Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

QUARTERLY NEWSLETTER

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In This Issue:

News and Events:

Ricci Tyrrell Johnson & Grey is honored to have again been selected as one of the 2021 **U.S. News & World Report Best Law Firms** - Tier-1 Products Liability (Philadelphia).

Ricci Tyrrell welcomes two new associates and one new paralegal to our Team. **Vikas Bowry** earned his BA degree in Criminology from Simon Fraser University in Burnaby, British Columbia. Thereafter, he attended the Widener School of Law in Wilmington, DE, graduating with *Pro Bono* distinction. Mr. Bowry served as a Judicial Fellow to the Honorable Lisette Shirdan-Harris and proceeded to serve as a Judicial Law Clerk to the Honorable Edward C. Wright, both in the First Judicial District of Pennsylvania. He has worked as a City of Philadelphia Assistant City Solicitor and as an associate at another Philadelphia firm. **Adam Mogill** earned dual BA degrees in Political Science and Sociology from Penn State. He also minored in Spanish. He obtained his J.D. from America University College of Law, graduating *cum laude*. Mr. Mogill served as a Judicial Law Clerk to the Honorable Michael E. Erdos, in the Pennsylvania First Judicial District. He has experience at a prior litigation firm. **Ryan Tino** has begun as a paralegal at the firm after graduating in 2020 from Boston College where he majored in Political Science, History.

Founding Members **Francis J. Grey** and **Bill Ricci** were honored to serve as **Judge *Pro Tem*** special discovery masters in the Philadelphia Court of Common Pleas during the COVID-19 judicial emergency.

Mr. Ricci is one of the course planners and faculty participants at the December 4, **2020 Masters of Litigation** program, a joint-presentation of the **American College of Trial Lawyers** and the **Temple University Beasley School of Law** LLM in Trial Advocacy.

Managing Member **John E. Tyrrell** was a member of a panel of the **PLAC Virtual Fall 2020 Conference**, discussing "The Pandemic: Was Corporate America Ready, How Did it React, What Changes are Permanent".

Mr. Tyrrell and Associate **Kelly Woy** co-authored an article in **Sports Facilities and the Law**, detailing the need for Sports Facility insurance coverage. You can access the article at this link: http://rtjglaw.com/wp-content/themes/rtjg/pdf/SFL-5-2.pdf.

Francis Grey recently addressed a conference at Firm client General Motors. Mr. Grey presented on the topic of Plaintiff's use of the pre-existing condition jury charge in a crashworthiness case.

Bill Ricci is presenting a mock appellate argument as part of the December 8, 2020 **Dispute Resolution Institute** Personal Injury Practicum.

SUCCESSFUL FEDERAL COURT MOTION TO DISMISS

*Firm Founding Member **Francis J. Grey** is lead counsel for Target and the briefing was principally handled by Associate **Samuel Mukiibi**.*

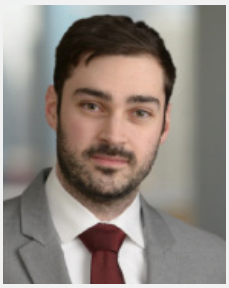
Francis J. Grey

Samuel Mukiibi

In *Hena v. Target Corp.*, Ricci Tyrrell lawyers recently secured a trimming of plaintiff's claims at the outset of a case in the United States District Court for the Eastern District of Pennsylvania.

The plaintiff alleged injuries from a slip and fall at a Target store and claimed that whichever store employees were responsible for keeping aisles clean must have been incompetent to allow for the alleged condition, and Target negligent for hiring and retaining them. In ruling on the defendant's Motion to Dismiss, Judge Berle M. Schiller granted dismissal of the plaintiff's claims for negligent hiring, selection, and retention, and for vicarious liability. Judge Schiller reasoned that the type of the work involved is the type that one can generally assume another is competent to perform. Moreover, plaintiff failed to plead any factual averments that would lead to the inference the store should have been aware that some employee was incompetent. Finally, the Court found vicarious liability is merely a doctrine of imputation, not a separate cause of action, and plaintiff had not identified any agent or tortious conduct specifically to allow imputation to Target.

DUTY OUT OF BOUNDS: PENNSYLVANIA'S APPLICATION OF THE NO-DUTY RULE



Alexander Shaen is an Associate at **Ricci Tyrrell Johnson & Grey**.

The "no-duty rule" was first adopted by the Pennsylvania Supreme Court in 1978 in a personal injury lawsuit involving a plaintiff struck by a batted ball at a professional baseball game. *See Jones v. Three Rivers Mgmt. Corp.*, 483 Pa. 75 (1978). The no-duty rule states generally that a defendant owes no duty of care to warn, protect, or insure against risks that are "common, frequent, expected and inherent" in an activity. *Id.* at 85. Since first adopting this rule in the context of a fan injured at a professional sporting event, the courts have analyzed this doctrine in suits involving patrons at ski resorts and most recently a retired teacher injured on the sidelines of a high school football game who later succumbed to his injuries. *See Cantafio v. Valley View School District*, No. 2018-CV-2991 (C.P. Lacka. Co. 2020). While the *Cantafio* matter is still pending with several interlocutory appeals also pending, the defendants preliminary objections arguing that the matter should be dismissed under the no-duty rule were overruled raising the question of the

appreciable bounds of the no-duty rule and whether a bystander on the sidelines of a high school football game exposed himself to the foreseeable injuries that could result from standing in close proximity to the playing field or if the risk of death from a collision with a player was a risk common, frequent, or expected to be inherent in the game of football.

To understand the genesis and application of the no-duty rule in Pennsylvania, a review of the types of claims barred and upheld under this rule must be considered. The no-duty rule was first adopted in *Jones*, where the plaintiff was attending a professional baseball game in Pittsburgh, Pennsylvania when she was struck by a batted ball. *Jones*, 483 Pa. at 79. While walking on one of the concourses, the plaintiff heard a cry of "Watch!", wherein she turned toward the field and was struck in the eye by a batted ball during batting practice. *Id.* at 79-80. A jury ultimately found in favor of the plaintiff and the Superior Court partially overturned, before the management company of the stadium appealed to the Supreme Court concerning its liability. *Id.* at 80.

On appeal, the Pennsylvania Supreme Court evaluated claims against operators of establishments like amusement parks, country clubs, and movie theaters. *Id.* at 82-85. In evaluating these claims, the Court held the "'no-duty' rules[] apply only to risks which are 'common, frequent and expected' . . . and in no way affect the duty of theatres, amusement parks and sports facilities to protect patrons from foreseeably dangerous conditions not inherent in the amusement activity." *Id.* at 85. The ultimate issue on appeal was whether a person "who attends a baseball game as a spectator can properly be charged with anticipating as inherent to baseball the risk of being struck by a baseball while properly using an interior walkway." *Id.* at 86. The Supreme Court evaluated plaintiff's claim under the no-duty rule and held that the architectural features of the area where the plaintiff was injured were not an inherent feature of the spectator sport of baseball. *Id.* at 86. Therefore, the Supreme Court held that the no-duty rule previously applied by the Superior Court to reverse the jury verdict was improperly applied. *Id.* at 86-87.

After *Jones*, a number of Superior Court decisions addressed the no-duty rule. *See, e.g.*, *Bowser v. Hershey Baseball Association*, 357 Pa. Super. 435 (1986) (grant of compulsory nonsuit was affirmed on appeal after it was determined that the defendant had no duty to warn or protect the plaintiff from being struck by an errant baseball); *Telega v. Security Bureau, Inc.*, 719 A.2d 372 (Pa. Super. 1998) (the Superior Court reversed the trial court's grant of summary judgment to the defendant security firm as an improper extension of the no-duty rule because the no-duty rule was inapplicable in an action where a spectator suffered injuries from an attack by aggressive fans attempting to steal a football that was thrown into the stands because the attack was not a reasonably foreseeable risk). *Petrongola v. Comcast-Spectacor, L.P.*, 2001 PA Super 338 (2001) (defendants had no duty to protect a spectator from a puck entering the spectator's seating area); *Pakett v. Phillies, L.P.*, 871 A.2d 304 (Commw. Ct. 2004) (plaintiff failed to demonstrate exceptions to the no-duty rule and the grant of summary judgment was affirmed as the plaintiff failed to show that the danger of getting hit by a foul ball was not an inherent risk of the game). The no-duty rule was substantively considered as applied to a game participant in *Craig v. Amateur Softball Ass'n of America*, 2008 PA Super 123 (2008). The plaintiff in *Craig* was playing in a slow-pitch softball game in 2002, when he was struck in the head with a softball while running the bases. *Craig*, 2008 PA Super 123 at *2. The plaintiff was not wearing a helmet when he was struck. *Id.* at *3. The defendant, the creator of the rules for the softball league, filed a motion for summary judgment arguing that it owed no duty of care to the plaintiff in requiring him to wear a helmet. *Id.* at *4. The motion for summary judgment was granted after the trial court concluded that the plaintiff's claims fell under the no-duty rule. *Id.* at *7. The plaintiff subsequently appealed. *Id.* at *4.

On appeal, the Superior Court evaluated whether the defendant owed a duty to the plaintiff. *Id.* at *6. Citing past precedent, the court held that "if it is determined the no-duty rule is applicable to a negligence claim, a plaintiff will be unable to set forth a *prima facie* case of liability." *See McCandless v. Edwards*, 2006 PA Super 247 (2006), *app. denied* 592 Pa. 768 (2007) (noting a *prima facie* case of negligence requires a showing of duty, breach, causation, and damages). Plaintiff argued that the no-duty rule was inapplicable, specifically arguing that "the risk of being struck in the head without wearing a helmet by a ball while running the bases, thrown with such force that [one's] skull becomes crushed is not a risk that is 'inherent' to the game of softball." *Id.* at *9. The Superior Court noted that this argument confused the concept of risk and result. *Id.* at *10. The risk at issue was being struck by an errant softball, which was the operative factor in the Court's analysis. *Id.* The Court concluded that the risk of being

struck by an errant softball was a common, expected and frequent risk of the game. *Id.* (*citing Loughran v. Phillies*, 2005 PA Super 396 (2005), *app. denied*, 588 Pa. 783 (2006)).

Most recently, the issue of the no-duty rule was evaluated in the context of a high school football game. *See Cantafio v. Valley View School District*, No. 2018-CV-2991 (C.P. Lacka. Co. 2020). In *Cantafio*, the decedent was a retired teacher who served as the statistician for his former high school and who, in his capacity as statistician, attended a high school football game on September 30, 2016. The decedent was standing on the sidelines during the game when a player ran toward the sidelines. The play spilled onto the sidelines where the decedent was standing and the player struck the decedent head-on. The collision caused the decedent to fall several feet behind him onto the asphalt curb/surface behind the team box where he was standing. The force of the collision caused the decedent to land on the back of his head, fracturing his skull, and rendering him unconscious. The decedent was taken to a nearby hospital, where he later succumbed to his injuries.

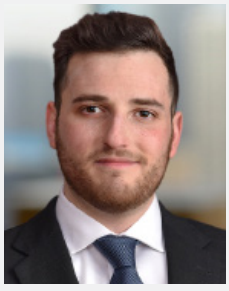
Ten years prior to the incident, the stadium where the incident occurred underwent a redesign, including the addition of the asphalt curb and surface twelve (12) feet and two (2) inches from the sideline of the football field and immediately behind the team box where the coaches and statisticians are required to stand during the game. The estate of the decedent brought suit against the owner and possessor of the stadium, the architecture/engineering/design firm that redesigned the stadium, and the contractor that completed the redesign. A number of other parties were later joined as additional defendants, including the high school whom the decedent was a statistician for.

The owner of the stadium filed preliminary objections partially on the basis of the no-duty rule. The owner argued that plaintiff's claims against it should be dismissed because "the decedent knowingly exposed himself to foreseeable injuries which could result from placing himself on the sideline of the football field, a few feet from where the football game was taking place." In reviewing the stadium owner's preliminary objections, the court was tasked with determining "whether one who stands on the sideline of a football game can properly be charged with anticipating, as an inherent part of watching football, the risk of death as a result of colliding with the players and striking an asphalt curb located near the field of play."

In reviewing the pleadings, the court concluded that "this risk is not a common, frequent, or expected one to be considered inherent in the game, and thus the no duty rule does not apply[.]" The owner's preliminary objections based on the no-duty rule were thus overruled, as well as all of the other parties' preliminary objections. Since dismissal was only raised in *Cantafio* via preliminary objections, the argument will likely be repeated in the summary judgment phase of the litigation, wherein it appears that the risk of a football player striking an individual on the sidelines is a common, frequent, and expected risk. Although *Cantafio* involved the death of a spectator on the sidelines, *Craig* held that the operative determination in the no-duty rule analysis was the risk of injury, not the result, which is something that will likely be contested as the litigation proceeds.

Pennsylvania's no-duty rule still stands for the proposition that the mere fact that an accident occurs, does not necessarily mean that the accident is compensable. While the owner and/or operator of stadiums, movie theatres, amusement parks, and recreational fields must still consider and try to prevent against risks that are not common, frequent, or expected to be inherent in certain activities, the individual participating in the sport and/or activity is held to be responsible to protect him or herself, as much as possible, from the common, frequent and expected risks of a sport and/or activity.

NEW JERSEY SUPREME COURT HOLDS PRODUCT LIABILITY ACT DOES NOT BAR CONSUMER FRAUD CLAIMS



Adam Mogill is an Associate at **Ricci Tyrrell Johnson & Grey**.

The New Jersey Supreme Court recently ruled that claims under the New Jersey Consumer Fraud Act,[1] ("CFA") relating to the sale of a product are not *per se*

[1] N.J.S.A. §§ 56:8-1 to 56:8-224

subsumed by the New Jersey Product Liability Act,[2] ("PLA"). Products liability claims having long been considered to be solely governed by the PLA. In *Sun Chemical Corp. v. Fike Corp.*, the high court held that, "irrespective of the nature of the damages sought, a CFA claim alleging express misrepresentations – deceptive, fraudulent, misleading, and other unconscionable commercial practices – may be brought in the same action as a PLA claim premised upon product manufacturing, warning, or design defects." 243 N.J. 319, 325 (2020). The Court's opinion therefore leaves open the possibility that a defendant who engages in fraudulent practices in connection with the sale of a product could face a CFA claim, a PLA claim, or both.

Plaintiff, Sun Chemical Corporation ("Sun Chemical"), operated an ink manufacturing business. Sun Chemical installed a new dust collection system at its facility. It then purchased an explosion isolation and suppression system ("Suppression System") from Defendant, Fike Corporation and Suppression Systems Inc. ("Fike") designed to prevent and contain potential explosions in its dust collection system. A fire occurred in the dust collection system on the first day the Suppression System was operational. Although the Suppression System's control panel activated, it failed to issue an audible alarm. Sun Chemical's employees attempted to extinguish the fire, but an explosion occurred sending a fireball through the dust collection system's ducts resulting in personal injuries to Sun Chemical's employees and property damage to its facility.

Sun Chemical commenced an action alleging a single count under the CFA, not the PLA, in the United States District Court for the District of New Jersey. The Complaint alleged that Fike made material oral and written misrepresentations about four aspects of the Suppression System. The District Court ultimately granted Fike's summary judgment motion determining that Sun Chemical's claims were governed by the PLA, not the CFA. On appeal, the United States Circuit Court for the Third Circuit certified questions of law to the New Jersey Supreme Court. In response, the New Jersey Supreme Court addressed "whether a Consumer Fraud Act claim can be based, in part or exclusively, on a claim that also might be actionable under the Products Liability Act." *Sun Chemical*, 243 N.J. at 324.

The Court noted at the outset that there was no authority directly addressing the "interplay between the CFA and PLA." *Id.* at 329. The Court began by reviewing the purposes and histories of the PLA and CFA. The PLA governs the legal universe of products liability actions as defined in that Act. The PLA is intended to protect users from harm caused by defective products by "establish[ing] clear rules" in "actions for damages for harm caused by products." N.J.S.A. 2A:58C-1(a). Specifically, the PLA imposes liability upon the manufacturer or seller for a product's "manufacturing defects, warning defects, and design defects." *Sun Chemical*, 243 N.J. at 333 (internal citations omitted).

The Court noted that the CFA, on the other hand, applies to fraud and misrepresentation and provides unique remedies intended to root out such conduct. The CFA prohibits "deceptive, fraudulent, misleading, and other unconscionable commercial practices 'in connection with the sale . . . of any merchandise or real estate.'" *Sun Chemical*, 243 N.J. at 329 (citing N.J.S.A. 56:8-2).

After reviewing the purpose and history of both the PLA and CFA, the Court noted that the PLA and CFA were "intended to govern different conduct and to provide different remedies for such conduct" and, therefore, there was "no direct and unavoidable conflict" between the statutes. The Court instructed:

> If a claim is premised upon a product's manufacturing, warning, or design defect, that claim must be brought under the PLA with damages limited to those available under that statute; CFA claims for the same conduct are precluded. But nothing about the PLA prohibits a claimant from seeking relief under the CFA for deceptive, fraudulent, misleading, and other unconscionable commercial practices in the sale of the product.

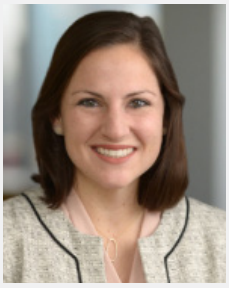
Sun Chemical, 243 N.J. at 336-37. The Court then turned to the issue of how a given claim must be pled. It found that this will depend on "the underlying theory of liability." *Id.* at 338. Sun Chemical was "mistaken in its heavy reliance on the nature of the damages" it sought. *Id.* at 339. Therefore, the Court held "it is the nature of the action giving rise to a claim that determines how a claim is characterized." *Id*. The nature of a plaintiff's damages does not determine whether the claim falls under the PLA or the CFA; rather, it is the theory of liability underlying the claim that determines the recoverable damages.

Ultimately, the decision allows for the co-existence

[2] N.J.S.A. §§ 2A:58C-1 to 2A:58C-11

of the PLA and CFA in limited situations, *e.g.*, where a plaintiff plausibly frames his "product" claim as arising from a fraudulent misrepresentation. Thus, manufacturers that once could be confident that their potential liability arising from the sale of products would be confined to the PLA, now face the possibility that they will be subject to the broad array of available remedies under the CFA, including treble damages and attorneys' fees and costs which are not available under the PLA. The *Sun Chemical* Court has opened the door, if not the flood gates, to a new wave of CFA claims being asserted against product manufacturers in cases that have been traditionally governed solely by the PLA.

HOME IS WHERE THE REGISTRATION IS?



This article was authored by **Ricci Tyrrell** Associate **Kelly Woy**.

The Supreme Court of Pennsylvania will soon have the opportunity to decide just how significant the consequences of registering to do business in the Commonwealth of Pennsylvania will be for foreign corporations. The anticipated ruling in the Supreme Court could have serious implications for corporations seeking to conduct business in Pennsylvania, including subjecting all foreign corporations registered to do business to general personal jurisdiction in the Commonwealth, no matter their connection (or lack thereof).

By way of background, in *Daimler AG v. Bauman*, the United States Supreme Court ruled that a corporation may be subject to general jurisdiction only in the limited jurisdictions in which it is deemed to be "at home." 571 U.S. 117, 137-138 (2014). Absent extraordinary circumstances, corporations are deemed to be "at home" only in jurisdictions where they are incorporated or choose to maintain their principal place of business. However, litigants in Pennsylvania have had varying degrees of success in circumventing the Supreme Court's "at home" requirement by arguing that corporations subject themselves to jurisdiction when they register to conduct business in the Commonwealth. To date, whether this is a viable path to jurisdiction remains an issue with an uncertain answer.

The very language of Pennsylvania's jurisdiction statute arguably authorizes courts in the Commonwealth to exercise general jurisdiction over a foreign company that has registered to do business in Pennsylvania. Specifically, 42 Pa.C.S.A. § 5301 provides the following:

> (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) (emphasis added). Significantly, Pennsylvania also has a statute that *requires* foreign corporations to register with the Commonwealth before doing business in Pennsylvania. 15 Pa.C.S. §§ 102, 411. The combined effect of these statutes creates a catch-22 for out of state corporations – they cannot conduct business in the Commonwealth unless they register to do business, thereby surrendering their constitutionally protected right to be free from general personal jurisdiction in a state where they are not "at home."

Current Pennsylvania Superior Court precedent disregards *Daimler's* constraints on the scope of general personal jurisdiction and holds that a foreign corporation's registration to do business is a sufficient basis for the exercise of general personal jurisdiction regardless of whether a corporation is "at home" in Pennsylvania. *Webb-Benjamin, LLC v. Int. Rug*

Group, 192 A.3d 1133 (Pa. Super. Ct. 2018). Federal district courts in Pennsylvania are split, having issued numerous decisions in which individual judges reach opposite conclusions.

With that important backdrop, we turn to the case of *Robert Mallory v. Norfolk Southern Railway Company*, No. 802 EDA 2018, which the Superior Court of Pennsylvania transferred to the Supreme Court of Pennsylvania on October 30, 2020, in order to finally address the constitutionality of the combined effect of the aforementioned statutes on foreign corporations.

Plaintiff Mallory filed a lawsuit in the Philadelphia Court of Common Please, Case No. 170901961, alleging a violation of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, against his former employer Norfolk Southern, due to an alleged exposure to harmful carcinogens which caused him to develop colon cancer. Norfolk Southern, a Virginia corporation, filed preliminary objections in the trial court seeking dismissal of the complaint due to lack of personal jurisdiction over the company in Pennsylvania. Mallory argued in response that Norfolk Southern consented to general jurisdiction in Pennsylvania, pursuant to 42 Pa.C.S.A. § 5301(a)(2)(ii), by registering to do business in Pennsylvania. Judge Arnold New granted the preliminary objections of Norfolk Southern, and dismissed the action for lack of personal jurisdiction.

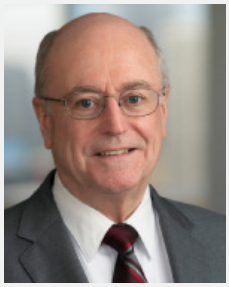
Mallory appealed from the order. In Mallory's statement of matters complained of on appeal, he raised a single issue: the court erred in finding it lacked personal jurisdiction over Norfolk Southern because Section 5301(a)(2)(ii) confers general jurisdiction by consent over any corporation who registers to do business in Pennsylvania. The trial court filed a Pa.R.A.P. 1925 opinion, in which it concluded that Section 5301(a)(2)(ii) was unconstitutional, noting that Pennsylvania law requires foreign corporation to register to do business in Pennsylvania pursuant to 15 Pa.C.S. §§ 411, and therefore taken together, the two statutes have the effect of "forcing foreign corporations to choose between consenting to general jurisdiction in Pennsylvania or foregoing the opportunity to conduct business in Pennsylvania," which violates the Due Process Clause of the Fourteenth Amendment.

The Superior Court ultimately found that it did not have subject matter jurisdiction over the matter on appeal, pointing to the Judiciary Code, which provides that the Supreme Court "shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas" that hold any Pennsylvania statute "repugnant to the Constitution . . . of the United States." 42 Pa.C.S.A. § 722(7). Therefore, the case was transferred to the Supreme Court of Pennsylvania to make a final determination.

Mallory presents the Pennsylvania Supreme Court with the opportunity to address an important constitutional issue that has not received appropriate consideration in Pennsylvania's intermediate appellate court, and which has led to a divide in federal courts.

Coverage Corner:

STATUTE OF LIMITATIONS FOR INSURANCE COVERAGE ACTIONS



Ricci Tyrrell Member **Francis P. Burns, III** has decades of experience in complicated insurance coverage issues.

A federal district court recently addressed when a claim "accrues" to trigger the running of the Pennsylvania statute of limitations applicable to a declaratory judgment action seeking to resolve a third-party liability coverage dispute. *Allegheny Ludlum, LLC. v. Liberty Mut. Ins. Co.*, 2020 U.S. Dist. LEXIS 171713 (W.D. Pa. 09/17/2020). The court held that a claim for declaratory judgment, like a claim for breach of contract, is subject to a four-year statute of limitations and "accrued" when coverage was denied and not when the underlying action was terminated by settlement.[3]

The underlying toxic tort action was commenced in 2003 by hundreds of former workers at an automobile muffler manufacturing plant in Alabama. The plaintiffs alleged that they suffered bodily injuries caused by exposure to toxic chemicals from 1964 to 2002 when

[3] This digest relies in part on review of filings in the court docket as well as the district court's opinion. Although the full opinion discusses other claims made against other insurers, for present purposes the district court's disposition of the claims against Liberty Mutual are the ones of interest.

the plant closed. Allegheny Ludlum, a Pittsburgh-based supplier to the plant, was joined as a defendant by an amended complaint filed on May 6, 2005. Allegheny Ludlum retained defense counsel and then placed Liberty Mutual on notice of the suit in June 2005. Liberty Mutual thereafter agreed to participate in the defense under a reservation of rights.

In 2007, the Alabama Supreme Court held that the tort claims alleged against those defendants added in 2005 did not relate back to the original 2003 filing date. The plaintiffs reacted to the ruling by filing a second amended complaint setting forth a single count alleging wanton misconduct by the defendants. In 2009, the Alabama Supreme Court held that a six-year statute of limitations period applied to the wantonness claims and dismissed the claims of plaintiffs whose injuries occurred exclusively before May 6, 1999. Following the 2009 decision, plaintiffs in the underlying action took the position that the ruling had two effects: it pared down the number of viable plaintiffs from 434 to approximately 285; and it defined the relevant time period for consideration of the "wantonness" claims to be 1999 through 2002. Liberty Mutual issued policies that were in effect from July 1, 1985 to November 1, 1998.

On September 14, 2010, Liberty Mutual and Allegheny Ludlum participated in a conference call to discuss the 2009 statute of limitations ruling of the Alabama Supreme Court. Allegheny Ludlum's risk manager followed up that conversation with an email to the effect that Liberty Mutual owed no coverage. In 2013, Liberty Mutual entered into a cost-sharing agreement with Allegheny Ludlum limited to defense costs that pre-dated the 2009 decision of the Alabama Supreme Court. Allegheny Ludlum settled the underlying litigation in 2017.[4] It also changed its position on the question of coverage, claiming it had been operating under a faulty understanding of the Alabama decision applying the statute of limitations. Liberty Mutual again denied coverage and Allegheny Ludlum commenced its action in the Western District of Pennsylvania for declaratory judgment, breach of contract and bad faith. Liberty Mutual moved successfully for summary judgment on the ground that the counts seeking declaratory relief and damages for breach of contract were time barred by Pennsylvania's four-year statute of limitations applicable to contract actions. 42 Pa. C.S.A. §5525(a)(8). The court also held that the bad faith claim was time-barred.

Relying on an earlier federal district court decision, Allegheny Ludlum argued that its claim did not accrue, and the statutory period did not begin to run until the underlying tort litigation terminated.[5] Citing more recent decisions by the Pennsylvania Superior Court, the district court found that no bright-line rule exists as to when the statute begins to run in a coverage dispute. Rather, the court held that a cause of action for declaratory judgment accrues "when an actual controversy exists." When an actual controversy exists was defined in three ways by the court: "as soon as the circumstances would permit a plaintiff to maintain an action"; "only where a case presents clearly antagonistic positions or claims indicating imminent and inevitable litigation"; and "when plaintiff could have first maintained the action to a successful conclusion." *Id*. at *12-13. Thus, a claim for declaratory relief may accrue for an insurer when it has enough facts to support its position that it does not owe coverage, and that could be as early as when an insurer receives a complaint against the insured.[6] *Id.* at 11.

In the case at hand, the precise question required determination of when Allegheny Ludlum's claim for improper denial of coverage had "accrued." The court found that "[a]t the latest, the September 14, 2010 teleconference was the accrual point for the statute of limitations" because on that date Allegheny Ludlum had sufficient facts to conclude that Liberty Mutual did not intend to provide coverage; therefore, the declaratory judgment action had been filed by Allegheny Ludlum three years too late to avoid the bar of the statute of limitations. Because an action for breach of contract also accrued with denial of coverage, that claim too was time-barred.[7]

[4] At that point Allegheny Ludlum had incurred approximately $2,800,00 in defense costs and paid out indemnity totaling $1,300,000.

[5] Wiseman Oil Co., Inc. v. TIG Ins. Co., 878 F. Supp.2d 597 (W.D. Pa. 2012) (statute will not begin to run until the conclusion of the underlying litigation).

[6] This observation is not essential to the court's holding and is, therefore, dicta. The court did not articulate how simple receipt of a complaint against an insured could, by itself, present "clearly antagonistic positions" justifying commencement of an action by an insurer or an insured.

[7] Allegheny Ludlum's claim for bad faith, alleging that Liberty Mutual failed to correct its insured's purportedly mistaken interpretation of Alabama law was dismissed as untimely under the applicable two-year statute of limitations applicable to such a claim. The court held that the bad faith claim limitations period began to run when coverage was initially denied and, citing Adamski v. Allstate Ins. Co., 738 A.2d 1033 (Pa. Super. 1999), rejected Allegheny Ludlum's "continuing violation" theory.

In most instances an insurer and its insured will communicate plainly about the duty to defend at the start of a third-party claim for damages or suit. A denial of coverage, in whole or in part, typically follows as a matter of course. Left unaddressed by Pennsylvania case law is whether a claim for declaratory judgment must be filed either when a partial denial of coverage is announced but does not result in the denial of a defense to an entire action, or when a defense is provided under a reservation of rights stating or implying that a duty to indemnify upon further factual development is not likely to be triggered. In circumstances where the underlying action is likely to endure beyond the two-year limitations period of the bad faith cause of action, a tolling agreement applicable to all applicable statutes of limitation and setting the clock running when the underlying action has been terminated may be desirable.

THE "POOR MAN'S PATENT"

Stuart M. Goldstein has specialized in representing clients in Intellectual Property matters throughout his career.

In our initial meeting to discuss a possible new patent application, a prospective client would sometimes present me with an unopened envelope on which there was a canceled stamp displaying a date of mailing. The client then informs me that the envelope contains a copy of documents and drawings describing the product to be patented, the product which the inventor had developed well before our meeting. Unfortunately, this "poor man's patent," as such document containing envelopes are commonly known, are of little or no value to an inventor and of no benefit to show priority of the date the invention was conceived.

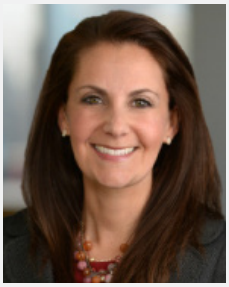
The theoretical concept of the "poor man's patent" is that, by enclosing documents describing an individual's invention in a sealed envelope and then mailing that envelope to oneself, the stamped date on the envelope would provide a priority date of invention; thus allowing the inventor to prove the date that he or she actually invented that product. This would avoid the expense of actually filing and prosecuting a patent application which would clearly establish a date of invention. Again, this type of "patent" now provides virtually no protection to the inventor.

First, from a practical standpoint, this process is not secure. For instance, an envelope can easily be tampered with, thus discrediting the material which is inside the envelope, thereby rendering it useless as reliable evidence to establish priority of invention.

More importantly, however, in 2013, the United States Patent Office changed, by statute, from a "first to invent" to a "first to file" system. In other words, prior to the statute, an inventor could prove that he or she actually invented a product by providing evidence as to when that product was conceived and then actually reduced it to practice, before a patent application was filed. If successful in proving this prior date of invention, the inventor would receive that pre-application date of priority. However, the 2013 statute provided a more straightforward and less complicated means of establishing priority of invention, a means consistent with that of other industrialized countries around the world. From 2013 forward, the date an application for a patent is filed is the date of priority of invention, plain and simple. Thus, the "poor man's patent," which attempts to evidence prior inventorship, becomes useless, when matched up against the date an actual patent application is filed.

The moral of this story is that as soon as an inventor has conceived and has been able to describe and memorialize his or her invention, a patent application should be filed to establish the date of invention. In fact, the United States Patent Office has made this process easier and less expensive by allowing the inventor to file a "provisional" patent application, which is an informal patent application document. A provisional application has none of the specific requirements of a formal or "non-provisional" application, thus allowing the inventor to avoid the relatively large fees and costs associated with having the formal patent application prepared and filed. Unlike a "poor man's patent," a provisional application will be afforded the date of priority that the inventor needs to establish, without question.

In The Community:

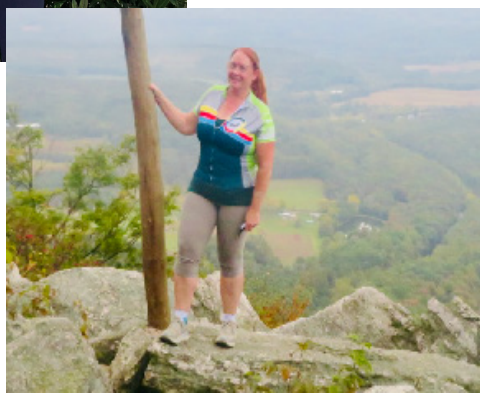


"In the Community" is edited by **Ricci Tyrrell** Member **Tracie Bock Medeiros**.

On September 26, 2020, **Team RTJG** participated in the 2020 all-virtual **Eagles Autism Challenge (EAC)**. EAC is dedicated to raising funds for innovative research and programs to help unlock the mystery of autism. Eagles Autism Challenge had over 2700 participants this year and raised over $3.1M dollars. Participants chose to enter into one of several events: 10-, 30- or 50- mile bike ride; 5K run/walk; or a Sensory Walk. Team RTJG was comprised of 32 members, employees, family and friends of the Firm. Over the past three years Ricci Tyrrell, through sponsorship and fundraising, has contributed over $100,000 to Eagles Autism Challenge and **Eagles Autism Foundation**.

***Tracie Medieros**, Member, after the 5K race completion. (left)*

***Patti Grey**, Billing Manager, at the height of her EAC hike. (below)*



In September, Ricci Tyrrell helped support the **Children's Miracle Network** and attended a fundraising golf outing sponsored by **Speedway LLC.** Associates **Kelly Woy** and **Sam Mukiibi**, along with Firm Member **Mike Droogan** attended the event and played in a foursome with Speedway's Associate General Counsel, Amanda Stacy Hartman. The event was held at NCR Country Club in Kettering, OH. The one-day event raised more than $2 Million for the Children's Miracle Network**.**

On September 24, 2020, Members **Fran Grey, Jason Avellino, Brian Wolensky** and their spouses, including Billing Manager **Patti Grey**, attended the **Boys & Girls Clubs of Philadelphia** annual fundraising event, the **Coach's Private Reserve Dinner** at the Adventure Aquarium. Boys & Girls Clubs of Philadelphia's mission is to "enable all young people, especially those who need us most, to reach their full potential as productive, caring, responsible citizens."

In October, Ricci Tyrrell helped support the **Special Olympics** and participated in an all-female fundraising golf outing held at Forsgate Country Club in Monroe Twp., NJ. The Firm foursome of **Kelly Woy, Patti Grey, Kirby Droogan and Alexandra Natale** finished in third place, and helped support a genuinely worthy cause.

In November, Firm employee **Lisa Tiffany** worked with the **Springfield Lions Club** to organize a **Thanksgiving Food Drive**. This year, the Springfield Lions Club sent out gift cards instead of baskets to 15 needy families in the Springfield area in hopes of helping families put together a nice meal or two for their holiday. Any food received during the drive was provided to a nearby food bank, **Loaves and Fishes.**

Ricci Tyrrell was once again a Scribe Sponsor for the **Katz JCC Festival of Arts, Books and Culture.** This year's event was held virtually from November 8 through November 19, 2020.

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