the theory of liability was that the business owner provided insufficient parking for those patronizing its facility, thereby making it necessary for Plaintiff to incur the risk of parking on the other side of the highway and of crossing the highway to reach his vehicle. The trial court entered Summary Judgment for the landowner and business operator on the grounds that they did not owe a duty to Plaintiff when he crossed the highway and was fatally injured. The decision was appealed.

The duty of a Pennsylvania landowner to protect its invitees from dangers on adjoining roadways was a question of first impression for the Superior Court. In reaching its ultimate decision that a Pennsylvania landowner owes no duty to an invitee injured on an adjourning roadway, the Court made several rulings that are of significance: (1) A pedestrian who walks on a public highway places himself at risk of injury from vehicles traveling on the highway. Any duty of care owed to that pedestrian must belong to those who maintain the road and those motorists who are licensed to drive safely on it. The duty does not extend to landowners who have premises adjacent to the roadway. (2) The court rejected efforts by Plaintiff to recast his liability theories in terms of unsafe conditions on the landowners property, i.e. Defendant's lack of adequate parking spaces. (3) Occasional past voluntary measures to protect patrons do not change the application of the no-duty rule espoused by the court.

Jason Avellino *is an Associate at Ricci Tyrrell Johnson & Grey.*

INDEMNIFICATION FOR PRODUCT MANUFACTURERS

Indemnification is a useful device for reducing the amount a defendant must ultimately pay. For product manufacturers, indemnification claims are often

encountered as a claim against them. Not uncommonly, a downstream seller of a manufacturer's products will turn to the manufacturer for indemnification if the seller has been held liable on account of an alleged defect in the manufacturer's product. But indemnification is a sword that can cut both ways. It can also provide relief to a manufacturer in the form of a claim for indemnification against the maker of a component part that the manufacturer incorporated into its end product.

In some cases, the indemnity obligation includes attorneys' fees and other costs incurred in defending the underlying litigation. The extent of the liability for indemnification depends on the nature of the claim for indemnification. If the claim is for contractual indemnification, the limits of the duty to indemnify will depend on the terms of the contract.
See Chester Upland School District v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. Ct. 2006). In the case of common law indemnification, the scope of the indemnification is a matter of law. Under Pennsylvania law, a claim for common law indemnification can include a claim attorneys' fees and other litigation costs. This article will address common law indemnification claims under Pennsylvania law.

The parameters of common law indemnification under Pennsylvania law are well established. A defendant has a common law right[1] of indemnification from a third party where the defendant has been required to pay a judgment for harms caused by the negligence of the third party, and the defendant is only secondarily liable, as compared to the third party, which is primarily liable. *Sirianni v. Nugent Bros., Inc.*, 506 A.2d 868, 870 (Pa. 1986) (citing *Builders Supply Co. v. McCabe*, 77 A.2d 368 (Pa. 1951)). Secondary liability is liability that rests on imputed or constructive fault only, "being based on some legal relation between the parties, or arising from some positive rule of common or statutory law, or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible." *Id*. at 871 (quoting *Builders Supply*, 77 A.2d at 371).[2] To determine whether a party's liability is primary or secondary, Pennsylvania courts focus upon such factors as whether the party was an active or passive tortfeasor,[3] and whether the party had the knowledge or opportunity to discover or prevent the harm. *See Anthony v. Small Tube Mfg. Corp.*, No. 06-CV-4419, 2007 U.S. Dist. LEXIS 73470, at *21 (E.D. Pa. Sept. 28, 2007); *Burch v. Sears, Roebuck & Co*., 467 A.2d 615, 622 (Pa. Super. Ct. 1983).

In strict products liability cases, primary liability generally lies with the manufacturer. *See Walasavage v. Marinelli*, 483 A.2d 509, 518 (Pa. Super. Ct. 1984) (citing *Burbage v. Boiler Eng'g and Supply Co., Inc.*, 249 A.2d 563, 567 (Pa. 1969)). This general rule of manufacturer responsibility is sometimes referred to as the "mere conduit" theory of indemnity. *See, e.g., Moscatiello v. Pittsburgh Contractors Equip. Co.*, 595 A.2d 1198, 1201 (Pa. Super. Ct. 1991).[4] An assembler of a product may thus obtain indemnification from the manufacturer of a component part. See Burbage, 249 A.2d at 563 (holding boiler manufacturer was entitled to indemnity from manufacturer of defective valve that was component part of boiler); *Walasavage*, 483 A.2d at 518 (concluding seller of dump truck entitled to indemnification from manufacturer of defective tailgate

assembly that seller installed on truck).[5] A seller's mere failure to discover and correct a defect for which the manufacturer was responsible does not make the seller an "active" tortfeasor or otherwise ineligible for indemnification. *Burbage*, 249 A.2d at 567; *Builders Supply*, 77 A.2d at 371.

The common law right of indemnification includes the right to attorneys' fees and costs. *See Treco*, 2001 Phila. Ct. Com. Pl. LEXIS 75, at *13-*14 (citing *Vattimo*, 465 A.2d at 1235 (citing, in turn, Restatement (Second) of Torts, § 914(2)). *See also Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 117 (3rd Cir. 1992).[6] The right is limited to costs and fees incurred in defending against the underlying tort claim; it does not include any amount spent in obtaining indemnification. *Boiler Eng'g Supply*, 277 A.2d at 814. No Pennsylvania case requires a party seeking common law indemnification for attorneys' fees and costs to have tendered its defense to the putative indemnitor. However, a common-law indemnitee may only recover "reasonable compensation for the loss of time, attorney fees and other expenditures thereby suffered or incurred in" defending against the tort claim. *Fleck*, 981 F.2d at 117 (quoting *Vattimo*, 465 A.2d at 1235 (quoting Restatement (Second) of Torts § 914(2))).

A party may obtain common law indemnification even if it settles the case against it. *See Willard v. Interpool, Ltd.*, 758 A.2d 684, 687 (Pa. Super. Ct. 2000) (citing *Tugboat Indian Co. v. A/S Ivarans Rederi*, 5 A.2d 153 (Pa. 1939)). "In order for a party to recover indemnity where there has been a voluntary [settlement], it must appear that the party paying the settlement was himself legally liable and could have been compelled to satisfy the claim." *Willard*, 758 A.2d at 687 (alteration in *Willard*) (quoting *Tugboat Indian Co.*, 5 A.2d at 153).[7] However, a defendant that wins a lawsuit does not have an indemnification claim, and has no claim for costs and attorneys' fees. *Automatic Time & Control Co. v. ifm Elecs., GmBh*, 600 A.2d 220, 223 (Pa. Super. Ct. 1991); see also *Merck & Co. v. Knox Glass, Inc.*, 328 F. Supp. 374, 377 (E.D. Pa. 1971). In such a case, the putative indemnitee has not been compelled to pay any damages for the underlying product liability claim, and there has been no finding of negligence or product defect on the part of the supplier. *Id*. at 222.

Thus, while many manufacturers are be aware of their potential duty to indemnify distributors of their products, they should also consider whether they can assert indemnity claims against others. They should do so where doing so is both legally viable and makes good business sense.

[1] Although the right is said to be "common law," it is based in equity. *See City of Wilkes-Barre v.* Kaminski Bros., 804 A.2d 89, 92 (Pa. Commw. Ct. 2002) ("[The right to indemnity] is a common law equitable remedy...."). In this usage, "common law" serves to distinguish the "common law" right from a right of indemnification based in contract. *See Treco, Inc. v. Wolf Invs. Corp.*, 2001 Phila. Ct. Com. Pl. LEXIS 75, at *12 (comparing *Embrey v. Borough of West Mifflin*, 390 A.2d 765, 774 (Pa. Super. Ct. 1978) (stating that "equitable principles are applied" to indemnity claims), with *McClure v Deerland Corp.*, 585 A.2d 19 (Pa. Super. Ct. 1991) (treating indemnity claim based on contractual provision as action at law)).

[2] *See also Pine Grove Manufactured Homes v. Ind. Lumbermens Mut. Ins. Co.*, No. 3:08-CV-1233,

2009 U.S. Dist. LEXIS 98926, at *9 (M.D. Pa. Oct. 23, 2009); *Moran v. G. & W.H. Corson, Inc.*, 586 A.2d 416, 428 (Pa. Super. Ct. 1991).
[3] *See Vattimo v. Lower Bucks Hosp., Inc.*, 465 A.2d 1231, 1236-37 (Pa. 1983) (single-Justice opinion announcing judgment of the Court, with one Justice joining in relevant part, and three concurring in relevant part) (holding plaintiffs/parents were not entitled to indemnification for legal fees for son's defense in civil and criminal actions stemming from son's having set fire while hospitalized for schizophrenia).
[4] "[W]e have utilized the 'mere conduit' theory to entitle mere sellers of products that injure consumers to indemnity from the manufacturer of the product on the grounds that the relative culpability of the seller pales in comparison to that of the manufacturer." *Moscatiello*, 595 A.2d at 1201. *See also Foley*, 12 Phila. at 584 (requiring manufacturer to indemnify distributor, where distributor was held liable solely because it was in chain of distribution).
[5] *See also Tromza v. Tecumseh Prods. Co.*, 378 F.2d 601, 606 (3d Cir. 1967) (allowing refrigerator manufacturer to obtain indemnification from manufacturer of defective compressor incorporated into refrigerator); *Seaboard Surety Co. v. Permacrete Const. Corp.*, 221 F.2d 366, 372 (3d Cir. 1955) (allowing common law indemnification for counsel fees); Burch, 467 A.2d at 622 (holding product seller was entitled to indemnity from supplier of component part of product); *Mixter v. Mack Trucks, Inc.*, 308 A.2d 139, 142 (Pa. Super. Ct. 1973) (holding seller of truck due indemnification from intermediate installer of component part); *Foley v. Clark Equip. Co.*, 12 Phila. 581, 585 (Pa. C.P. 1985) (holding forklift manufacturer owed indemnity to distributor).
[6] *See also Boiler Eng'g & Supply Co. v. Gen. Controls, Inc.*, 277 A.2d 812, 814 (Pa. 1971) (citing *Orth v. Consumers' Gas Co.*, 124 A. 296 (Pa. 1924)).
[7] See also *Fox Park Corp. v. James Leasing Corp.*, 641 A.2d 315, 317 (Pa. Super. Ct. 1994) (stating that party that enters into settlement and then seeks indemnification must be able to prove its liability and the reasonableness of settlement amount)

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

IN THE COMMUNITY

Each holiday season, Ricci Tyrrell makes a donation to **Philabundance®**, a regional non-profit hunger relief organization. The firm's tradition continued this past holiday season.

On December 22, 2016, Ricci Tyrrell hosted its first Holiday Ugly Sweater 50/50 Competition. Participants got in the holiday spirit and wore their competition submissions for the day. Following a firm-wide vote, Ricci Tyrrell paralegal **Alexis Shaw** earned half of the pot and the remainder was donated to **The Philadelphia Ronald McDonald House ("RMH")**. Ricci Tyrrell members **Francis P. Burns III** and **Nancy D. Green** came in second and third place, respectively. The RMH provides a comfortable room to sleep, home-cooked meals, and other supportive services to families who travel to Philadelphia to obtain medical treatment for their children. These services allow parents to comfort their children around the clock, in the hospital or after an outpatient treatment. By staying at the House, the families also get support from a community of other parents in similar situations, finding comfort and hope. With Ricci Tyrrell's Ugly Sweater Competition donation, the RMH was able to help a family spend time together close to the hospital while

they received medical care for their newborn baby whose spinal cord failed to develop properly.

In honor of **Martin Luther King** day, Ricci Tyrrell was closed on January 16, 2017. During her time off, Ricci Tyrrell Associate **Tracie Bock Medeiros** and her 4 year old son Zachary participated in **Har Zion Temple's Martin Luther King Day of Service**. Together they helped organize and sort donated goods for distribution to local charities. Zach enjoyed playing "glove basketball" as he sorted the donated gloves and tossed them into the appropriate boxes.

Tracie Bock Medeiros served on the Silent Auction Committee for the "For Our Children" event at the **Noreen Cook Center for Early Childhood Education of Har Zion Temple**, where her son attends preschool. The annual fundraiser and silent auction was held on March 18, 2017 and raised money to expand the school's playgrounds.

John E. Tyrrell will be the keynote speaker at the Athletic Awards Banquet for Valley Central High School in June. Valley Central is Mr. Tyrrell's *alma mater* and is located in Montgomery, NY.

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 January 21, 2017, 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 served meals again on March 18, 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 a long-time volunteer at her church, **St. Thomas More Church**, located in Cherry Hill. January 2017 marked Julie's 22nd year as a volunteer pre-k Sunday school teacher at her church.

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


Best Lawyers
BEST
LAW FIRMS
U.S.News
2017


AV
AV PREEMINENT
Martindale-Hubbell
Lawyer Ratings


Super Lawyers
Ricci, Tyrrell, Johnson & Grey PLLC
FEATURED IN
Super Lawyers Business Edition