Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

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NEWS AND EVENTS:

WILLIAM J. RICCI NAMED PDI DEFENSE LAWYER OF THE YEAR

We are proud to announce that Ricci Tyrrell founding Member William J. Ricci has been named "Defense Attorney of the Year" by the **Pennsylvania Defense Institute (PDI)**. Each year PDI honors a member of the civil defense bar who best exemplifies the qualities of professionalism, dedication to the practice of law and promotion of the highest ideals of justice in the community. We are so proud of Bill Ricci for this accomplishment.

In This Issue:

FEDERAL DEFENSE ARBITRATION AWARD BASED ON A LACK OF PRODUCT IDENTIFICATION AND PLAINTIFF'S ASSUMPTION OF THE RISK

On July 26, 2017, a panel of Federal Arbitrators found in favor of Ricci Tyrrell client **Columbus McKinnon ("CM")**, in a lawsuit stemming from an incident in which Plaintiff claimed he was injured when he attempted to retrieve a piece of rubber stuck in an operating conveyor, allegedly manufactured by CM. The conveyor was part of a used tire recycling system owned by Plaintiff's employer and purchased in its entirety from a third party. The only identifiable CM product within this tire recycling system was a CM Liberator; the remaining components were either manufactured by other entities or were unidentified. Plaintiff suffered a crush type injury to the left forearm, with lacerations and broken bones in the wrist and hand.

At arbitration, Ricci Tyrrell argued Plaintiff's inability to identify CM as the manufacturer of the subject conveyor. Under Pennsylvania law, before liability will attach, the plaintiff must establish that the injuries sustained were caused by the product of a *particular* manufacturer or supplier. *Stephens v. Paris Cleaners, Inc.*, 885 A.2d 59, 63 (Pa. Super. 2005); *Santarelli v. BP America*, 913 F. Supp. 324, 329 (M.D. Pa. 1996) ("If the plaintiff cannot link each defendant to the product which allegedly caused her injury, she cannot prevail against that defendant"). Moreover, while CM manufactured the Liberator, CM could not be liable for the conveyor because a manufacturer cannot be expected to foresee every possible risk that might be associated with use of a completed product, which is manufactured by another party, and to warn of dangers in using that completed product in yet another party's finished product. *Jacobini v. v. & O. Press Co.*, 588 A.2d 476, 480 (Pa. 1991); *see Petrucelli v. Bohringer and Ratzinger* 46 F.3d 1298, 1309 (3rd Cir. 1995).

In CM's case in chief, Ricci Tyrrell presented testimony of the CM salesman who first sold the Liberator and testified that no conveyor was sold with it. Along with documentary evidence of this transaction, Ricci Tyrrell also presented the testimony of a CM engineer who explained how by design the subject conveyor differed from a CM conveyor.

Ricci Tyrrell also advised the panel that even if it accepted Plaintiff's circumstantial product identification, the evidence showed that Plaintiff assumed the risk of his injury. In Pennsylvania, assumption of the risk is a complete defense in a products liability case where a plaintiff knows of a specific defect and voluntarily proceeds to use the product with knowledge of the danger caused by the defect. *See Howell v. Clyde*, 620 A.2d at 1113 n.10 (Pa. 1993). Plaintiff's testimony showed a subjective knowledge of the risk of injury from sticking one's hand into a conveyor and an awareness of this risk at the time of injury. Furthermore, Plaintiff testified to his significant experience generally with conveyors.

Plaintiff did not appeal the arbitration award which resulted in a judgment in favor of CM.

The Ricci Tyrrell team on this case was presided over by founding Member ***John E. Tyrrell****.*
Patrick J. McStravick*, Member, handled the arbitration.*
Associate ***Sam Mukiibi*** *provided valuable assistance.*



THE SLIDING SCALE APPROACH TO PERSONAL JURISDICTION SLIDES INTO OBLIVION

In an important ruling for the defense bar, the United States Supreme Court recently handed down an 8-1 opinion in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, __ U.S. __ (2017), which imposed significant limitations on the ability of state courts to adjudicate cases involving aggregated claims of plaintiffs from many jurisdictions.

As is often seen with significant product liability cases, *Bristol-Myers* involved claims in a California state court from over 600 plaintiffs, many of whom were not California residents.[1] The plaintiffs asserted a variety of state law claims based upon injuries allegedly caused by a drug-Plavix-manufactured by Bristol-Myers Squibb Company ("BMS").[2]

BMS, is a large pharmaceutical company incorporated in Delaware and headquartered in New York.[3] As the Court noted, BMS maintains substantial operations in New York and New Jersey. While also recognizing that BMS engages in business activities in other jurisdictions, including California, the Court emphasized that 50% of the BMS workforce is employed in New York and New Jersey, with only approximately 160 employees working in research and laboratory facilities in California.[4] The Court additionally noted that BMS neither developed Plavix in California nor manufactured, labeled, packaged, or worked on the regulatory approval of the drug there.[5] In fact, as the Court took care to note, all of BMS's activities with respect to Plavix occurred outside of California.[6]

The nonresident plaintiffs-who hailed from 33 other States-did not allege that they obtained Plavix from California physicians.[7] Nor did they allege that they were injured by Plavix or were treated for their injuries in California.[8]

After the plaintiffs commenced suit, BMS initially moved to quash the service of summons on the nonresidents' claims. The California court denied BMS's motion, finding that there was general jurisdiction over BMS as it "engages in extensive activities in California."[9] Following the Court's decision in *Daimler AG v. Bauman*, 571 U.S. __ (2014), the California Supreme Court instructed the California Court of Appeal to vacate its earlier order.[10] The Court of Appeal did so, finding that general jurisdiction was "clearly lacking."[11] That, however, did not end the story. On remand, the Court of Appeal found that the California courts had specific jurisdiction over the nonresidents' claims against BMS,[12] a decision which the California Supreme Court affirmed, utilizing a "sliding scale approach to specific jurisdiction."[13]

Under that approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[14] Using the sliding scale approach, the California Supreme Court concluded that "'BMS's extensive contacts with California permitted the exercise of specific jurisdiction 'based on a less direct connection between BMS's forum activities and plaintiffs' claims that might otherwise be required.'"[15] The California Supreme Court then went on to find that because "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product," the sliding scale test was satisfied.[16]

In rejecting the sliding scale approach, the Supreme Court observed that for specific jurisdiction to exist, "'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'"[17] That is, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'"[18] The Court further observed that the "primary concern" of specific jurisdiction is "the burden on the defendant."[19] As the Court explained, assessing this burden not only "requires a court to consider the practical problems resulting from litigating in the forum," but also "the more abstract matter of submitting to the coercive power of a State that may have

little legitimate interest in the claims in question."[20] And noting that this federalism interest may at times be "decisive," the Court explained that "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause . . . may sometimes act to divest the State of its power to render a valid judgment."[21]

Guided by these principles, the Court found California's sliding scale approach to be particularly dangerous. As the Court explained, the "nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California."[22] Then, observing that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction,"[23] the Court found that the "mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California-and allegedly sustained the same injuries as did the nonresidents-does not allow the State to assert specific jurisdiction over the nonresidents' claims."[24]

In assessing how the *Bristol-Myers* decision will impact litigation moving forward, one need look no further than the Majority and dissenting opinions. As Justice Alito explained writing for the Court:

> Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. Alternatively, the plaintiffs who are residents of a particular State-for example, the 92 plaintiffs from Texas and the 71 from Ohio-could probably sue together in their home states. [25]

Writing in dissent, Justice Sotomayor responded:

> [T]here is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because [BMS] already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach-litigating those claims in separate suits in as many as 34 different States-would prove far more burdensome. By contrast, the plaintiffs' interest in obtaining convenient and effective relief, is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own.[26]

As these passages make clear, the Majority and dissenting opinions not only reach differing conclusions, but also reflect divergent views on the purpose of specific jurisdiction and the effect that the Court's Opinion would have. On the one hand, the Majority focuses on the burden of jurisdiction on the defendant in dispelling the parade of horribles that some have suggested would result from the conception of specific jurisdiction it enunciated with its Opinion.[27] On the other hand, Justice Sotomayor focuses her dissent on "fair play and substantial justice," asking "[w]hat interest could any single State have in adjudicating respondents' claims that the other States do not share?"[28] And so, the *Bristol-Myers* decision can be fairly read as rejecting Justice Sotomayor's plaintiff-friendly view of specific jurisdiction.

Despite clarifying the focus of specific jurisdiction analysis, the *Bristol-Myers* decision left several questions unanswered. For example, the Opinion expressly left open the question of whether the "Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."[29] The Court also does not address how much of a connection is required between a plaintiff's claims and the forum state to permit specific jurisdiction given that the nonresidents' claims had no connection to California. Nor does it grapple with the issue of how courts should

proceed in multi-defendant cases wherein no one state has general jurisdiction over all of the defendants and no two defendants are residents of the same state. Finally, the Opinion does not "confront the question" of whether a plaintiff injured in the forum can represent "a nationwide class of plaintiffs, not all of whom were injured there."[30]

These are all issues that will surely be the source of considerable contest in the future and must be considered in preparing a defense of any claim involving the assertion of specific jurisdiction.

[1] *Id.* at __ (slip op., at 1).
[2] *Id.*
[3] *Id.*
[4] *Id.* at __ (slip op., at 1-2).
[5] *Id.* at __ (slip op., at 2).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at __ (slip op., at 2-3).
[10] *Id.* at __ (slip op., at 3).
[11] *Id.*
[12] *Id.*
[13] *Id.* (internal citations omitted).
[14] *Id.*
[15] Id.
[16] *Id.* at __ (slip op., at 3-4).
[17] *Id.* at __ (slip op., at 5) (quoting *Diamler*, 571 U.S. at __ (slip op., at 8)
[18] *Id.* at __ (slip op., at 5-6) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).
[19] *Id.* at __ (slip op., at 6) (internal citations omitted).
[20] *Id.*
[21] *Id.* at __ (slip op., at 6-7) (internal citations omitted).
[22] *Id.* at __ (slip op., at 8).
[23] *Id.* at __ (slip op., at 8) (quoting *Walden v. Fiore*, 571 U.S. __, __ (2014) (slip. op., at 8)).
[24] *Id.* at __ (slip op., at 8).
[25] *Id.* at __ (slip op., at 12).
[26] *Bristol-Myers Squibb*, 582 U.S. at __ (slip op., at 6) (Sotomayor, J., dissenting).
[27] *Bristol-Myers Squibb*, 582 U.S. at __ (slip op., at 12)
[28] *Bristol-Myers Squibb*, 582 U.S. at __ (slip op., at 9) (Sotomayor, J., dissenting).
[29] *Bristol-Myers Squibb*, 582 U.S. at __ (slip op., at 12)
[30] *Bristol-Myers Squibb*, 582 U.S. at __ (slip op., at 10 n.4) (Sotomayor, J., dissenting).

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

STATE TRADEMARK REGISTRATION V FEDERAL TRADEMARK REGISTRATION

A trademark, whether a logo, name, or slogan, designates particular goods or services. By registering the mark, the owner or registrant of that mark acquires substantial rights to use the mark in commerce, without fear that it will be copied or imitated by competitors. There are, however, two distinct, jurisdictional options available for registering a trademark which should be considered before beginning the registration process. A trademark owner can obtain a federal registration or a state registration. There are advantages and disadvantages to both.

In order to secure a federal registration, a formal application must be completed and filed with the United States Patent and Trademark Office (USPTO). The application must contain the name of the owner of the mark, the type of mark, a fairly detailed description of the goods and services the mark is to designate, the class (category) of goods or services, and a specimen of the mark showing the mark in use in commerce. A filing fee of $275.00 per class is required.

Once the requisite filing fee is submitted and the application is filed, it will be reviewed by a trademark examining attorney who will insure that there are no conflicts with existing marks and that the application otherwise complies with USPTO requirements. There are then several other steps in the application registration process. The process itself can take from six months to several years before the mark is actually registered.

On the other hand, the state trademark registration process is comparably less involved and less expensive. Trademark registration in most states also requires an application, although that application is not as extensive as the one required by the USPTO. The applicant must submit a registration form, a specimen of the trademark showing the mark being used with the applicable good or service, and a fee, usually between $50 and $100. These basic actions will provide the registrant with a state trademark registration. There is no formal examination as there is in the USPTO application process.

Thus, state trademark registration is obtained more quickly and economically than a federal registration. It also establishes a clear record of the date the registrant began using the mark in commerce. This record could be significant in a potential trademark infringement suit or to obtain an injunction against a competitor who is using the mark. Nonetheless, state trademark registration only protects a trademark in the state where it is registered.

A federal trademark registration creates a legal presumption of ownership of the trademark throughout the entire United States. If trademark ownership rights need to be established in the future, a federal registration is superior to any state registration. Once a federal trademark registration is obtained, the owner is entitled to place a ® on its trademark, notifying others of the existence of the federal trademark. There are a number of other significant advantages to obtaining a trademark registration.

In summary, whether the owner of a trademark is best served by filing a federal trademark registration versus a state trademark registration is contingent upon how and where the trademark and the goods or services it designates are to be used. If the registrant does not intend to use the mark outside a particular state, wishes to obtain some type of registration relatively quickly, and/or does not want to expend substantial funds to obtain a registration, he or she may be best served by filing a registration in that state. If the registrant requires nationwide protection of the trademark which is superior to any state registration, federal registration will be required.

It is important to note that filing for a state trademark registration does not preclude the filing of a federal trademark registration. A federal trademark registration can be obtained after one is secured from the state.

Stuart M. Goldstein *heads Ricci Tyrrell's Intellectual Property practice at Ricci Tyrrell Johnson & Grey.*

PENNSY SUPPLY, INC. V HIGH: A POST-*TINCHER* CONSUMER EXPECTATION QUESTION BEFORE THE PENNSYLVANIA SUPREME COURT

On November 9, 2012, Jeffery High purchased four cubic yards of concrete from Pennsy Supply, Inc., which he and his brother, Charles High, sought to have poured into a 36" crawl space in the basement of Jeffrey's home. The concrete was delivered by a Pennsy Supply truck driver and contained a warning which stated that the concrete was "irritating to skin and eyes" and to "avoid prolonged contact," as well as wear "rubber boots and gloves". The subject concrete, known as "wet concrete" contained lime, which is caustic and capable of causing skin burns. Jeffery signed for the delivery under the warning label. Charles, who arguably did not see the delivery ticket was familiar from past experience that exposure to wet concrete affected the skin. Despite this, neither brother wore rubber boots or gloves, and knelt and laid in the uncured concrete while leveling it for over an hour. Both brothers suffered significant chemical burns to their skin, required substantial medical treatment and filed a lawsuit against Pennsy Supply alleging that the concrete was defective because it had a pH in excess of 11.5 and capable of causing burns to the skin upon prolonged exposure.

I n *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014), the Pennsylvania Supreme Court set forth two alternative ways for a plaintiff to establish that a product is in a defective and unreasonably dangerous condition: "(1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions."[1] The first option is the "consumer expectation test"; the second is the "risk-utility test." Determining which test could apply to prove that a product was designed or manufactured in a defective condition is based on the facts of a particular dispute. However, the consumer expectation test should not be allowed in matters which are wholly dependent on the presentation of expert testimony. Moreover, in considering the adequacy of a complex product, such as an automobile or industrial machine, consumers have no meaningful idea how safely a product really ought to perform in various situations. Ordinary consumers are likely to be unaware of how the technology is designed to work. It is for this reason that defense counsel typically attempt to preclude the consumer expectation test in complex product liability cases.[2]

At the trial stage of the *Pennsy Supply v. High* matter, the Court was tasked with determining whether wet concrete is defective because of its caustic nature. The case proceeded under the consumer expectations test because plaintiffs did not present any expert reports showing that there was a defect in the concrete, anything unusual about the particular batch concreate, any manufacturing defect, or any indication that Pennsy Supply's warnings were inadequate. Pennsy Supply was awarded summary judgment.[3] It argued that wet concrete is a ubiquitous product used in virtually every modern construction project. It further argued that its wet concrete was from a chemical process that has been in existence for 191 years and is the only way to achieve the physical and mechanical properties of concrete. Essentially, wet concrete is a product of natural chemical composition with a high-pH range around 12-13 necessary for the product to perform as expected.

On appeal, the split-panel of the Superior Court concluded that pursuant to the consumer expectation test, a fact issue existed as to whether the dangers of wet concrete, its caustic nature, are knowable to the ordinary consumer. The High brothers argued that the trial court's award of summary judgment conflicted with *Tincher* because it removed the question of whether the product was "unreasonably dangerous" from the province of the jury. The Superior Court concluded that the jury, and not the judge, should make the determination as to this factual issue. Accordingly, it reversed the trial court's entry of summary judgment. In its remand of the matter, the Superior Court also instructed the trial court to consider whether the High brothers were pursuing

failure-to-warn claims against Pennsy Supply.[4] Whether the Superior Court injected a legal claim not specifically alleged by plaintiffs ultimately became a secondary issue in Pennsy Supply's appeal of this matter to the Supreme Court.

The *Tincher* related question raised to the Supreme Court in *Pennsy Supply v. High* is whether the Superior Court correctly interpreted the consumer expectation test when it reversed the trial court's entry of summary judgment. Pennsy Supply argues that the *Tincher* court expressed concern over the consumer expectation standard, explaining that the theory of liability could lead to a result where an ordinary product, used as intended, could be deemed defective merely because the product was of a complex nature. Pennsy Supply's appeal to the Supreme Court cites case law, though from other jurisdictions, which expressly notes that lime is one of the main ingredients in wet concrete, that the substance has been in use for 150 years and the dangers of irritations and burns have been known for centuries.[5][6] Pennsy Supply's appeal also parallels an example found in the Restatement (Second) of Torts § 402A, cmt. i., regarding alcohol which is not unreasonably dangerous but will get people drunk and can be especially dangerous to alcoholics. Pennsy Supply argues the absence of any evidence to suggest that the wet concrete was in any way out of the ordinary or improperly used. Further, Jeffrey High signed a receipt containing a warning expressly stating that skin irritation would occur and Charles High knew wet concrete would affect his skin if exposed.

Where Pennsy Supply may fall short is that its appeal concedes that a "modicum of investigation" would reveal that wet concrete can cause burns and skin irritation. Also, it could be argued that knowledge of the dangers of wet concrete would only be possessed by construction laborers who work with the product on a daily basis. Here, neither of the High brothers were professional contractors and the warning on the concrete warned of irritation, but not severe chemical burns. Certainly, most people would not mix concrete with their bare hands simply because of the grime involved.

A decision from the Pennsylvania Supreme Court on this matter is expected later this year.

[1] *Tincher*, 104 A.3d at 335.
[2] David G. Owen, Owen's Hornbook on Product Liability, §5.6 (2d. Ed. 2008).
[3] The opinion of the Court of Common Pleas of Dauphin County is not officially reported, but can be found at 2016 WL 676409.
[4] The opinions of the Superior Court have been selected for publication in the Atlantic Reporter and can be found at 2017 PA Super 10 and 2017 WL 127834.
[5] *See Jowers v. Comm. Union Ins. Co.*, 435 So.2d 575 (La.Ct.App. 1983); *Young v. Elmira Transit Mix, Inc.*, 52 A.D.2d 2020 (N.Y.App.Div. 1976); *Sams v. Englewood Ready-Mix Corp.*, 259 N.E.2d 507 (Ohio Ct. App. 1969).
[6] Pennsylvania has no recorded decisions considering whether concreate is unreasonably dangerous by virtue of its capacity for causing burns while in its liquid state.

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

ARBITRATION AWARD IN FAVOR OF DEFENDANT IN CASE OF ALLEGED NEGLIGENT INSPECTION AND REPAIR SERVICES

On August 17, 2017, a panel of Federal arbitrators found in favor of Ricci Tyrrell

Johnson & Grey ("Ricci Tyrrell") client, Terex Utilities, Inc. d/b/a Terex Services ("Terex Services") in a lawsuit stemming from an incident in which Plaintiff, a City of Philadelphia employee, was injured while working on an overhead traveling crane. The crane at issue was used to transport trash at the City's Northwest Transfer Station. Some time prior to the incident, the cab door of the crane had been modified to incorporate the use of a bungee cord to hold the door shut while in operation. On the day of the incident, the cab door had been wedged open against the railing of an outside platform. Plaintiff stood in the open doorway with his hand positioned on the door jamb. As the operator maneuvered the crane out toward the trash pit, he applied the brakes, causing the door to un-wedge itself and slam shut forcefully on Plaintiff's hand.

For years prior to the incident, Terex Services provided inspection and repair services for the crane at issue pursuant to a contract with the City of Philadelphia. Plaintiff asserted and alleged that Terex Services had negligently performed its services by failing to recognize and report that the cab door of the crane had been modified and represented a safety hazard to employees.

At arbitration, Ricci Tyrrell argued that (1) Terex Services' duty of care to Plaintiff was limited by the nature and scope of its contractual duties with the City of Philadelphia, and (2) Terex Services had performed all requested inspection and repair services in conformance with the terms of the contract and in compliance with all relevant industry standards, rules, and regulations. In addition, Ricci Tyrrell presented expert testimony that the use of the bungee cord to hold the cab door shut neither violated any industry standard nor represented an unreasonably dangerous condition or safety concern.

Ricci Tyrell also argued that Plaintiff lacked any reliable evidence to demonstrate that any Terex Services employee ever observed the bungee cord attached to the crane cab door such that he/she would have been in a position to identify it as a potentially dangerous condition or safety concern.

*The Ricci Tyrrell team on this case was presided over by founding Member **Francis J. Grey, Jr.** Associates, **Jason M. Avellino** and **Jonathan A. Delgado** provided valuable assistance.*



COVERAGE CORNER

In this installment, we report on recent federal court decisions applying Pennsylvania law to construe the phrase "arising out of" in a policy exclusion. Following established precedent, the Third Circuit in April held the term is unambiguous and denotes "but for" causation when used in an insuring agreement or an exclusion. *General Refractories Co. v. First State Ins. Co.*, 855 F.3d 152 (3d Cir. 04/21/2017). Without discussing the *General Refractories* decision, a district court later held that when used in an exclusion the phrase should be strictly construed and read to mean "proximately caused by." *The Netherlands Ins. Co. v. Butler Area School District*, 2017 U.S. Dist. LEXIS (W.D. Pa. 06/09/2017).

First, some background. Pennsylvania law requires a court to enforce clear and unambiguous policy language.[1] If the language of an exclusion is clear and unambiguous, it must be enforced as written.[2] But even if no ambiguity exists, policy language must be given a reasonable interpretation and may be found to have a broader or narrower reach when the policy is read as a whole and applied to a

particular set of facts.[3] Unambiguous language may, therefore, be unenforceable in exceptional circumstances, as for example: where the insured was mislead by the insurer's agent about the scope of coverage; if a policy is renewed with a material change but without explicit notice to the insured; the language used has a specialized meaning for the parties as the result of industry custom, commercial usage or the negotiations of the parties.[4] But the default rule remains - clear and unambiguous language cannot be construed to mean other than what it says.

"Arising out of" was first construed by the Pennsylvania Supreme Court as a term in the insuring agreement of an auto liability policy. *Manufacturers Casualty Insurance Co. v. Goodville Mutual Casualty Co.*, 170 A.2d 571 (Pa. 1961). The policy promised to pay all sums the insured shall become legally obligated to pay as damages caused by accident and "arising out of" the ownership, maintenance or use of the policyholder's automobile or trailer. The trailer was involved in a collision while being towed by a motor vehicle that was not insured under the policy. The Court held that "[c]onstrued strictly against the insurer [as the drafter of the policy], 'arising out of' means causally connected with, not proximately caused by." Construing the phrase was not, however, determinative. Instead, the Court found there was no coverage because at the time of the accident the trailer was not being used by a "permissive user" and for that reason the person seeking coverage did not qualify as an insured.

The most frequently cited case interpreting the phrase is *McCabe v. Old Republic Insurance Co.*, 228 A.2d 901 (Pa. 1967). The policy at issue excluded any liability for injuries or death of an employee "arising out of and in the course of his employment by the insured." The insured, a contractor, sought coverage for a judgment entered against him in an action for wrongful death and survival. The decedent, an employee of the insured, was fatally injured on-the-job during installation of a municipal sewer. As the decedent was laying a concrete bed in a trench made to receive a section of pipe, the trench walls collapsed and buried him. The insured argued that the injury and death did not "arise out of" the decedent's employment but was proximately caused by the absence of shoring in the trench. Citing its decision in *Goodville*, the Supreme Court held that "we cannot agree that any ambiguity exists," declared that "arising out of" means causally connected with and not proximately caused by, and found the facts of the accident supported an obvious casual connection between the decedent's employment and his death.

General Refractories Co. v. First Aid Insurance Co. involved disputed coverage for asbestos claims. The issue on appeal was whether a policy exclusion disclaiming coverage for bodily injury "arising out of asbestos" precluded a manufacturer from obtaining indemnification for thousands of settlements with plaintiffs suffering adverse health effects from exposure to its asbestos-containing products. The focus in the district court, driven by the arguments of the parties, was on the word "asbestos." The insured argued that the exclusion was limited to bodily injury caused by the sale of "raw" asbestos, not asbestos as part of a finished product. GeneralRefractories made and sold products that sometimes contained asbestos components, but never "mined, milled, processed, produced or manufactured raw mineral asbestos." During a one-day bench trial, General Refractories offered extrinsic evidence to prove that when its policies were issued, asbestos was understood to mean "raw asbestos."[5] General Refractories' communications with the insurer and its own insurance broker was introduced by the defense as evidence of the parties' intent to exclude all injuries related to asbestos in any form.

The district court ultimately found that the phrase "arising out of asbestos" contained a latent ambiguity because the exclusion could reasonably be read to exclude only losses related to raw asbestos. The Third Circuit reversed, finding that the focus in the trial court had been misplaced because its analysis overlooked "arising out of," which the Court found "has an established, unambiguous meaning" that is "entrenched in Pennsylvania jurisprudence." The Court thus held that the plain language of the exclusion is unambiguous and not reasonably susceptible of different constructions: "The provision plainly encompasses losses that would not have occurred but for

asbestos or which are causally connected to asbestos. Pennsylvania law permits no other interpretation." *Id*. at 160. Evidence bearing on the meaning of "asbestos" did not cloud the meaning of "arising out of", and the phrase negated any material ambiguity that "asbestos" may introduce. "But for" inclusion of asbestos - originally mined or milled as a raw material - in the insured's finished products, the plaintiffs would not have contracted asbestos-related diseases.[6] Consequently, even if asbestos meant "raw asbestos," coverage was precluded as a matter of law. The Court ended with this observation:

Parties to an insurance contract must be able to place faith in consistent interpretations of common language when drafting their policies if they are to properly allocate the risks involved. While future parties may present evidence demonstrating a meaning of "arising out of" that is unique to their contract, the phrase is not ambiguous on its face when used in a Pennsylvania insurance contract.

Netherlands Insurance Company v. Butler Area School District is a coverage action brought by two insurers, Netherlands Insurance and Peerless Insurance Company, against a school district and its superintendent seeking a declaration of no coverage for an underlying toxic tort class action. The underlying complaint alleged "lead and/or copper" contamination of drinking water at an elementary school. The court held that pollution exclusions requiring "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" did not apply because lead and copper elements of the water system degraded over time rendering the material incrementally bioavailable for human exposure.[7] The court also held that lead exclusions did not preclude coverage because the plaintiffs sought damages for injuries resulting from lead and/or copper: "...[T]aking the facts in the Second Amended Complaint as true, there are allegations of potential injury from copper that are not dependent on lead injury nor stem from lead injury."[8] The policies did not included an exclusion for injury due to exposure to copper.

The district court also construed "arising out of" as part of the lead exclusions and held the phrase must be understood to exclude a claim for injury only if "proximately caused by lead" - a factual finding requiring a trial. Cited in support of the district court's analysis is an unpublished, non-precedential Pennsylvania Superior Court opinion that, predictably, applied the operative phrase as meaning "but for" and not proximate causation.[9] What the district court found instructive was a statement by the Superior Court, inconsequential to the state court decision, that the phrase "arising out of" is to be construed against the insurer as the drafter of the insurance agreement.[10] Missing from the district court's discussion is a rationale for invoking a rule of construction without first finding the phrase ambiguous, which in itself would openly conflict with Third Circuit precedent - not least with *General Refractories Co. v. First Aid Insurance Co*. which is cited in the court's opinion but not discussed. The district court opinion does not cite, and no case has been found, to support the proposition that a rule of strict construction may be deployed to override "an established, unambiguous meaning...entrenched in Pennsylvania jurisprudence." Construing "arising out of" was not necessary or consequential to the decision; but application of a rule of narrow construction to an unambiguous term, instead of applying the term's settled meaning, may inspire insureds to follow suit.

[1] *Minnesota Fire and Casualty Co. v. Greenfield*, 855 A.2d 854 (Pa. 2004).
[2] *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 735 A.2d 100 (Pa. 1999).
[3] See e.g., *Bucks County Construction Co., Inc. v. Alliance Insurance Co.*, 56 A.2d 338 (Pa. 1948). A construction shovel owned by the insured was damaged while being transported on a tractor trailer. The shovel itself collided with an overhead pillar; the tractor trailer did not. The policy's schedule of insured property included the shovel and insured against damage from a number of specified causes, including "collision, derailment or overturning of land conveyances while the insured property is being transported thereon, including loading and unloading." Alliance denied coverage because it interpreted the policy to mean that the damage must occur as the result of a collision, derailment or overturning of a land conveyance - i.e., the tractor trailer carrying the shovel. The court agreed there was no ambiguity in the policy language; however, notwithstanding the clear meaning of the words, the court held it would be unreasonable to

construe the language to deny coverage implied for protection in transit of specific property named in the policy. Also see, *Windows v. Erie Insurance Exchange*, 2017 Pa. Super. LEXIS 309 (Pa. Super. 2017)(no ambiguity exists if one of two proffered meanings is unreasonable).

[4] See generally, *Auto-Owners Insurance Co. v. Stevens & Ricci, Inc.*, 835 F.3d 388 n. 21 (3rd Cir. 2016).

[5] The insured's evidence included, but was not limited to, examples of comparable insurance policies, issued in the same time frame, which explicitly excluded both "asbestos" and products containing asbestos, and "expert" testimony of an asbestos-claimants' lawyer who explained that the terms "asbestos" and "asbestos-containing product" had distinct meanings to parties involved in asbestos litigation during the relevant time frame.

[6] "But for" causation is a de minimus standard of causation under which even the most remote and insignificant force may be considered the cause of an occurrence. *Takach v. B.M. Root Company*, 420 A.2d 1084, 1086 (Pa. Super. 1980).

[7] The court relied on *Lititz Mutual Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001) which held that lead-based house paint did not become available for ingestion or inhalation by "discharge, dispersal, release or escape" within the language of a pollution exclusion.

[8] The lead exclusions sought to withhold coverage for bodily injury "arising, in whole or in part, either directly or indirectly out of…inhalation, ingestion, absorption, use or existence of, exposure to, or contact with lead or lead contained in goods, products or material:…" The district court did not address decisions that have held allegations of concurrent causation pose no impediment to finding a lack of coverage where an exclusion applies to the instrumentality of injury as one of multiple causes. Cf., *Columbia Casualty Co. v. Federal Insurance Co.*, 2016 U.S. Dist. LEXIS 117990 (E.D. Pa. 2016).

[9] *Penn-America Ins. Co. v. Tomei*, 2016 Pa. Super. Unpub. LEXIS 1859 (Pa. Super. 2016) ("Steadfast [Insurance Company] argues that an unrelated third party posting illicit videos to the Internet from his home has nothing to do with Sunkissed's [the insured tanning salon] business, and therefore, the alleged injuries [claimed by patrons] did not 'arise out of' the business. However, clearly, there was a causal connection between the business and [the criminal actions of the peeping Tom]. These videos of nude customers were created at Sunkissed's business. The videos were of unsuspecting patrons of the business, who had to disrobe in order to use the tanning beds. The offensive videos would not have existed 'but for' Sunkissed's business. Although there is no allegation that [the peeper] was acting on Sunkissed's behalf, there is an obvious causal **relationship**.")

[10]Only when an ambiguity exists should a rule of construction be used to conclude the matter against the drafter. *Burns Manufacturing Co. v. Boehm*, 356 A.2d 763, 767 n.3 (Pa. 1976); *Mutual Benefit Insurance Co. v. Politsopoulos*, 115 A.3d 844 n. 6 (Pa. 2015)("Consistent with ordinary principles of contract interpretation, where a policy provision is ambiguous, it is generally construed against the insurance company as the drafter of the agreement. [citation omitted]. This precept dovetails with the approach, reflected in decisions of our intermediate courts, that policy exclusions are to be construed narrowly in favor of coverage."); *Miller v. Prudential Insurance Co.*, 362 A.2d 1017, 1020 (Pa. Super. 1976)("The general rule governing the construction of insurance policies is well settled: an insurance policy is to be construed most strongly against the insurer and liberally in favor of the insured so as to effect the dominant purpose of indemnity or payment to the insured, but this is where the terms of the policy are ambiguous or uncertain and the intention of the parties is therefore unclear.")

Francis P. Burns III *is the head of Ricci Tyrrell's Insurance Coverage practice.*

IN THE COMMUNITY

In December of 2016, Ricci Tyrrell's Billing and Information Technology Manager **Eric P. Shaw** earned his black belt in Taekwondo from **Cherry Hill Martial Arts and Fitness** in Marlton, NJ. Since obtaining his rank, Eric has volunteered to help teach the next generation of Martial Artists. He regularly teaches in the Tiny Tigers (3 to 4 year old students) and Dragons (5 to 6 year old students) programs at Cherry Hill Martial Arts. Eric also volunteers twice a year to organize extracurricular practice sessions on Sunday afternoons for students who are about to earn their black belts. At Cherry Hill

Martial Arts, Eric has had the honor of providing instruction to children, adults, and special needs students.

On April 22, 2017, Ricci Tyrrell employee **Yolanda Jenkins** volunteered at the **Wills for Heroes Foundation** event at the **Community College of Philadelphia**. Wills for Heroes programs provide essential legal documents free of charge to our nation's first responders, including wills, living wills, and powers of attorney.

On April 28, 2017, Ricci Tyrrell Member **Nancy D. Green** was re-elected to the Board of Directors of **Shir Ami Synagogue** in Newtown, PA. Also, Nancy was on the planning committee for the annual **Women for Greenwood House Becky Deitz Levy Luncheon** which took place on May 11, 2017 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.

In May, Ricci Tyrrell Associate **Eric Pasternack** was appointed to serve as the **Co-Chair** of the **Mock Trial Committee** of the **Philadelphia Bar Association's Young Lawyers Division**, which together with Temple Law School, runs the John S. Bradway High School Mock Trial Program in Philadelphia.

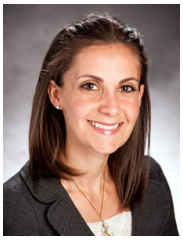
On June 3, 2017 Ricci Tyrrell employee **Lisa Tiffany** co-chaired **The Springfield Lions Club's** 51st annual chicken BBQ which was a resounding success. The Club's main goal is to help the hearing and visually impaired. Lisa was also on the planning committee for the Club's 4th of July parade. The Club runs and totally funds the parade and festivities for the Springfield Community including music, food, fun house and all!

On August 7, 2017, Ricci Tyrrell founding Members **John E. Tyrrell** and **Francis J. Grey, Jr.** attended the **Philadelphia Eagles** training camp as guests of the **Eagles Charitable Foundation**, which Ricci Tyrrell Johnson & Grey is proud to support.

Each year, the **Philadelphia Ronald McDonald House** ("RMH") provides housing, food, comfort and companionship to hundreds of families with seriously ill children. Unfortunately, due to the lack of available space, it must turn many families away. So, it's making some more room. 88 more rooms, in fact. On June 28, 2017, Ricci Tyrrell Associate **Tracie Bock Medeiros** attended the Groundbreaking Reception for the new building. In connection with the **Room in Our Hearts Campaign For Expansion**, Ricci Tyrrell purchased a brick that will be engraved with the firm's name and located on the patio outside of the new building.

Ricci Tyrrell also participated in the **Philadelphia Ronald McDonald House Philalympics** in August. The Philalympics is a corporate challenge where local companies compete against each other in Philadelphia-themed games, including adult tricycle races, slingshot games, and Philadelphia trivia, all to crown the 'phunnest' company in Philadelphia. The day served as a great team building activity, networking event, and raised funds for the Philadelphia Ronald McDonald House. Participating for Ricci Tyrrell were **Tracie Bock Medeiros, Eric Shaw, Alexis Shaw, Julianne Johnson, Sam Mukiibi, Jonathan Delgado** and **Sheila Ciemniecki**.

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



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