Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

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News and Events:

Ricci Tyrrell Johnson & Grey is pleased to announce that **Brian L. Wolensky** has joined our firm as a Member. His practice primarily focuses on the defense of product manufacturers in cases involving either property damage or serious and catastrophic injuries. He has extensive experience representing automobile manufacturers in claims involving occupant protection systems. Brian also has experience handling a variety of litigation matters including premises liability, professional liability, insurance coverage, warranty disputes, contract litigation, environmental pollution, construction defect, transportation and trucking and various other general litigation matters.

Brian has been admitted *pro hac vice* to courts in a number of different states and has managed cases in those states as part of national counsel or regional counsel programs. He has first chair jury trial experience and is knowledgeable about the benefits and risks associated with trial practice.

Ricci Tyrrell Managing Member **John Tyrrell** was interviewed in the most recent edition of ***Sports Litigation Alert***, the sports industry's only subscription-based periodical reporting on the intersection of sports and the courts. A copy of the interview is accessible by clicking the following link: https://www.rtjglaw.com/2018/12/27/john-tyrrell-interviewed-by-sports-litigation-alert/.

On November 2, 2018, **Ricci Tyrrell** Member **William J. Ricci** was a panelist for a Continuing Legal Education (CLE) program entitled: ***Masters of Litigation***. This was the second annual joint seminar program presented by **Temple University Beasley School of Law** and the

American College of Trial Lawyers. The topic for Mr. Ricci's panel was ***Examination of Expert Witnesses***. The panel discussed how to prepare for direct and cross examination of expert witnesses, how to examine the expert, use of exhibits in the examinations, and anticipating problem issues in your case.

On November 10, 2018, **Ricci Tyrrell** Managing Member **John E. Tyrrell** was one of the presenters at the 2018 SnowPro Summit hosted by Sauers Snow and Ice Management. The presentation addressed ***Snow Removal Liability Issues and Concerns***. Mr. Tyrrell has provided risk-management consultation to his clients on this subject for decades.

DEFENSE VERDICT IN YORK COUNTY JURY TRIAL

Ricci Tyrrell client Speedway LLC received a defense verdict in the matter of *Puradaih v. Speedway LLC*. Plaintiff allegedly slipped and fell on black ice while walking across a Speedway parking lot. Plaintiff suffered a broken humerus as a result of the fall and subsequently filed a lawsuit against Speedway and their snow removal contractor. A jury trial commenced in the York County Court of Common Pleas before the Honorable Clyde W. Vedder on November 13, 2018.

Plaintiff alleged a "pile of snow" which existed on the Speedway parking lot effectuated a "melt and re-freeze occurrence" which resulted in plaintiff's fall; however, plaintiff presented very little evidence in favor of its argument. In fact, photographs taken of the scene of the incident on the morning of the incident, which were shown to plaintiff's counsel, were subsequently discarded and were not shown to the jury at trial.

Speedway successfully argued that the loss of these photographs constituted spoliation and received an adverse inference jury instruction. In addition, Speedway argued that the evidence proffered at trial failed to establish actual or constructive notice of the condition and that plaintiff was a trespasser to which it owed no duty of care. The jury deliberated for about three hours and eventually returned a verdict finding that Speedway was not negligent.

Ricci Tyrrell Member **Michael T. Droogan, Jr** was lead trial counsel in the *Puradaih* case.

Matthew R. Mortimer is an Associate at **Ricci Tyrrell Johnson & Grey** who second-chaired the trial.

GAINING A STRATEGIC ADVANTAGE BY REMOVING UTPCPL CLAIMS TO FEDERAL COURT

Currently, Pennsylvania federal and state courts are split on whether the economic loss doctrine applies to claims brought under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. § § 201-1 to 201-9. The Third Circuit predicted that the Pennsylvania Supreme Court would apply the economic loss doctrine in UTPCPL cases, and therefore federal courts are bound to follow that predictive ruling. However, the Pennsylvania Superior Court has since ruled that the doctrine does not bar UTPCPL claims. This split has led to incongruous results for state claims in federal courts sitting in diversity, which may be subject to the economic loss doctrine, and the same claims in state courts, which are not. The split therefore has strategic implications for litigators.

By way of background, the economic loss doctrine provides that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." See *Excavation Technologies Inc. v. Columbia Gas Co.*, 985 A.2d 840, 841 n.3 (Pa. 2009) (quoting *Adams v.*

Copper Beach Townhome Communities LP, 816 A.2d 301, 305 (Pa. Super. 2003)). See also *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir. 2002) (providing that the economic loss doctrine precludes a plaintiff from bringing a tort action arising out of a contractual relationship where the plaintiff's only damages are economic in nature).[1]

In *Werwinski*, the Third Circuit held that the economic loss doctrine bars common law intentional and statutory fraud claims, including those brought under the UTPCPL. See *Werwinski*, 286 F.3d at 680-81. *Werwinski* involved eight purchasers and lessees of Ford motor vehicles who filed a lawsuit against Ford Motor Company in which they alleged breach of express warranty, breach of implied warranty, fraudulent concealment, and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law based on two allegedly defective components in the transmissions of certain vehicles. Id. at 664. The case was initially filed in the Philadelphia Court of Common Pleas but was removed to Federal Court based on diversity jurisdiction. Id. at 663. The plaintiffs alleged damages to their vehicles, only, specifically that each had experienced transmission failures and incurred substantial repair costs before his or her automobile had reached 80,000 miles. Id. at 663-64. The Third Circuit recognized that the Supreme Court of Pennsylvania had not addressed the economic loss doctrine's applicability to UTPCPL claims, and therefore it examined what the Pennsylvania Supreme Court has said in related areas, the decisions of intermediate Pennsylvania courts, federal court cases interpreting state law, and decisions from other jurisdictions. Id. at 670-680. Ultimately, the Third Circuit predicted that the Pennsylvania Supreme Court would hold that the economic loss doctrine applies to UTPCPL claims, and it consequently affirmed the Eastern District of Pennsylvania's application of the economic loss doctrine to plaintiffs' fraudulent concealment and UTPCPL claims. Id.

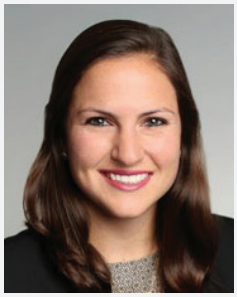
Following *Werwinski*, the Pennsylvania Supreme Court in *Knight v. Springfield Hyundai* came to the opposite conclusion, holding that the economic loss doctrine does not apply to statutory claims brought under the UTPCPL. 2013 Pa. Super. 309, 81 A.3d 940 (Pa. Super. Ct. 2013). In *Knight*, Plaintiff filed a complaint in the Court of Common Pleas of Philadelphia County, alleging fraud, breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, violation of the Uniform Commercial Code, conversion, violation of the Fair Credit and Extension Uniformity Act, and violation of the Unfair Trade Practices and Consumer Protection Law based on her purchase of a used Hyundai motor vehicle. Id. at 943-44. In determining whether the economic loss doctrine barred Plaintiff's UTPCPL claims (as alleged in Defendant's preliminary objections), the Superior Court reasoned that because the Pennsylvania Supreme Court has defined the economic loss doctrine as providing "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage," and Plaintiff's claims were statutory claims brought pursuant to the UTPCPL (i.e., did not sound in negligence), the economic loss doctrine was inapplicable. Id. at 951- 52 (emphasis added).

Despite this recent conflicting Pennsylvania state precedent, Pennsylvania district courts continue to apply the economic loss doctrine to bar UTPCPL claims in federal court. In *Whitaker v. Herr Foods, Inc.*, Judge Robreno recognized that the Eastern District of Pennsylvania was bound by *Werwinski*, and wrote that "[o]nce a panel of the Third Circuit makes its prediction as to state law, a subsequent panel of the Third Circuit cannot overrule it. The prior prediction remains controlling upon a subsequent panel unless a U.S. Supreme Court decision requires modification or the Third Circuit sitting en banc overrules the prior decision." 198 F. Supp. 3d 476 (E.D. Pa. 2016) (Robreno, J.) (citing *Debiec v. Cabot Corp.* 352 F.3d 117, 131 (3d Cir. 2003)). See also *Simon v. First Liberty Ins. Corp.*, 225 F. Supp. 3d 319, 326027 (E.D. Pa. 2016) (applying *Werwinski* to bar UTPCPL claims under the economic loss doctrine); *McGuckin v. Allstate Fire and Cas. Ins. Co.*, 118 F.Supp. 3d 716, 720-21 (E.D. Pa. 2015) (same); *Vaughan v. State Farm Fire & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 167208, at *4 (E.D. Pa. Dec. 3, 2014).

The strategic implication of the Pennsylvania state and federal split on this issue, of course, is that a defendant in a lawsuit in which the Plaintiff has alleged a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection law, but has only alleged economic injuries, should do everything in its power to remove the case to federal court, where those claims will be dismissed based on the economic loss doctrine.

[1] The reasoning behind the economic loss doctrine is that "the need for a remedy in a tort is reduced when the only injury is to the product itself and 'the product has not met the customer's expectations, or, in other words, that the customer has received insufficient product value.'" *Werwinski*, 286 F.3d

at 671 (quoting *E. River S.S. Corp. v. Transamerica Delaval*, Inc., 476 U.S. 858, 872, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986)). Where the customer's injury is "based upon and flow[s] from the purchaser's loss of the benefit of his bargain and his disappointed expectations as to the product he purchased, "the harm sought to be redressed is precisely that which a warranty action does redress." *REM Coal Co. v. Clark Equip. Co.*, 386 Pa. Super. 401, 563 A.2d 128, 129 (Pa. Super Ct. 1989).



Kelly J. Woy is an Associate at **Ricci Tyrrell Johnson & Grey**.

DOES REGISTERING TO DO BUSINESS IN THE COMMONWEALTH OF PENNSYLVANIA MEAN THAT A FOREIGN CORPORATION CONSENTS TO GENERAL PERSONAL JURISDICTION?

On September 25, 2018, a split three-judge panel of the Pennsylvania Superior Court in *Murray v. Am. LaFrance, LLC*, Civ. A. No. 2105 EDA 2016, 2018 Pa. Super. 267, *1 (Pa. Super. Sept. 25, 2018), reversed a trial court opinion granting preliminary objections for lack of personal jurisdiction. The majority held that a foreign corporation consents to general personal jurisdiction by simply registering to do business in Pennsylvania. The dissenting judge, however, concluded that Pennsylvania's current consent to personal jurisdiction by registering to do business is "perilously close" to a violation of the Due Process Clause of the Fourteenth Amendment.

The procedural history leading to this appellate decision begins with the grant of the Defendants' preliminary objections and dismissing the complaints for lack of personal jurisdiction.[1] Defendants' preliminary objections argued the following:

> (1) that their principal place of business was in Illinois;[2] (2) they did not have corporate offices in Pennsylvania; (3) they were not Pennsylvania domestic companies; (4) they did not own or lease real property in Pennsylvania; (5) they did not have bank accounts in Pennsylvania; (6) they did not design or manufacture any products in Pennsylvania; and (7) their contacts with Pennsylvania were minimal.

Id. at *2-3. Considering these factors, the trial court concluded that Defendants were not "at home" in Pennsylvania, sustained the preliminary objections, and dismissed the claims against them.

The majority of the Superior Court three-judge panel disagreed with the trial court and reversed on the basis that the Defendants consented to general personal jurisdiction by registering as a foreign corporation in Pennsylvania.[3] Pennsylvania's general personal jurisdiction statute (long-arm statute) states:

> (a) General Rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual and to enable such tribunals to render personal orders against such person or representative:
>
> . . .
>
> (2) Corporations.—
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
>
> (ii) Consent, to the extent authorized by the consent.
>
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.
>
> . . .

42 Pa.C.S.A. § 5301(a)(2)(i)-(iii).

In further evaluating the claim, the majority considered the recent Supreme Court decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which considered the issue of general personal jurisdiction over a foreign corporation, but did not discuss consent to general jurisdiction based on business registration laws. *Murray*, 2018 Pa. Super at *7. As such, the Superior Court considered the present matter, one of first impression.

Looking to the Eastern District Court of Pennsylvania for guidance, in *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648 (E.D. Pa. 2016), [4] the Superior Court considered whether the framework established in *Daimler* eliminated consent by registration under 42 Pa.C.S.A. § 5301 as a basis for jurisdiction. The Bors court reasoned, and the majority of the Superior Court agreed, that since the Pennsylvania statute "'specifically advises the registrant of the jurisdictional effect of registering to do business[,]'" consent remains a viable form of establishing general personal jurisdiction under the Pennsylvania registration statute after *Daimler*. *Murray*, 2018 Pa. Super. at *8, *quoting Bors*, 208 F. Supp. at 655. The Superior Court therefore concluded that the trial court erred in dismissing the complaints, so the order was vacated, and the case was remanded back to the trial court. *Id*. at *8-9.

Despite the majority of the three-judge panel concluding that consent remained a valid form of establishing personal jurisdiction under Pennsylvania's long-arm statute, Judge Bowes' dissenting opinion recognized the conceptual flaw "in perpetuating a legal fiction that blindly equates the administrative act registration as a foreign corporation with express consent to general personal jurisdiction." *Id*. at *10-11 (Bowes, J. dissenting). As Judge Bowes so elegantly described, the mere act of simply registering with Pennsylvania to do business should not be treated as a hardline rule for establishing personal jurisdiction.[5]

Judge Bowes began her dissent by reviewing the domiciles of the parties, the location of the action giving rise to the litigation, and the business registration of the Defendants. The Plaintiffs were domiciled in Massachusetts, New York, and Florida, while the Defendants were Delaware companies with their principal place of business in Illinois. The injured allegedly occurred in New York. Despite no meaningful connections to Pennsylvania, the mere fact that the Defendants registered with the Pennsylvania Department of State as a foreign corporation in 1969 pursuant to 15 Pa.C.S. § 411(a), seemingly swayed the majority to conclude that the Defendants consented to general personal jurisdiction. The registration statute states:

> (a) Registration required.—Except as provided in section 401 (relating to application of chapter) or subsection (g), a foreign filing association or foreign limited liability partnership may not do business in this Commonwealth until it registers with the department under this chapter.

15 Pa.C.S. § 411(a). Despite the Defendants registering with the Pennsylvania Department of State nearly fifty years ago and the parties and allegations having no ties to Pennsylvania; the mere act of registering with the state seemingly affords prospective plaintiffs the option of suing any defendant registered to do business in Pennsylvania despite no connections to the state whatsoever.

Recognizing the overreaching implications of Pennsylvania's purported stance equating registration of a foreign corporation to consent to personal jurisdiction, Jude Bowes stated

> I believe that it is improper to manufacture general personal jurisdiction over an out-of-state corporation from a single, statutorily mandated, organizational document that was filed with the Commonwealth approximately forty-seven years ago.

Murray, 2018 Pa. Super. at *15 (Bowes, J. dissenting). Moreover, Judge Bowes believed that Pennsylvania's policy is "perilously close" to violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id*. Rather than simply adopting the federal jurisprudence outlined in *Bors*, Judge Bowes would require plaintiffs to establish some evidence of contacts with Pennsylvania that would comport with the due process requirements that the United States Supreme Court highlighted in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which required "fair warning" that a particular activity would expose a defendant to jurisdiction.

Given that the foreign corporation registration statute of 15 Pa.C.S. § 411(a) and § 411(e)[6] do not directly address the subject of jurisdiction at all, Judge Bowes found it unlikely that a foreign corporation could consent to jurisdiction by simply registering in Pennsylvania. *Murray*, 2018 Pa. Super. at *18. Moreover, Judge Bowes reasoned that the rationale behind Pennsylvania's long-arm statute (42 Pa.C.S.A. § 5301(a)(2)(i)-(iii)), discussed *supra*, was flawed in that prior courts came to the *ipso facto* conclusion that mandatory registration equated to consent, despite the Pennsylvania registration statute stating otherwise. *Id*. at *20.

Judge Bowes' dissent also addressed any policy concerns, namely to whom the statute is benefiting. Pennsylvania's long-arm statute was designed with the intent to draw foreign corporations into the Commonwealth's jurisdiction, presumably for the benefit of the Commonwealth's residents. *Id*. at *20-21. Given this rationale and that none of the parties involved in the *Murray* litigation were Pennsylvania residents, the Commonwealth has no legitimate interest in the litigation and adjudicating the case in Pennsylvania would only divert resources away from its residents. *Id*. at *20. Rather than invoke Pennsylvania's long-arm statute for corporations with no connections to Pennsylvania, Judge Bowes proposed that corporations that register in Pennsylvania, pursuant to § 411(a), acknowledge that the Commonwealth may exercise personal jurisdiction over lawsuits that stem from the corporation's suit-related activities within the Commonwealth. *Id*. at *21.

Lastly, Judge Bowes considered the 1969 date of registration for the Defendants, which predated the consent by registration construct included in Pennsylvania's long-arm statute. *Id*. at *32. Judge Bowes' dissent agreed with the analysis in *Gorton v. Air & Liquid Sys. Corp.*, 303 F. Supp. 3d 278, 298 (M.D. Pa. 2018), which concluded that "[b]ecause the explicit general-jurisdiction language in section 5301 did not exist prior to 1978, a [foreign] defendant qualified to do business in Pennsylvania prior to that time . . . would not be subject to the personal jurisdiction of courts located in Pennsylvania based only upon that defendant's qualification as a foreign corporation in the state." A party, however, could retroactively consent to personal jurisdiction by continuing to make filings in Pennsylvania. Since the Defendants in *Murray* had registered before the consent by registration language was added to Pennsylvania's long-arm statute, Judge Bowes concluded that the Defendants did not consent to personal jurisdiction and she respectfully dissented from her colleagues.

The entire premise surrounding consent by registration is that a volitional and deliberate choice is made. Based on the *Murray* decision, as well as other recent decisions, companies are subjected to general personal jurisdiction in Pennsylvania based on the mere act of registering to do business. Foreign companies that wish to do business in Pennsylvania are required to register with the Commonwealth to conduct business, but there is no warning regarding the implications of registering. The registrant blindly relinquishes its fundamental due process rights and is subjected to the general jurisdiction of a forum with which it has no specific relationship. Judge Bowes recommendation that a registrant be provided with a "fair warning" of the implications of registration is an appropriate suggestion and would cure any due process concerns associated with Pennsylvania's current personal jurisdiction analysis. A motion for reconsideration is currently pending before the Superior Court in *Murray* and the issue is ripe for Pennsylvania Supreme Court review. A favorable decision in either the Superior Court or Supreme Court would add some amount of protection to foreign corporations registered in Pennsylvania, or considering to register to do business in Pennsylvania, and would provide a limitation to the currently limitless reach of Pennsylvania's current consent-by- registration personal jurisdiction formula.

[1] Seven cases were consolidated by the court on March 13, 2017.

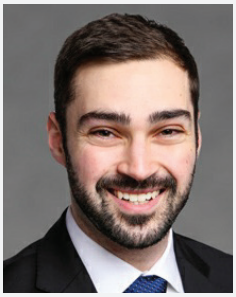
[2] Defendants were also incorporated in Delaware.

[3] In order for a Pennsylvania court to acquire general personal jurisdiction over a foreign corporation, one of the following must be true: "the business must have been incorporated in Pennsylvania, must consent to the exercise of jurisdiction, or must carry on a continuous and systematic part of its general business in the Commonwealth." *Moyer v. Teledyn Cont'l Motors, Inc.*, 2009 Pa. Super. 124, 979 A.2d 336, 349 (Pa. Super. 2009), *affirmed*, 611 Pa. 480, 28 A.3d 867 (Pa. 2011).

[4] The Bors court ultimately concluded that *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991), which adopted the consent analysis approach, remained good law.

[5] See discussion *infra* regarding the requirement that a foreign corporation register with the Pennsylvania Department of State before conducting business in the Commonwealth.

[6] (e) Governing law not affected.-Section 402 (relating to governing law) applies even if a foreign association fails to register under this chapter.



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BEWARE OF INVENTION PROMOTION COMPANIES

Most of us have seen the television commercial in which a cartoon caveman goes about inventing a stone wheel and George Foreman promises to help the inexperienced inventor patent and commercially develop his or her product. These commercials are compelling, as they offer clients the enticing possibility of striking it rich with their inventions. But, as a practical matter, how trustworthy are companies which advertise these types of invention promotion services?

One answer to this question has very recently been provided in the news. World Patent Marketing, Inc. (WPM) is one such invention promotion company and it has now become increasingly noteworthy. Acting United States Attorney General Matthew Whitaker served on the advisory board of WPM when the Federal Trade Commission charged the company with invention promotion scams. WPM was accused of deceiving and bilking numerous consumers who had paid thousands of dollars for the development of their inventions. It accepted money from unsuspecting consumers on the pretense that it would patent and market their inventions. However, after stringing these consumers along for months or even years, these individuals received virtually nothing in return. Many ended up in debt or losing their life savings.

The operators of WPM were not only charged with deceiving consumers, but also with unduly suppressing complaints about the company by improperly using egregious threats of intimidation and criminal prosecution against dissatisfied customers. At least one such threat was made by Mr. Whitaker himself in an August 2015 email, in which he responded to a disgruntled inventor seeking relief from WPM. In that email, Mr. Whitaker first identified himself as a former U.S. Attorney for the Southern District of Iowa and a member of WPM's Advisory Board. His message to the would-be inventor was quite threatening indeed. To wit: "Your emails and message from today seem to be an apparent attempt at possible blackmail or extortion. You also mentioned filing a complaint with the Better Business Bureau and to smear World Patent Marketing's reputation online. I am assuming you understand that there could be serious civil and criminal consequences for you if that is in fact what you and your 'group' are doing."

In May 2018, World Patent Marketing, Inc. agreed to a settlement with the Federal Trade Commission which forever banned the company from the invention promotion business. WPM was ordered to pay almost $26 million dollars.

All invention promotion companies who offer assistance to inventors are not unscrupulous. However, inventor success stories are minuscule, especially when compared to the thousands of consumers who have employed such companies. The overwhelming majority spend substantial money with little or nothing to show for it.

Invention promotion companies routinely request substantial upfront payments from prospective clients who are virtually never dissuaded from the notion that theirs is the next million-dollar invention. Unfortunately, the companies are usually quite aware that many of these inventions are either not patentable or not new, or, most significantly, not commercially viable. Yet, invention promotion companies will almost always encourage the inventor to proceed. Turning away a potential client is rare.

In these situations, the company itself is the only entity guaranteed to make money, since it has the inventor's upfront payment. In exchange, the inventor usually receives a binder or booklet containing generic, boilerplate information, which is generally available to anyone who surfs the internet. The inventor is given little else and is certainly not guaranteed of anything.

While most of these tactics are technically not illegal, they are obviously unethical and immoral. Over the years of my personal practice, I have had too many clients come to me with the same, sad story. They have each paid invention promotion companies ranging anywhere from $500 to $15,000, yet they have never received a patent or even a tailored marketing plan to assist in the development of their particular product.

The novice inventor can avoid losing substantial money and, possibly, the actual patent rights to his or her invention, by simply following a few basic practices:

1. Inventors should not be taken in by success story advertisements of invention promotion companies. It is not as easy as these companies make it sound to successfully manufacture, market, and sell a product. In fact, while it certainly can be done, and there are examples of product successes,

the road to developing a successful product is often long and arduous and it requires diligent and faithful guidance.

2. One should never pay an invention promotion company money upfront. Instead, the inventor should offer to pay the company a percentage of the profits from the sale of the product. By doing this, the company has a stake in the success of the venture and will use its best efforts towards making the product a success. The company which receives money upfront has no incentive to ensure the product is brought to market. It has already received its money.

3. Finally, it is always good practice to consult with a bona fide, patent attorney, duly registered before the United States Patent and Trademark Office (USPTO). A list of the registered patent attorneys can be found in the USPTO website at www.uspto.gov. These attorneys can assist in assessing the veracity of invention promotion companies and advise whether they are even necessary.

Stuart M. Goldstein heads **Ricci Tyrrell's** Intellectual Property Practice.

COVERAGE CORNER - IS CYBERBULLYING AN ACCIDENT?

Youth suicide is a significant public health concern. Upward trends have been seen in the ten to nineteen-year-old age group and many who do not successfully end their life strongly think about or attempt suicide.[1] "One factor that has been linked to suicidal ideation is experience with bullying."[2] Cyberbullying victims have been found to be 1.9 times more likely to have attempted suicide than those who are not cyberbullying victims.[3]

If cyberbullying is alleged to have been a substantial factor causing a troubled teenager's suicide is that an "accident" within the insuring agreement of an occurrence-based liability policy? The question was addressed in a recent federal action commenced to resolve a dispute over the duty to defend a high school age boy accused of sending vile text messages to a female classmate who took her own life. *State Farm Fire & Cas. Co. v. Motta*, 2018 U.S. Dist. LEXIS 208472 (E.D. Pa. December 11, 2018).

Zach Trimbur and Julia Morath were high school classmates. Because Trimbur was found to have harassed and bullied a different student, identified to the action only as Jane Doe, school administrators contacted his parents and were assured they would control his behavior in the future. Despite those assurances, his conduct continued. At an unspecified time prior to April 7, 2017, he sent the following text message to Ms. Morath:

> That's ok with me, so go back to your hellhole of a home and sit in your room and let some more guys come and penetrate you as you desperately reach out for any attention you can grasp because you are afraid of everything and anything. No one cares about your health issues and how you are an anorexic, bulimic, receding hairline [c---] who goes home and cuts herself every night to cope with the fact that guys will only ever do anything with you due to the fact that you are easy and that your own mother doesn't even love you. So then you only have to go back to a hospital with all of your other freak show disabled people that don't know how to stick a piece of food in there [sic] mouths. You claim to cut people off but no one cares about you enough to give a [s---]. Also you should probably work better on covering up your scars located on EVERYWHERE on your flicking body because they make you look more repulsive than you already do. Best regards,

Julia showed the message to her parents who in turn contacted school administrators on April 6, 2017. Trimbur was suspended from school the same day; yet, he was undeterred. He allegedly "continued to harass, bully, and/or cyberbully" Julia. She died by suicide on April 7, 2017.

The Moraths sued Trimbur and his parents in state court under the Pennsylvania Wrongful Death and Survival Acts. The tort action explicitly alleged only a negligence theory. The boy's mother, Stephanie Motta, sought coverage for her son under the personal liability coverage of a homeowner's policy issued to her by State Farm.[4]

A defense was entered subject to a reservation of rights. State Farm separately commenced the coverage action seeking a declaration of no duty to defend because the alleged bodily injury to the decedent did not arise from an "occurrence," defined in the policy as a "an accident...during the policy period." State Farm argued the conduct alleged was "inherently non-accidental in nature." That the complaint alleged the text message was sent intentionally was not in dispute. But Trimbur argued that it is necessary to consider the foreseeability of the outcome to find an accident and Julia's death by suicide was an extraordinary intervening event that was unforeseeable to him.

Subject to exceptions under the workers' compensation law and claims against mental health professionals, the court found that the general rule in Pennsylvania is "that suicide -- or attempted suicide - is not a recognized basis for recovery in a tort claim." *Id.*, at *28, citing *Ferris v. Cleaveland*, 2012 U.S. Dist. LEXIS 91259 (M.D. Pa. 2012) (attempted suicide secondary to injuries from an auto accident).[5] The court found material to its analysis that although the Moraths' complaint used the words "harassment," "bullying," and "intentional," no intentional tort was pleaded.[6]

Viewing the events alleged from the boy's perspective, the court was unwilling to "conclusively find death by suicide foreseeable from cyberbullying" despite Trimbur's reference in his text message to prior self-harm and "his apparent appreciation of some level of Julia Morath's struggles with mental illness." The court held that while "the teenage boy may have intended to...possibly cause her emotional distress...from [his] perspective, *his classmate's death by suicide is an accident*"; therefore, State Farm was obliged to defend him in the underlying action. (italics added). The court expressly left open whether a different result would be necessary if the only claim alleged was for intentional infliction of emotional distress.[7] The court also left determination of State Farm's duty to indemnify for another day.

[1] Hinduja, S. & Putchin, J.W., *Cyberbullying Research Summary*, an abbreviated version of "Bullying, Cyberbullying, and Suicide", Archives of Suicide Research, 14(3), 206- 221(2010).

[2] *Id.*

[3] *Id.*

[4] Trimbur's father did not reside in the same household and for that reason did not qualify as an insured. State Farm did not contest its duty to defend Ms. Motta.

[5] *Ferris* collected then-existing case law in accord with the *McPeake* rule: "Generally, suicide has not been recognized as a legitimate basis for recovery in wrongful death cases. This is so because suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor." *McPeake v. William T. Cannon, Esq., P.C.*, 553 A.2d 439 (Pa. Super. 1989) (negligent legal representation allegedly caused the decedent to leap from a courtroom window after a jury convicted him of rape). Two state trial court decisions have allowed claims to survive challenges at the pleading stage, despite McPeake, on the rationale that the Superior Court did not enact a bright line rule and a negligence case must undergo a foreseeability analysis on its facts. *Hudak-Bisset v. County of Lackawanna*, 37 Pa. D. & C. 5th 159 (Lackawanna Cty. 2014) (suicide allegedly due to chronic pain from injury sustained in a motor vehicle accident); *Mackin v. Arthur J. McHale Heating & Air Conditioning Co.*, 76 Pa. D. & C. 4th 544 (Lackawanna Cty. 2005) (same).

[6] Why the cause of action pleaded factored into analysis at all, much less as a material consideration is not reconciled in the opinion with the Pennsylvania rule that only the operative facts alleged in the complaint are relevant to a duty to defend determination. *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 2 A.3d 526, 540-541 (Pa. 2010).

[7] See, *Rowe v. Marder*, 750 F.Supp. 718 (W.D. Pa. 1990) (recovery may be available for suicide alleged to have been caused by intentional wrongdoing).

Francis P. Burns III is a Member at **Ricci Tyrrell Johnson & Grey**.

IN THE COMMUNITY

On September 12, 2018, **Ricci Tyrrell** employees, **Sheila Ciemniecki**, **Yolanda Jenkins** and **Julianne Johnson** partnered with **Eagles Charitable Foundation** and volunteered at the Eagles Vision Screening Blitz at the Frances E. Willard Elementary School in Philadelphia.

The Vision Screening Blitz is part of the Eagles Eye Mobile program which provides vision screening support for the Philadelphia School District during the school year.

On October 31, 2018, Ricci Tyrrell employees "dressed up" in pink to raise money for breast cancer awareness month. Pink breakfast goodies were sold, and the proceeds were donated to the **Susan G Komen Foundation** for breast cancer research.

Ricci Tyrrell continued its tradition of contributing to **The Barristers' Association** of Philadelphia's Annual Thanksgiving Drive. With the support of Ricci Tyrrell, the Barristers 34th Annual Drive provided Thanksgiving "turkey baskets" to more than 750 lower income families in the Philadelphia area. Each year the Barristers inform the public on a different area of law. In previous years, the legal aid materials have addressed wills and estates, protection from abuse, family law, small claims court, criminal records searches and the expungement process. Included in this year's baskets was an information sheet for free or low-cost legal services and resources in the Philadelphia area.

On Saturday, February 23, 2019, **William J. (Bill) Ricci's** band, ***The O'Fenders***, will be performing at a benefit for CHOP, the **Children's Hospital of Philadelphia** at **Twenty 9** in Malvern. 100% of the suggested door donation will go to CHOP. All food and beverages are being donated by the owners of **Twenty 9** and ***The O'Fenders***.

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