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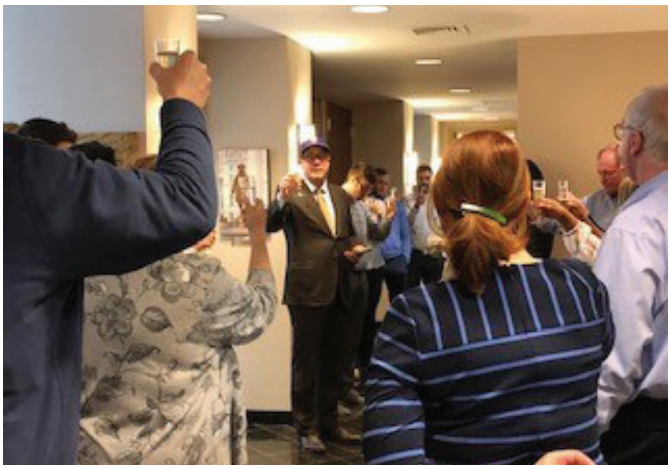


Ricci Tyrrell Johnson & Grey *celebrated its 6th year anniversary on March 30, 2020. We thank our clients and friends for taking this journey beside us. We hope our Mission Statement continues to appear relevant and fresh when you deal with us:* ***Our commitment is to excellence in all aspects of advocacy on behalf of our clients.*** *(Photo taken at 5th year anniversary)*

The remote practice of law has challenged all firms, but we think it has offered a unique opportunity to test technology, innovativeness and commitment in a new environment. We are very proud that commitments we had in place for readiness have allowed Ricci Tyrrell to continue to aggressively represent our clients. We are especially proud that our lawyers and staff have risen to this occasion.

Jacqueline Zoller has joined the firm as a Senior Associate. Ms. Zoller brings significant experience in complex litigation to Ricci Tyrrell. She is a graduate of Fordham University and Rutgers Law School and after graduation from Rutgers clerked for the Honorable O'Brien Kilgallen, of the Superior Court of New Jersey.

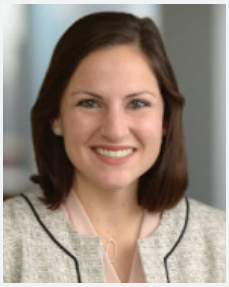
Managing Member **John Tyrrell** was recently interviewed in **Sports Facilities and the Law** where he offered tips on managing risk at spectator events. Here is a link to the interview: www.rtjglaw.com/2020/03/03/john-tyrrell-featured-in-sports-facilities-and-the-law/

DEFENSE VERDICT IN *SLAPPY SUTTON V. SPEEDWAY*

Michael T. Droogan, Jr. is a Member at **Ricci Tyrrell Johnson & Grey**.

On February 13, 2020, **Speedway LLC**, a valued client of the firm, received a defense verdict after a four-day trial in the United States District Court of Eastern District of Pennsylvania before the Honorable Jan E. DuBois. **Mike Droogan**, a member of the firm, tried the case for Speedway. Plaintiff alleged that Speedway was negligent because after an upgrade to the underground telecommunication lines that led from the store to the underground storage tanks, the contractor had covered a trench it dug with concrete instead of asphalt. The trench was cut in the ground along the sidewalk in the front of the store. Plaintiff alleged that as he exited the store on the evening of January 19, 2016, he was unable to detect a difference in the concrete sidewalk from the one-foot wide swath of concrete in front of it, causing him to misstep. As a result of mis-stepping, plaintiff tore both his patella tendons, a fact that was not in dispute at trial. The jury concluded Speedway was not negligent. Importantly, Judge DuBois had previously granted summary judgment to Speedway. The Third Circuit Court of Appeals reversed Judge DuBois and remanded the case for trial. Eight jurors unanimously agreed with both Speedway and Judge DuBois that the condition of the sidewalk/area immediately adjacent to it was not dangerous.

A CASE TO WATCH: UNITED STATES SUPREME COURT TO ADDRESS THE LIMITS (OR LACK THEREOF) ON SPECIFIC PERSONAL JURISDICTION IN THE CONTEXT OF PRODUCTS LIABILITY



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

On April 27, 2020, the United States Supreme Court is scheduled to hear the consolidated appeals of *Ford Motor Company v. Montana Eighth Judicial District Court, et al.*, No. 19-368, and *Ford Motor Company v. Adam Bandemer*, No. 19-369. In relation to these cases, the Supreme Court will answer the question of whether a state court may exercise specific personal jurisdiction over the out-of-state manufacturer of a defective product that was designed, manufactured, and sold outside of the state, based on the facts that product caused injury in the state after the plaintiff or a third party brought the product into the state, the manufacturer sold the same type of product to other consumers in the state, and the manufacturer has extensive *general* connections to the state. The outcome of this argument will have significant implications, good or bad, for manufacturers of products sold in many states related to where those manufacturers can properly be subject to suit.

Both of the lawsuits included in the consolidated appeal involve a suit against Ford for an accident involving one of its vehicles. Ford Motor Company is incorporated in Delaware, headquartered in Dearborn, Michigan, and sells cars in all 50 states. *Ford v. Montana Eighth Judicial District Court*, No. 19-368, involves a 1996 Ford Explorer which the company assembled in Kentucky and sold to a dealer in Washington, which sold it to a resident of Oregon. The car was resold to a resident on Montana in 2007, and resold again to another resident of Montana in 2009. In May 2015, the daughter of the most recent owner suffered a fatal accident while

driving the car in Montana, when the tread of one of the tires separated from the body of the tire and the car rolled into a ditch. The personal representative of the decedent's estate sued Ford and several tire companies in Montana state court, alleging design defect, failure to warn, and negligence. Ford moved to dismiss the claims for lack of personal jurisdiction, but the trial court denied the motion.

The Montana Supreme Court affirmed, finding that the exercise of personal jurisdiction over Ford complied with the Due Process Clause of the Fourteenth Amendment, as "Ford purposefully availed itself of the privilege of conducting activities in Montana" because it "delivers its vehicles and parts into the stream of commerce with the expectation that Montana consumers will purchase them," "advertises in Montana," "is registered to do business in Montana," "operates subsidiary companies in Montana," "has thirty-six dealerships in Montana," "has employees in Montana," "sells automobiles in Montana," and provides "repair, replacement, and recall services" in Montana. The Court further reasoned that the claims in the case "'relate to' Ford's Montana activities," because the decedent's "use of the Explorer in Montana is tied to Ford's activities of selling, maintaining, and repairing vehicles in Montana," and because "ford could have reasonably foreseen the Explorer—a product specifically built to travel—being used in Montana." The court pointed out that "Ford's purposeful interjections into Montana are extensive," "the accident involved a Montana resident," and "the accident occurred in Montana."

Ford Motor Co. v. Bandemer, No. 19-369, involves a 1994 Ford Crown Victoria, which the company designed in Michigan, assembled in Ontario, and sold to a dealer in North Dakota in 1994. The car's fourth owner registered the car in Minnesota in 2011, and its fifth owner registered it in Minnesota in 2013. In January 2015, the son of the fifth owner rear-ended a snow plow while driving the car in Minnesota, and the passenger-side airbag did not deploy, leading the passenger, Bandemer, to suffer a severe brain injury. The plaintiff passenger sued Ford, the car owner, and the driver in Minnesota state court, asserting claims against Ford for product liability, breach of warranty, and negligence. Ford moved to dismiss the complaint for lack of personal jurisdiction, but the court denied the motion. The state court of appeals affirmed.

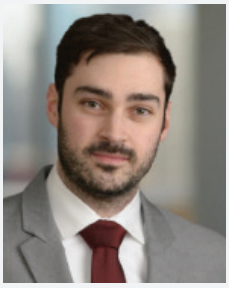
The Minnesota Supreme Court affirmed the denial of Ford's motion to dismiss. It explained that Ford made purposeful contacts with Minnesota because it "collected data on how its vehicles perform through Ford dealerships in Minnesota and used that data to inform improvements to its designs," "sold more than 2,000 1994 Crown Victoria vehicles in Minnesota," "sold about 200,000 vehicles of all types in Minnesota during a three-year period," and "conducted direct-mail advertising in Minnesota." It concluded that because Ford "has sold thousands of [1994] Crown Victoria cars" in Minnesota and "the Crown Victoria is the very type of car that Bandemer alleges was defective," Ford's contacts with Minnesota "relate to the claims at issue in this case. It pointed out that the accident at issue "occurred on a Minnesota road, between a Minnesota resident as plaintiff and both Ford—a corporation that does business regularly in Minnesota—and two Minnesota residents as defendants." Two justices dissented, reasoning that the Minnesota courts could not exercise personal jurisdiction over Ford because "all of Ford's Minnesota contacts, such as its data collection and its marketing efforts, are unrelated to Bandemer's claims."

The legal background for the issue in this appeal are as follows. The Supreme Court has recognized two types of personal jurisdiction that have separate requirements for satisfying the mandates of the Due Process Clause: "general" jurisdiction and "specific" jurisdiction. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Goodyear Dunlop Tires Operates, S.A. v. Brown*, 564 U.S. 915, 924 (2011). A court with general jurisdiction over a defendant may hear any claim against that defendant. *Id.* at 919. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that state. *Daimler AG v. Bauman*, 571 U.S. 117 (2014). On the other hand, to exercise specific personal jurisdiction over a defendant, the lawsuit must "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Id. See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In other words, 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." *Goodyear*, 564 U.S. at 919. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.*

Because Ford is not "at home" in Montana or Minnesota (i.e., isn't headquartered or incorporated in either state), the respective courts are not able to exercise general personal jurisdiction over the company. Rather, the issue on appeal is whether each of these state courts can permissibly exercise specific personal jurisdiction over the company in compliance with the Due Process Clause. Specifically, the court will have to decide whether each of the incidents at issue in the lawsuits "arise out of or relate to" Ford's activities in the state.

The outcome of this case will have significant implications for manufacturers who sell products in a number of states.

RELEVANT FACTORS TO CONSIDER WHEN FILING A MOTION BASED ON *FORUM NON CONVENIENS*



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On October 16, 2019, a three-judge panel of the Pennsylvania Superior Court in *McConnell v. B. Braun Medical Inc.*, 221 A. 3d 221 (Pa. Super. 2019) unanimously vacated an order dismissing the Appellant's product liability claim on the ground of *forum non conveniens*. The Superior Court denied a Petition for Reargument on December 16, 2019. In reaching this decision, the Superior Court determined that the trial court (Philadelphia Court of Common Pleas) abused its discretion by failing to weigh many of the relevant factors in evaluating a *forum non conveniens* claim and giving weight to irrelevant factors. Although the order dismissing the case based on *forum non conveniens* was vacated, the Superior Court provided guidance on relevant factors to consider in moving to transfer and/or dismiss based on this ground and also noted that its opinion was limited to the dismissal of the case and not the issue of whether the case should be transferred from Philadelphia County to Lehigh County.

The Appellant's product liability action arises from the implantation of a medical device in 2003 in Michigan, where the Appellant then resided. *Id.* at 224. The Appellant eventually moved to Texas and in 2015 learned that her medical device caused her recoverable damages. *Id.* In 2017, the Appellant filed her complaint in the Philadelphia County Court of Common Pleas based on theories of negligence, breach of implied warranty, negligent misrepresentation, and strict products liability including failure to warn, design defect and manufacturing defect. *Id.* at 225.

Prior to discovery commencing, Appellees filed a two-part motion based on *forum non conveniens*. *Id.* Appellees first argued that the complaint should be dismissed and that the suit should be refiled in Appellant's home state of Texas or in Michigan, where the medical device was implanted. *Id.* Appellees alternately argued that the case should be transferred to Lehigh County.[1] *Id.* A third defendant joined the Appellees' motion and consented to a trial in either Texas or Michigan. *Id.* Argument was subsequently held on Appellees' motion.[2]

It was undisputed that the Defendants placed the subject medical device into the stream of commerce; there was, however, a dispute as to their "local presence" in Philadelphia County. *Id.* The Defendants were a Pennsylvania corporation with headquarters in Lehigh County, a Delaware Corporation with a principal place of business in Lehigh County, and a French Corporation with no presence in the United States. *Id.* The Appellees argued that the medical device was designed and manufactured in France, the Appellant had the device implanted in Michigan, and that the Appellant never resided in Pennsylvania. *Id.* Given these factors, the Appellees argued that the parties have minimal connection to Pennsylvania, Pennsylvania had little interest in the litigation, and that there was another forum available that was more convenient for trial purposes. *Id.*

Prior to the argument, Appellees submitted an Affidavit from their President. The Affidavit stated that the President of one of Appellees' companies resided in Illinois, but further indicated that several potential trial witnesses resided and worked in Lehigh County. *Id.* at 225-26. Affidavits from these potential trial witnesses stated that it would be a hardship for the witnesses travel the sixty miles to Philadelphia to attend the trial.[3] *Id.* at 226.

The trial court dismissed the Appellant's suit finding that Pennsylvania had little interest resolving her product liability suit because the "'decisions and documentation for the locus of [Appellant's] action arose outside of Pennsylvania'" despite the corporate presence of Appellants in Pennsylvania. *Id.* Other factors considered by the trial court were as follows: (1) re-filing in Appellant's home state would alleviate potential difficulties applying out-of-state law and the presence of witnesses could more easily be ensured; and (2) it was presumed that causation and damages would be contested and that Appellant's medical care providers in Texas would be unwilling to attend a Pennsylvania trial. *Id.* The Trial Court did not consider the fact that Appellees employees made marketing, sale and distribution decisions in Pennsylvania nor did the court consider that documentation relevant to these subjects was present in Pennsylvania. *Id.*

Appellant appealed arguing that the trial court misapplied and/or rendered a manifestly unreasonable decision by overruling her choice of forum when her suit was dismissed based on *forum non conveniens*. *Id.* The doctrine of *forum non conveniens* allows dismissal of a case when the evidence shows that another forum would be more appropriate:

> Inconvenient forum — when a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

42 Pa.C.S. § 5322(e). The Superior Court noted that a plaintiff's choice of forum is entitled deference but is considered to a lesser degree where the plaintiff's residence and place of injury are located elsewhere. *Id.* at 227 (*citing Bochetto v. Piper Aircraft Co.*, 94 A.3d 1044, 1056 (PA. Super. 2014)).

A trial court may grant a motion to dismiss based on *forum non conveniens* only if "weighty reasons" support disturbing the plaintiff's choice of forum and the trial court must consider both private and public interest factors involved in this case. *Id.* (*citing Jessop v. ACF Industries, LLC*, 859 A.2d 801, 803 (Pa. Super. 2004)). The Superior Court specifically identified the following private factors:

> the relative ease of access to sources of proof; availability of compulsory process for attendance for unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. (*quoting Farley v. McDonnell Douglas Truck Servs., Inc.*, 638 A.2d 1027, 1030 (Pa. Super. 1994) (citations omitted)). The Superior Court identified the following public factors:

> administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 227-28. Lastly, the Superior Court noted that a defendant must show that a forum is inconvenient to itself, not the inconvenience to the plaintiff. *Id.* at 228.

Having identified the relevant factors to consider in evaluating a *forum non conveniens claim*, the Superior Court noted that the burden was on Appellees to show that Pennsylvania is less convenient than another available forum. In reviewing the private interest factors, the Superior Court found that the Appellees relied heavily on assumptions and "potential" inconveniences. *Id.* at 229. Appellees focused heavily on the medical care providers located in Texas without specifically identifying these providers nor indicating these medical providers would not attend a trial in Pennsylvania. *Id.* at 228. Further, there was nothing in the record to establish this believed inconvenience. *Id.* It was thus improper for the trial court to justify dismissal of the case based on assumptions. *Id.* at 229.

The Superior Court continued its review of private factors and noted that the trial court did not consider the presence of Appellees' employees in Lehigh County and further discounted the trial court's treatment of this evidence because the trial court did not consider this evidence in weighing to dismiss the case since the affidavits of employees in Lehigh County were only

used in support of the motion to transfer to Lehigh County, not the motion to dismiss. *Id.* at 230. The Superior Court found that no matter the reason why the evidence was introduced, it showed that Pennsylvania was more convenient than either Michigan or Texas and further showed the ease of access that Pennsylvania provided. *Id.* By failing to consider these affidavits, the trial court failed to note that access to these employees with pertinent knowledge regarding the design and marketing of the medical product was more convenient in Pennsylvania and the relative burden of having them travel to either Michigan or Texas as opposed to traveling within Pennsylvania.[4] *Id.*

The Superior Court also found that both the Appellees maintain corporate offices in Pennsylvania, so in terms of the inconvenience to them, Pennsylvania was as good a forum state as any other. *Id.* Further, the Superior Court found that the Appellees application of law concerns were not fully developed and not yet ripe as Appellees did not show that the law of Appellant's home state, Texas, is likely controlling nor did Appellees show that the application of Texas law would make a difference in the suit. *Id.* at 231.

The Superior Court next evaluated pertinent public interest factors and found that the trial court abused its discretion as to public factors because it "disregarded Pennsylvania's interests and improperly focused on whether *Philadelphia* is a convenient forum." *Id.* By disregarding this factor, the Superior Court found that the trial court conflated a motion to dismiss with a motion to transfer, noting that a case's lack of connection to one county does not justify dismissal from the entire state. *Id.*, n.12. It was undisputed that a number of Appellees' employees work and reside in Pennsylvania, many of which had personal knowledge regarding Appellant's claim. *Id.* The trial court failed to recognize Pennsylvania's interest in the outcome of the case based on these meaningful ties, including Appellees headquarters being in Pennsylvania. *Id.*

The Superior Court concluded that the trial court abused its discretion because it gave no weight to many of the relevant factors and too much weight to irrelevant factors. Notably, the Appellees also failed to carry their burden of establishing why a trial in Pennsylvania would be inconvenient. Despite vacating the order, the Superior Court stated that the issue of transfer from Philadelphia County to Lehigh County was not before it and that Appellees' pending motion to transfer could be considered upon remand to trial court. *Id.* at 232.

The *McConnell* opinion provides helpful insight into relevant factors to consider when attempting to either dismiss a case based on *forum non conveniens* or have a case transferred to a different venue. First and foremost, and a factor that was overlooked by the Appellees, is that a defendant has the burden of establishing inconvenience to itself, not the inconvenience to the plaintiff. Attacking the inconvenience of a forum to a plaintiff can often appear as an easy avenue to show limited connections to a forum state like if the plaintiff is from Texas and filing a law suit in Pennsylvania, a state where she has never lived, but this factor is not highly relevant. Similarly, inconvenience of the forum is based on the state, not the individual county. Appellees argued that Philadelphia County was an inconvenient county, yet also filed a separate motion to transfer to Lehigh County showing that Pennsylvania was the proper forum state, but the county was improper. Certain factors to consider when filing a motion to dismiss and/or transfer based on *forum non conveniens* are: (1) ease of access to sources of proof; (2) availability compulsory process for attendance for unwilling witnesses and the cost of obtaining attendance of willing witnesses; (3) if applicable, possibility of view of the premises; (4) all other practical problems that make trial easy, expeditious and inexpensive; (5) judicial administrative difficulties; (6) imposition of jury duty on people of a community with no relation to the litigation; and (7) having the trial in a forum that is at home with the state law that will govern the case. Although this particular case resulted in the Superior Court vacating the order dismissing the case based on *forum non conveniens*, the Superior Court's analysis in this case provides guidance to defendants who seek dismissal and/or transfers based on *forum non conveniens*.

[1] The trial court did not address the Appellees' alternative motion to transfer the case to Lehigh County.

[2] Appellees Preliminary Objections to Venue were previously overruled due to Appellees' contacts with Philadelphia County, but this ruling was now at issue. *Id.*, n.3.

[3] The Superior Court noted the irony of the Appellants argument noting that if the sixty miles to Philadelphia would be a hardship then a trial in Texas or Michigan would be even more of a hardship. *Id.*, n.4.

[4] Regarding the French corporate defendant, Appellees did not state that Appellant must seek relief in European courts. Rather, Appellant and Appellees agreed that the suit should be filed somewhere in the United States. *Id.*

"PRODUCT LIABILITY DEFENDANTS BREATHE A SIGH OF RELIEF AS THIRD CIRCUIT VOTES IN FAVOR OF EN BANC REHEARING OF *OBERDORF V. AMAZON.COM INC.*, VACATING THE COURT'S OVERWHELMINGLY BROAD DEFINITION OF A "*SELLER*" PURSUANT TO §402A"

Matthew R. Mortimer is an Associate of **Ricci Tyrrell Johnson & Grey**.

The Third Circuit Court of appeals recently handed down a controversial decision addressing the definition of a "seller" under §402 of the Second Restatement of Torts in *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019). Should it stand, the precedent created by the opinion is likely to cause wide-ranging liability concerns for possible product liability defendants, including individuals and/or entities with only negligible roles in the sale/distribution of products.

Oberdorf involved a plaintiff who purchased an allegedly defective dog collar from Amazon.com.[5] Notwithstanding the admission that she purchased the product directly from "The Furry Gang," a third-party vendor that independently listed and marketed the product on the online marketplace and further shipped the product directly to plaintiff without the assistance of Amazon, plaintiff pursued claims based on, *inter alia*, strict products liability and named Amazon as the sole defendant.[6] However, Amazon successfully claimed that it merely provides an online marketplace for products to be sold solely by third-party vendors. Thus, the Middle District of Pennsylvania dismissed plaintiff's claim on summary judgment concluding, *inter alia,* that Amazon was not a "seller" subject to strict product liability under Pennsylvania law. Plaintiff argued on appeal for the application of strict product liability law to Amazon as a "seller." The primary issue addressed on appeal was Amazon's role in effectuating the sale of products offered by third-party vendors. The Circuit Court reversed, concluding that Amazon should be considered a "seller" under § 402A of the Second Restatement of Torts, for consumer injuries caused by defective goods purchased on Amazon.com.[7]

With respect to Amazon's services, both the majority and Judge Scirica, who filed a separate opinion discussed below, seemingly agreed that the following is true: Amazon, a multinational technology company, offers products for sale at Amazon.com, in three primary ways. Amazon does source, sell, and ship some products as seller of its own goods. Second, third-party sellers sell products through Amazon Marketplace "fulfilled by Amazon." Third, at issue here, third-party sellers sell products through Amazon Marketplace without additional "fulfillment" services. In order to use Amazon's services, a third-party vendor must assent to Amazon's Services Business Solutions Agreement. However, the vendor chooses which product or products it would like to sell using Amazon's website. This choice, subject to limited exceptions, is generally left to the sole discretion of the vendor. In addition to deciding which products to sell, vendors determine and provide the means of shipping without ever placing the items in Amazon's possession. The listed price for the product is also chosen by the third-party vendor. When the third-party vendor has chosen a product that it wants to offer on Amazon's website, the vendor provides Amazon with a description of the product, including its brand, model, dimensions, and weight. Based on this information, Amazon formats the product's listing on its website. Amazon then lists the product online and sales begin. As customers make purchases on Amazon's website, Amazon collects two types of fees.[8] With respect to purchase at issue, both the majority and Judge Scirica concede that plaintiff apparently logged onto Amazon's website and ultimately decided to purchase the dog collar at issue. However, the dog collar was sold by a third-party vendor which shipped the product directly from Nevada to plaintiff.

The Pennsylvania Supreme Court has made clear that the Second Restatement of Torts § 402A, which is specifically limited to "sellers" of products, applies to Pennsylvania strict products liability claims. For purposes of this article, it is noteworthy that Pennsylvania has considered and refused to impose "seller" liability for an auctioneer who "never owned, operated or controlled the equipment which was to be auctioned." *Musser v.*

Vilsmeier Auction Co., 522 Pa. 367, 562 A.2d 279, 279 (1989). As the *Musser* court explained, in auctioning a product owned and controlled by the third-party seller, "[t]he auction company merely provided a market as the agent of the seller. ... Selection of the products was accomplished by the bidders, on their own initiative and without warranties by the auction company." *Id*. at 282. In other words, the auction company's role was "tangential" to the core of the transaction, the exchange between the buyer and third-party seller. *Id*.

Pennsylvania courts moreover have not held liable as sellers such tangential actors as shopping malls renting space to retailers, credit card companies that enable sales transactions, or newspapers or websites hosting classified ads. *Oberdorf*, *supra* at 157. In Pennsylvania, a business assisting a sale is not a "seller" for products liability purposes unless it takes on the particularly involved retail relationship of sales agent/ manufacturer's representative. *Hoffman v. Loos & Dilworth, Inc.*, 452 A.2d 1349, 1351 (Pa. Super. 1982). The Pennsylvania Supreme Court has made it clear that courts later tasked with determining whether an actor is a "seller" should consider whether the following four factors apply:

> (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
>
> (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
>
> (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
>
> (4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."

Oberdorf, supra at 144.

Applying the facts at issue to applicable Pennsylvania law, the diametrically opposed opinions of the majority vs. the concurring/dissenting judge and their respective analysis effectively illustrate persuasive aspects with respect to both sides of the argument. For example, each opinion contained a multilayered analysis. Namely, a comparative analysis discussing types of roles deemed sufficient to support a "seller" determination and attempted to either relate or distinguish Amazon's activities at issue with the same. Moreover, both opinions applied the facts at issue to the four-factored test discussed above and analyzed the same.

Third Circuit's Majority Opinion

Comparative analysis

Amazon apparently relied heavily on the Pennsylvania Supreme Court's decision in *Musser*, supra, to support its contention that it is not a "seller." It was conceded that the *Musser* Court reasoned "[t]he auction company merely provided a market as the agent of the seller," and this concluded that applying strict liability doctrine to the auction house would not further the doctrine's underlying policy justification. *Musser, supra* at 282. The Third Circuit, however, attempted to distinguish Amazon's services from the auction company in *Musser* by comparing Amazon's role to that of a "sales agent" deemed to be a "seller" under §402 in *Hoffman, supra*. In *Hoffman*, the manufacturer's sales agent, E.W. Kaufmann Co., would transmit orders for linseed oil from the packager to the distributor. That was Kaufmann's only role in the sales process. Nonetheless, the court made clear that strict liability in Pennsylvania is properly extended "to anyone 'who enters into the business of supplying human beings with products which may endanger the safety of their persons and property." Because Kaufmann's tasks amounted to being "in the business of selling or marketing merchandise," rather than performing a "tangential" role, it could be held strictly liable for injuries resulting from defects in that merchandise. *Id*. at 1354.

The Third Circuit opined that Amazon's role here extends beyond that of the *Hoffman* sales agent, who in exchange for a commission merely accepted orders and arranged for product shipments. According to the opinion, Amazon not only accepts orders and arranges for product shipments, but it also exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers. *Hoffman* was also cited by the Circuit Court pursuant to its rejection of Amazon's claim that it cannot be considered a "seller" because it does not take title to or possession of the products sold by third-party vendors. *Oberdorf, supra* at 149. The Court reasoned that strict products liability should be applied broadly

to those who market products, "whether by sale, lease or bailment, for use and consumption by the public." *Id*.

The Pennsylvania Supreme Court's Four-Factor Analysis

The Majority opinion ultimately reasoned that all four factors weighed in favor of imposing strict liability on Amazon. In support of its opinion that Amazon "may be the only member of the marketing chain available to the injured plaintiff for redress," it was emphasized that Amazon failed to account for the fact that under the Agreement, third-party vendors can communicate with the customer only through Amazon. This apparently enabled third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. Amazon also allegedly had no vetting process in place to ensure, for example, that third-party vendors were amenable to legal process. Neither plaintiff nor Amazon was able to locate The Furry Gang. As a result, it was opined that Amazon stood as the only member of the marketing chain available to the injured plaintiff for redress.

In determining whether "imposition of strict liability upon the [actor would] serve[ ] as an incentive to safety," the Court rejected Amazon's contention that imposing strict liability, where it does not have a relationship with the designers or manufacturers of products offered by third-party vendors, would not be an incentive for safer products. Despite admitting that Amazon does not have direct influence over the design and manufacture of third-party products, the Majority emphasized that Amazon exerts substantial control over third-party vendors. Therefore, it reasoned that Amazon is fully capable, in its sole discretion, of removing unsafe products from its website. Imposing strict liability upon Amazon would be an incentive to do so.

In consideration of whether Amazon is "in a better position than the consumer to prevent the circulation of defective products," while conceding that Amazon may at times lack continuous relationships with third-party vendors, the Court argued that the potential for continuing sales encourages an on-going relationship between Amazon and the third-party vendors. Further, the court reasoned that Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation. Third-party vendors, on the other hand, are apparently ill-equipped to fulfill this function, because Amazon specifically curtails the channels that third-party vendors may use to communicate with customers.

Finally, the Court concluded that Amazon can distribute the cost of compensating for injuries resulting from defects. Amazon had already provided for indemnification by virtue of a provision in the Agreement. Moreover, Amazon can adjust the commission-based fees that it charges to third-party vendors based on the risk that the third-party vendor presents.

Judge Scirica's Concurrence

According to the concurrence, in nearly all cases, "selling" entails something Amazon does not do for Marketplace products: transferring ownership, or a different kind of legal right to possession, from the seller to the customer. Thus, in Pennsylvania, sellers include traditional wholesalers and retailers, as well as those who supply a product through a transaction other than a sale. *See, e.g., Chelton v. Keystone Oilfield Supply Co.,* 777 F. Supp. 1252, 1256 (W.D. Pa. 1991) (wholesaler); *Burch v. Sears, Roebuck & Co.*, 320 Pa.Super. 444, 467 A.2d 615, 618 (1983) (retailer). Pennsylvania courts would not hold liable as sellers such tangential actors as shopping malls renting space to retailers, credit card companies that enable sales transactions, or newspapers or websites hosting classified ads. *Oberdorf, supra* at 149.

According to Judge Scirica, well-settled Pennsylvania products liability law precluded treating Amazon as a "seller" strictly liable for any injuries caused by the dog collar. For example, he opined that Plaintiff's theory would substantially widen what has previously been a narrow exception to the typical rule for identifying products liability defendants sufficiently within the chain of distribution. A "seller" in Pennsylvania is almost always an actor who transfers ownership from itself to the customer, something Amazon does not do for Marketplace sellers like The Furry Gang.

Comparative Analysis

Judge Srica's analysis in this regard emphasized the nature of Amazon's role in the sale of products akin to the product at issue. Specifically, the sellers, like The Furry Gang, supply and ship products directly to

consumers without ever placing the items in Amazon's possession. Moreover, more than a million businesses of all sizes sell products on Amazon Marketplace, according to Amazon's own figures, and "small and medium-sized businesses selling in Amazon's stores now account for 58 percent of [Amazon's] sales. These businesses and their products are diverse: a recent profile of highly successful Amazon Marketplace sellers included businesses offering beauty products, indoor gardening kits, and an educational toy teaching coding. Amazon distinguishes products sold through the Marketplace from those sold directly by Amazon, identifying the seller responsible for the item in a "sold by" line placed prominently next to the price and shipping information. The seller's name also appears on the order confirmation page, before the customer finalizes the purchase. Amazon's conditions of use for customers affirm the distinction, explaining, in Amazon Marketplace purchases from third-party sellers, "you are purchasing directly from those third parties, not from Amazon. We are not responsible for examining or evaluating, and we do not warrant, the offerings of any of these businesses or individuals." The relationship reflected in the agreement between Amazon and these vendors is one of "independent contractors." The agreement specifically disclaims other potential relationships.

A manufacturer's representative, also termed "sales agent" or "manufacturer's agent," is a salesperson who helps a manufacturer expand sales by representing a product, usually in a particular region for a period of time, promoting the product to retailers or directly to customers. *Hoffman, supra.* In *Hoffman,* after evaluating the sales agent's uniquely involved retail role, the Superior Court of Pennsylvania concluded it was much more than "tangential," and the sales agent could be held liable as a seller. *Hoffman*, *supra* at 1354. Contrary to the majority, the concurrence distinguished Amazon's activites at issue from those of the sales agent in *Hoffman* and further reasoned Amazon Marketplace, like the auctioneer in *Musser*, is "tangential" to the actual exchange between customer and third-party seller. Judge Scirica took the position that, like an auctioneer, Amazon Marketplace merely provides the "means of marketing" to a third-party seller who accomplished the "fact of marketing" when it "chose the products and exposed them for sale." And like an auctioneer, Amazon Marketplace never owns, operates, or controls the product when it assists in a sale. Accordingly, Amazon Marketplace's similarities to the auctioneer emphasize it has little in common with the manufacturer's representative in *Hoffman*, the only kind of "seller" held liable despite not having made a transfer of ownership or possession rights.

The Pennsylvania Supreme Court's Four-Factor Analysis

The concurrence opined the first factor, availability of other members of the distribution chain, weighs in Amazon's favor. Namely, all Amazon Marketplace products are sold by third-party sellers who are available to be sued. That seller may be defunct, insolvent, or impossible to locate by the time of suit, just as the seller of an auctioned product may be. But as the Pennsylvania Supreme Court noted in applying this factor, "[t]o assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence."

The second and third factors, the potential incentive to safety and the defendant's relative ability to prevent circulation of the products, also weigh in favor of Amazon according to the concurring opinion. In *Musser*, the court considered the auctioneer's current business model, finding the auctioneer was "not in the business of designing and/or manufacturing any particular product," nor did the auctioneer attempt to create the kind of "ongoing relationship" with any of its large catalogue of sellers "which might equip the auctioneer to influence the manufacturing process." *Id*. at 282. The auctioneer was not the kind of seller who makes it "his business to know the product he sells." *Id.* at 283. Similarly, Amazon Marketplace is "not in the business" of choosing, monitoring, or influencing third-party sellers' products or their manufacturing processes. Rather, the current model of Amazon Marketplace is an open one. All sellers meeting Amazon's terms may offer their products, and the same general terms apply to all. Although Amazon reserves the right to eject sellers, the company does not undertake to curate its selection of products, nor generally to police them for dangerousness.

Subsequent to the publication of the Third Circuit's opinion, a majority of the active Third Circuit judges voted to list the case for rehearing *en banc*. Therefore,

the opinion and judgment discussed above were vacated. The question of who/what constitutes a "seller" subject to strict liability is likely to become a recurring issue for Pennsylvania state court defendants.

[5] On January 12, 2015, plaintiff allegedly put the retractable leash on her dog, and took the dog for a walk. It was alleged the dog lunged unexpectedly, causing the D-ring on the collar to break and the leash to recoil back and hit plaintiff's face and eyeglasses. As a result, plaintiff alleged to be permanently blind in her left eye.

[6] Plaintiff propounded two separate theories of strict product liability against Amazon: (1) failure to warn; and (2) design defect. Plaintiff further alleged a variety of negligence theories with respect to Amazon's supposed marketing, sale and distribution of the allegedly defective product.

[7] The Court's opinion placed significant emphasis on both its description regarding anatomy of a sale on Amazon.com as well as the details of plaintiff's particular purchase. That said, Circuit Judge Scirica filed an opinion concurring in part and dissenting in part, discussed in detail below, pursuant to which he reasoned that Amazon's tangential relationship to third-party sales of products was insufficient to establish the it was a "seller" of those products under Pennsylvania law.

[8] One is a commission, typically between seven and fifteen percent of the overall sales price; the other is either a per-item or monthly fee, depending on the third-party vendor's preference.

INTELLECTUAL PROPERTY - IT DOESN'T LAST FOREVER

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

There is a commonly held misconception that when a patent is granted, the patent owner receives a monopoly on his or her invention. In fact, a patent is not a monopoly, but is a particular intellectual property right given to the owner of the patent for a limited period of time. The same limited ownership interests apply to the intellectual property rights which are provided under copyright and trademark law.

Article I, Section 8, Clause 8 of the U.S. Constitution reads:

> The Congress shall have the power to promote the Progress of Science and Useful Arts by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

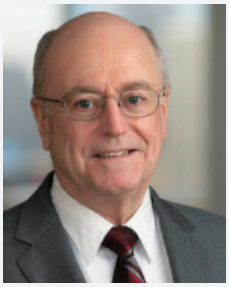
Equipped with this language, requiring that "inventors" have "exclusive rights" to their "discoveries" for "limited times," Congress has passed the patent statutes, 35 USC 1, et seq. Included in these statutes is the provision that a patent shall provide the inventor the right to preclude others from making, using, selling, and distributing his or her invention for a given period of time. This grant is a property right conferred by statute. Currently, it is a right usually granted for a period of 20 years from the date an application for a patent is filed. A patent cannot be renewed. Once it has expired after the 20-year period, the subject matter in the patent becomes part of the public domain.

Copyrights, like patents, are also mandated in the Constitution. That mandates provides that "authors" will have the "exclusive rights" to their "writings" for "limited times." Current copyright statutes grant to "authors" (which include music composers, artists, poets, photographers, writers, and all others who create) and their heirs, the exclusive ownership of their "writings," i.e. their artistic work, for the life of the author, plus 70 years. Again, no renewals are allowed.

On the other hand, trademarks are not addressed in the Constitution. Trademarks are derived from the common law. As a result, federal trademark statutes allow a federally registered trademark to be renewed, first after five years, then after 10 years, and then every subsequent 10 years. As long as a strict renewal process is properly followed, trademark registrations can be renewed indefinitely.

One final note with regard to trade secrets, another form of intellectual property. A trade secret is never registered. As long as it remains the sole, "secret," proprietary subject matter of the trade secret owner, it is protected from competitors. Once the trade secret is disclosed, it is automatically subsumed into the public domain.

COVERAGE CORNER - CGL COVERAGE FOR FAULTY PRODUCTS OR WORKMANSHIP



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

In 2006, the Pennsylvania Supreme Court held that a general liability policy with an insuring agreement defining an "occurrence" as an "accident"- an undefined term commonly understood to mean an unexpected, fortuitous event – did not grant coverage when the insured's work or product is itself the source of claimed damage or loss. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006).[9] The court was unwilling to allow manufacturers to convert their CGL policies into performance bonds which guarantee the work, unlike a liability policy which insures against accidents. The court left the door open to coverage if the insured's work or product *actively malfunctions* and causes injury to an individual or physical damage to another's property. Judging by the volume of coverage litigation since 2006, the coverage boundary has been a source of ongoing debate.

To appreciate the context for the debate requires at least an introductory snapshot of Pennsylvania's four-corner's rule that drives a coverage determination at the outset of a lawsuit. When an insured is sued a duty to defend is triggered, if at all, by the factual allegations contained in the underlying complaint. Information extrinsic to the complaint may not be considered as part of the duty to defend analysis.[10] If the factual allegations, taken as true, could potentially support a duty to indemnify under the policy there is duty to defend. Factual allegations control over legal rubrics and causes of action explicitly named. For example, even if the complaint alleges only counts under the headings of breach of contract and breach of warranty, a duty to defend cannot be ruled out without reviewing the underlying facts pleaded and it is inconsequential to the analysis how the facts are arranged to support individual counts.[11] Conversely, dressing the operative facts with negligence terminology cannot transform faulty workmanship into an accident.[12] Because the duty to defend is broader than the duty to indemnity – the former duty being dependent on facts alleged and the latter on facts proven – if a court determines that there is no duty to defend then there is and can be no duty to indemnify. *Kvaerner*, 908 A.2d 896, n. 7. Consequently, a duty to defend determination can be and often is the final word absent amendment of the underlying complaint. A pair of federal court decisions applying Pennsylvania law provide helpful illustrations.

In our first example the importer and wholesaler of a nutritional supplement contracted with a nutrition tablet manufacturer to deliver thousands of pounds of the supplement for combination with other substances to create marketable tablets for consumers. After combining the supplement with other substances to make the tablets, the manufacturer discovered that the supplement was defective, rendering nearly $1,000,00 of finished product worthless. Suit followed, and the importer tendered the claim to its insurance company seeking defense and indemnity under an occurrence-based CGL policy. The insurer at first accepted the defense of the claim, but later sued for a declaratory judgment to avoid coverage and was successful in the district court. On appeal, the Third Circuit affirmed. The court found that the importer's theory of coverage was infected with two mistaken theories. First, the buyer's claim that the seller provided defective nutritional supplement, without more, could not trigger coverage because such a claim involved faulty workmanship, not an accident. Second, the court held that the buyer's claim for consequential damages did not change the analysis because *Kvaerner's* logic is not limited to situations in which only "the work product itself" is damaged. On the contrary, the court held, failure to provide a product as agreed, and the consequences of such a failure, are too foreseeable to be considered an accident, even if the faulty product damages property other than itself. *Nationwide Mutual Insurance Company v. CPB International, Inc.*, 562 F.3d 591 (3d Cir. 2009).

Our second example involved faulty construction of football fields. The manufacture of synthetic turf was hired as a subcontractor on a project to construct the fields for a school district. A different contractor prepared the base for each field. The turf contractor installed the synthetic playing surfaces and drainage systems. The school district later found that the

drainage systems had been defectively constructed and installed with the consequence that the fields were unstable, and the subgrade was ruined. Suit was filed alleging breach of warranty. The suit was tendered for defense and indemnity under an occurrence-based CGL policy. The insurer first disclaimed coverage but agreed to defend when a negligence claim was added by an amended complaint. The insured then brought an action for declaratory judgment seeking a declaration that its insurer had a duty to defend and indemnify on all claims alleged. The district court granted summary judgment to the insurer, finding no duty to defend, and the ruling was affirmed on appeal. The Third Circuit held that faulty workmanship, even when cast as a negligence claim, does not constitute an "occurrence" defined as an "accident." Damage to the subgrade, which was not installed by the insured, caused by the defective drainage systems did not amount to an accident because the harm was a foreseeable and expected consequence of the faulty installation.[13] *Specialty Services International, Inc. v. Continental Cas. Co.*, 609 F.3d 23 (3rd Cir. 2010).

The Superior Court of Pennsylvania Superior appears to be on a different path. In *Indalex Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 83 A.3d 418 (Pa. Super. 2013) several homeowners sued a window manufacturer alleging that windows and doors installed in their homes were negligently designed and manufactured, resulting in water leakage, physical damage, and personal injury. National Union denied coverage to *Indalex* on the basis that the homeowners' allegations described faulty workmanship, not an accident as required by the policy. The Superior Court disagreed, observing that the damage was the result of an "off-the-shelf product that failed" (i.e., actively malfunctioned) and allegedly caused property damage and personal injury beyond the product itself: "Here, there are issues framed in terms of a bad product, which can be construed as an 'active malfunction,' and not merely bad workmanship." The court emphasized that the alleged damage extended beyond the work product itself: "[B]ecause Appellants set forth tort claims based on damages to persons or property, other than the insured's product, we cannot conclude that the claims are outside the scope of the coverage."

In *Pa. Mfrs. Indem. Co. v. Pottsdown Indus. Complex LP*, 215 A.3d 1010 (Pa. Super. 2019) a panel of the Superior Court again was presented with a trial court's application of *Kvaerner* in a declaratory judgment action brought to determine the duty to defend against an action seeking to recover for property damage. The complaint in the underlying action alleged that the plaintiff, a commercial tenant, sustained water damage to inventory caused by flooding during rain storms over the course of several years. The floods cause a total loss of more than $700,000 in inventory stored at the leased premises. The tenant sued its landlord alleging breach of its contractual obligation to keep the roof in good repair. The tenant's claim was pleaded as a single cause of action for breach of contract. But the complaint also alleged that the defendant negligently maintained and repaired the building's roof. Conditions that allegedly contributed to water intrusion included pour caulking, gaps and separations in the roofing membrane, undersized drain openings, and accumulated debris and clogged drains. The landlord tendered the suit for defense and indemnity under a commercial general liability policy that defined "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The landlord's insurance company agreed to defend the action under a reservation of rights and promptly filed a declaratory judgment action seeking to be relieved of any coverage obligation. The insurance company successfully moved for judgment on the pleadings. The trial court found that the allegations of inadequate roof repairs were claims for "faulty workmanship" which did not constitute an "occurrence." On appeal, the Superior Court reversed. The court held that a theory of liability based on failure to properly perform contractual duties did not preclude the existence of an "occurrence" where the claim was for damage to property not supplied by the insured and unrelated to what the insured contracted to provide. The court cited *Indalex* as authority for the proposition that when faulty work causes personal injury or damage to other property, there is an "occurrence" defined as an accident. In the underlying action the complaint alleged damage to inventory stored on the premises, caused by a distinct event, flooding, and sought damages for destruction of that other property, not for the cost of repairing or replacing the defective roof. The court also held that confining the underlying action to breach of contract did not change the analysis because the factual allegations determined whether the suit was within coverage, not the label of the cause of action selected by the plaintiff.

In a lengthy footnote the Superior Court acknowledged a long line of federal court decisions cited by the insurer

to support it position that the property damage was a foreseeable and expected consequence of the failure to maintain the roof, and for that reason the allegations lacked the fortuity quality of an accident triggering coverage. *Id*., at 1017, n. 2. The court distinguished a string of federal cases but perhaps most telling as a directional signal for state trial judges is the concluding sentence of footnote 2:

> To the extent that any of the federal decisions suggest that claims against an insured for damage to another's property that is unconnected to the insured's contract cannot arise out of an "occurrence" simply because the insured is alleged to have negligently performed a contractual obligation, we conclude that they are neither persuasive nor an accurate statement of Pennsylvania law.

The only case report to cite *Pottsdown Indus.* to date was issued recently in the District Court for the Western District of Pennsylvania. *Zürich American Ins. Co. v. Century Steel Erectors Co., L.P.*, 2020 U.S. Dist LEXIS 65724 (W.D. Pa. 04/14/2020). The same definition of "occurrence" considered in *Kvaerner* and *Pottsdown Industrial* was again at issue. The underlying action alleged that a large section of concrete broke from the second level of a university campus parking garage and crashed to the ground. The University sued the general contractor and thereafter several additional defendants, among them *Century Steel*, were joined. Two causes of action, in separate counts, alleged that *Century Steel* was guilty of negligence and breach of contract. Defense of the joinder complaint was tendered to *Zurich*.

The damages allegedly caused by collapse of concrete installed by *Century Steel* included the cost to repair the garage, loss of revenue from the garage, expenses associated with alternative parking arrangements, and legal and engineering expenses. *Century Steel* argued that while faulty workmanship is not an "occurrence" when it only results in damage to the workmanship itself, commercial general liability policies are meant to provide coverage when the insured's work causes damage to property other than to property on which it worked. Thus, *Century Steel* contended that because collapse of the garage caused damage beyond what it allegedly installed, including parts of the garage built by others, the event described in the underlying action qualified as an "occurrence." A Federal Magistrate Judge disagreed and held that Zurich had no duty to defend.[14] The court read the operative Complaint to Join as alleging that *Century Steel* improperly installed structural and architectural components of the parking garage in breach of its subcontract. In addition, the damages claimed were limited to damage to the garage itself, the project on which *Century Steel* had worked, and consequential economic damages. So construed, the court held that even under a liberal reading of the Complaint, the factual allegations did not represent a fortuitous event, even when cast as negligence. The court distinguished *Pottstown Industrial* on two grounds. First, the court accepted Zürich's argument that the Superior Court held that an occurrence-based policy does not provide coverage when an insured's faulty workmanship damages the insured's product or "the project on which the insured worked." *215 A.3d at 1016*. Second, the court found that collapse of the garage was not an unforeseeable, fortuitous event unconnected to the actions of *Century Steel*; rather, it was directly the result of its faulty workmanship.

The district court did not discuss how physical damage to work of other contractors easily differs from the core factual allegations supporting the holding in *Pottstown Industrial.* It is important to note, however, that the court fully discounted a claim by *Century Steel* that cars parked in the garage also had been damaged; the court found no such damage alleged in the underlying pleadings. The outcome presumably would have been different had such collateral damage been pleaded. And whether the district court's effort to distinguish *Pottstown Industrial* would be accepted by the Superior Court, or added to the list of federal cases in footnote 2, is an open question.

[9] The policy defined "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Policies are contracts that can vary significantly; therefore, a coverage analysis must always begin with the language of the policy.

[10] A district court recently held that extrinsic evidence offered to contradict allegations of a civil action complaint, even if admitted as false by the policyholder, will not take a claim out of coverage for purposes of the duty to defend. The allegations at issue were whether the Named Insured's employee was driving a covered vehicle at the time of an accident. *MMG Ins. Co. v. Giuro, Inc.*, 2020 U.S. Dist. LEXIS 1716 (M.D. Pa. 2020).

[11] *Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co.*, 939 F.3d 243, 252 (3d Cir. 2019).

[12] *Specialty Services Int'l, Inc. v. Continental Cas. Co.*, 609 F.3d 223, 231 (3d Cir. 2010).

[13] Thus, the harmful consequence of a negligent act or omission, or the defective nature of a product, may be unintended, but an unintended consequence is not necessarily synonymous with an accidental one having the quality of fortuity that a policy insures. A note of caution: the policy

language always controls and there are policy-based definitions of "occurrence" that could dictate a different result, especially a definition that adds a subjective element to the analysis. *Sapa Extrusions, Inc. v. Liberty Mutual Ins. Co.*, supra., at 252-253, 257-260. [14] The court also granted Zurich reimbursement of defense costs incurred to defend Century Steel in the underlying action under a Reservation of Rights. The policy included an endorsement which reads, in relevant part, as follows: "If we initially defend an insured ("insured") or pay for an insured's ("insured's") defense but later determine that none of the claims ("claims"), for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred. The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense or the payment of defense costs and to seek reimbursement for defense costs."

In The Community

Ricci Tyrrell is proud to again sponsor **Eagles Autism Challenge** in 2020. Our firm has been an event sponsor for all three years that **EAC** has existed. **EAC** is dedicated to raising funds for innovative research and programs to help unlock the mystery of autism. The event aims to inspire and engage the community, so together, we can provide much needed support to make a lasting impact in the field of autism.

On June 26, 2020, **Boys & Girls Clubs of Philadelphia** will host its **8th Annual Philly Showcase of Wine, Cheese & Beer.** Ricci Tyrrell is happy to again sponsor this signature event. This year the Pennsylvania Convention Center will be transformed into an Island Paradise as the event celebrates "The Big Kahunas" **Shane Victorino** and **Tom McCormick**..

Lisa Tiffany, Legal Assistant at Ricci Tyrrell, is a long-time member of the **Springfield Lions Club** whose main objective is to serve the blind and hearing impaired in the surrounding community. For the past 8 years Lisa and the Lions Club has collected food from members, grocery stores and high schools to deliver over 65 baskets during the Easter holiday. Due to Covid-19, the delivery this year was cancelled, but the Lions Club donated all the food that was gathered to a local food bank.

Bill Ricci, Member, recently married his long-time sweetheart **Eileen Watkins** on February 8, 2020 and held a reception/fund raiser at **Stevens on State** in Media, Pa. All proceeds and donations were for **Children's Hospital of Philadelphia** for leukemia research.

In January and February 2020, **Nancy Green**, Member, helped to cook, package and label more than 200 meals for *Caring for Friends*. *Caring for Friends* provides food and friendship to homebound and medically compromised seniors, kids, and families in Philadelphia and its surrounding suburbs who don't have the means to cook for themselves.

While homeschooling her children during the COVID-19 closures, **Tracie Bock Medeiros,** Member, has enjoyed working with her 7 year old Zach and 4 year old Naomi on thank you letters to first responders and health care providers. They have also been making rainbow loom bracelets to sell on the boardwalk down the shore this summer to raise money for the Children's Hospital of Philadelphia (CHOP). 15 month old Nathan has enjoyed cheering on his brother and sister.

Zach, Nathan and Naomi Medeiros