

Appellate

While trial attorneys properly focus on winning the trial, appellate attorneys focus on the larger goal of winning the case. The Appellate Practice Group provides exceptional written and oral advocacy at every level of litigation. In addition to its traditional function of handling appeals, the group serves our clients by becoming involved in their most difficult and complex cases at the early stages of litigation. The group routinely provides assistance with developing litigation strategy, drafting dispositive motions, monitoring trials, and crafting post-trial motions. The group enjoys a well-earned reputation for creative, nuanced, and thorough legal analysis, and is frequently at the forefront of developing areas of the law.

Pre-Trial, Post-Trial, and Appellate Advocacy

We provide appellate-level expertise at all levels of litigation, including:

- **Counseling:** We assist in the development of litigation strategy to position issues for appeal or, in some cases, avoid an appeal altogether.
- **Motions Practice:** Our attorneys identify and develop the important legal issues through pre-trial motions, trial briefs, oral argument, and interlocutory appeals.
- **Trial Monitoring:** We monitor the trial to ensure preservation of the record, identify trial court errors, prepare trial briefs, and, if necessary, facilitate settlement.
- **Post-Trial Intervention:** At the critical post-trial stage where the appellate issues are identified and developed, our attorneys provide a fresh perspective of the record and an objective evaluation of the chances of success through the post-trial motion and appeal.
- **Appeals:** Our attorneys craft creative and persuasive appellate arguments, drawing upon our nuanced understanding of the appellate rules and thorough knowledge of the record in each case. Our expertise in appellate practice and procedure often provides us a strategic advantage over our opponents.

Appellate practice is not just a procedural specialty

Our appellate lawyers undertake these roles in the broad spectrum of substantive areas of the law and jurisdictions in which the firm practices generally. For example, we routinely handle cases in areas of law such as catastrophic/excess liability; ERISA; class actions; construction practices; general commercial litigation; insurance coverage and bad faith; insurance fraud; insurance professional liability; life health and disability; medical professional liability; product liability; subrogation; and toxic and environmental torts. This extensive multi-disciplinary experience provides a unique perspective and contributes to an informed analysis of legal issues for our clients.

Practice Contacts

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Related Practices

Catastrophic/Excess Liability
Class Actions
Construction and Surety
General Commercial Litigation
Healthcare
Insurance Coverage and Bad Faith
Insurance Fraud
Life, Health, Disability and ERISA
Product Liability
Professional Liability
Subrogation
Toxic Torts and Environmental

Practice Highlights

- We provide exceptional written and oral advocacy at every level of litigation.
- We provide assistance with developing litigation strategy, drafting dispositive motions, monitoring trials, and crafting post-trial motions.
- Our singular focus is to achieve the best possible result for our clients using our procedural and substantive expertise.

We add value to the representation of our clients

Our singular focus is to achieve the best possible result for our clients using our procedural and substantive expertise. We endeavor to do this in a cost-effective manner that is collaborative - and not duplicative - of the efforts of litigation counsel. Thus, the decision to add one of our appellate lawyers to an existing trial team or to hire one of our appellate lawyers to handle or collaborate upon a post-trial motion or appeal is an investment in a favorable outcome.

The Appellate Practice Group achieves successful results for our clients. These results are as varied as securing the reversal of one of the largest judgments in Pennsylvania history to obtaining an extraordinary emergent stay from the state supreme court during trial that resulted not only the stay of the subject trial, but hundreds more county-wide until an unsettled venue issue was resolved by the supreme court.

Representative Matters

- **Insurance Coverage** *Axis Reinsurance Co. et. al. v. HLTH Corp. et. al.*, – A.2d –, 2010 WL 1610623 (Del. Apr 22, 2010)

This case related to the applicability of a Prior Acts Exclusion (PAE). National Union, the primary insurer in the applicable tower of insurance, denied coverage for a directors and officers claim based on the PAE in its policy. Based upon purported ambiguities created when the PAE was read in connection with an Amend Retention Endorsement (ARE), the trial court held that there was coverage for defense costs under the policy. The Supreme Court reversed, holding that reading the PAE together with the ARE does not create an ambiguity because each has a distinct and independent purpose and function.

- **Litigation - Conflict of Laws** *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892 (Del. 2009)

This appeal addressed conflict of laws questions arising from a tort action based upon the theft of a vehicle in Maryland. The vehicle was subsequently involved in an accident in Delaware. Although the plaintiff filed her complaint in Delaware, she argued that Maryland's statute of limitations applied. The trial court applied Delaware's statute of limitations and dismissed the complaint. The Supreme Court affirmed, finding that the plaintiff's cause of action accrued in Delaware where the accident occurred. The Supreme Court also found that the trial court properly applied the most significant relationship test when analyzing the conflict of laws question.

- **Insurance/Attorney's Fees:** *Shore Orthopaedic Group, LLC v. The Equitable Life Assurance Society of the United States*, 397 N.J. Super. 614, 938 A.2d 962 (App. Div. 2008), aff'd, — A.2d —, 2009 WL 1759775 (N.J. Jun. 22, 2009)

In both the New Jersey Superior Court, Appellate Division, and New Jersey Supreme Court, the Appellate Practice Group successfully defended against an action for attorney's fees pursuant to New Jersey Court Rule 4:42-9(a)(6). Rule 4:42-9(a)(6) provides for the award of attorney's fees to a successful claimant in an action upon a liability or indemnity policy of insurance. This case involved a Business Overhead Expense policy owned by a physician's practice group to cover losses in the event of a physician's disability. The policy named the practice group as the beneficiary. The practice group argued that the policy, in theory, extinguished the physician's liability to the group and, therefore, constituted an indemnity policy in substance. In rejecting the practice group's claim, the New Jersey Supreme Court confirmed that the rule applies only to third-party policies, and held that the policy in question was not a third-party policy because the practice group, which owned the policy, was named as the beneficiary, and no payment obligation ran to the physician.

- **Civil Rights and Federal RICO:** *MacShane v. City of New York*, 2007 WL 1062936 (E.D. N.Y. Mar. 30, 2007); *Buneo v. City of New York*, 2007 WL 1062959 (E.D. N.Y. Mar. 3, 2007); *Henry v. City of New York*, 2007 WL 1062519 (E.D. N.

Y. Mar. 30, 2007); *Davis v. City of New York*, 2008 WL 4701211 (E.D. N.Y. Oct. 22, 2008)

Certain New York City police officers filed seven civil rights and federal RICO lawsuits against a treatment center in upstate Pennsylvania. Those lawsuits were all brought in the United States District Court for the Eastern District of New York and were based on allegations that, among other things, the treatment center conspired with the city police department to deprive certain employees of their civil rights. The treatment center offered a "uniformed professionals" substance abuse treatment program, to which many police department employees were referred by their employer. On behalf of the treatment center, the Appellate Practice Group developed an aggressive strategy of disposing of the lawsuits by way of comprehensive Rule 12 motions, thereby saving the client from expensive discovery in a foreign venue. As a result of our briefing, our client was dismissed from complex federal litigation without having engaged in any discovery whatsoever.

- **Products Liability:** *Department of General Services v. United States Mineral Products Co.*, 587 Pa. 236, 898 A.2d 590 (2006), on remand, 927 A.2d 717 (Pa. Commw. 2007), affirmed, 598 Pa. 331, 956 A.2d 967 (2008)

In a complex products liability action involving alleged PCB contamination of a state office building, the Appellate Practice Group joined forces with litigation counsel to convert a \$60 million judgment to a defense verdict for a large, multinational company. The Pennsylvania Supreme Court agreed that the first trial judge had violated Pennsylvania products liability and damage law by allowing recovery of raw replacement costs unbounded by fair market value, submitting damage claims to the jury unsupported by competent expert testimony, and allowing recovery for contamination caused by an unintended use of the product - a catastrophic building fire - which caused the release of PCBs from building materials. On retrial, White and Williams obtained a defense verdict and successfully defended against the state's post-trial motions. The Pennsylvania Supreme Court affirmed, finding no basis to overturn the jury's verdict that the company's product, when used as intended, was not unsafe. Also as a result of this litigation, the Appellate Practice Group secured one of the largest award of costs in the history of Pennsylvania jurisprudence.

- **Insurance Broker Liability:** *Finderne Management Co. v. Barrett*, 402 N.J. Super. 546, 955 A.2d 940 (2008)

This case concerned the liability of those who marketed, sold, and administered sophisticated employee benefit plans to businesses. The promised tax benefits ultimately were disallowed by the IRS, and certain participating businesses sued the plan's originator, brokers, and administrators. New Jersey's Appellate Division agreed with the Appellate Practice Group that New Jersey's Consumer Fraud Act did not apply to this case because the transaction at issue - a company's purchase of an employee welfare benefit plan - was not a consumer transaction under the Consumer Fraud Act. The Appellate Division also found that the plaintiffs were not entitled to "benefit of the bargain" damages because it would have required the court to effectively enforce the employee benefit plan when the IRS had disallowed certain deductions under the plan.

- **Medical Malpractice:** *Swan v. Balan*, 956 A.2d 1222 (Del. 2008)

After the jury entered a verdict for the defense in this medical malpractice action, the plaintiff filed an appeal alleging, among other things, that trial counsel made numerous improper comments during his closing argument. On appeal, the issues of waiver and prejudice associated with the alleged comments played an important role. The Delaware Supreme Court agreed with the Appellate Practice Group that the allegedly improper comments did not address central issues in the case and, to the extent that there were any errors, the trial court gave a curative instruction that mitigated any potential prejudice. Consequently, the defense verdict was affirmed on appeal.

- **Insurance Coverage/Exclusions:** *Lopez v. State Farm Ins. Co.*, 2008 WL 2951971 (N.J. Super. App. Div. Aug. 4, 2008)

This case involved a claim for coverage by an insured who shot someone in a fight. The trial court granted summary judgment in favor of the insurer, and the plaintiff appealed. The issue on appeal was whether the incident fell within a policy exclusion that excluded coverage for claims of bodily injury that were either expected or intended by the insured. Although the plaintiff argued that he was acting in self-defense, the court concluded that there was no coverage because the injury was an inherently probable consequence of the insured's actions.

- **Insurance Broker Liability:** *Harbor Commuter Service, Inc. v. Frenkel & Co., Inc.*, 401 N.J. Super. 354, 951 A.2d 198 (2008)

This case arose out of the procurement of marine insurance policies for a businessman attempting to start a new ferry service. To do so, he borrowed several million dollars, and the lender required the start-up company to obtain certain maritime insurance coverage. After the vessel allegedly ran aground, the start-up company made multiple insurance claims. Coverage was denied. The company, thereafter, sued three insurance brokers involved in procuring the vessel's insurance coverage. After a damages-only trial, the company was awarded more than \$9 million for the loss of the value of the start-up business. The Appellate Practice Group appealed on behalf of our insurance-broker client, and argued that it met all reasonable duties. The New Jersey Appellate Division agreed, holding that the brokers should have been awarded summary judgment prior to trial. It held that one of the subject policies - the hull policy - would have provided coverage for the claimed loss had the company not misrepresented the purchase price. The court also found that the company was equitably estopped from asserting coverage under the breach of warranty policy due to the company's misrepresentations. The court also held that the insurance brokers that were not involved in placing the breach of warranty owed no duty to Harbor with regard to that policy. The company's \$9 million judgment was thus vacated in full and judgment was entered in favor of the defendant-brokers.

- **Medical Malpractice:** *Stroud v. Abington Memorial Hospital*, 2008 WL 2061408 (E.D. Pa. May 13, 2008)

The case involved a medical malpractice claim against a hospital and a physician. After the statute of limitations expired, the plaintiffs sought to add a significant number of additional parties based on an allegation that the hospital withheld a critical test result, which would have enabled them to identify all culpable parties had the report been turned over in a timely fashion. Notwithstanding the liberal "relation back" principles of the Federal Rules of Civil Procedure, and despite the plaintiffs' claim of "fraudulent concealment," the Appellate Practice Group secured an award of summary judgment in favor of all additional defendants based on the statute of limitations defense.

- **Civil Rights/Municipal Liability - State-Created Danger Doctrine:** *J.H. v. City of Philadelphia*, 2008 WL 3983269 (E.D. Pa. Apr. 19, 2008)

The plaintiff alleged that he was abused by his foster parents. He sought recovery for purported violations of the Due Process Clause of the United States Constitution. The plaintiff's claims required our attorneys to undertake an extensive analysis of the standards for imposing liability on municipalities, and whether the Due Process Clause was implicated by either the state-created danger doctrine or the special relationship doctrine. Finding that the plaintiff had failed to create a genuine issue of fact with respect to the City's liability, the court granted summary judgment in the City's favor.

- **Medical Malpractice:** *Leatherbury v. Greenspun*, 939 A.2d 1284 (Del. 2007)

Addressing an issue of first impression in the State of Delaware, the appeal focused on the use of Federal Express to serve a Notice of Intent in the face of unambiguous statutory language requiring the use of certified mail. If properly served, the Notice of Intent would have tolled the statute of limitations for a period of 90 days. Based upon the plaintiff's improper service using Federal Express, the Appellate Practice Group secured the dismissal of

the plaintiff's claim based on the statute of limitations defense. This decision establishes that in order to secure the benefits of the tolling statute, plaintiffs in medical malpractice cases have an affirmative duty to establish compliance with the explicit terms of the statute, 18 Del. C. 6856(3), and that courts have no authority to vary the terms of the statute, or ignore its mandatory provisions.

- **Civil Rights:** *Iseley v. Talaber*, 232 Fed.Appx. 120 (3d Cir. 2007)

In this case, a state prisoner brought a civil rights action against state and prison officials and prison healthcare providers, alleging that their alleged failure to provide adequate medical treatment for his disease constituted cruel and unusual punishment in violation of the Eighth Amendment. The district court dismissed the complaint, and the prisoner appealed. On appeal, the Third Circuit Court of Appeals agreed with the Appellate Practice Group that issue preclusion, or collateral estoppel, barred the prisoner from re-litigating issues that had been adjudicated in prior actions.

- **Products Liability:** *Arnoldy v. Forklift LP*, 927 A.2d 257 (Pa. Super. 2007)

This products liability case involved a forklift alleged to be defective due to the lack of automatic backup warning devices. The trial court agreed with our attorneys' position that the plaintiff's claims were preempted by federal law. The plaintiff appealed, and the Pennsylvania Superior Court affirmed. In addition to holding that the plaintiffs' state law claims were preempted, the Superior Court also agreed that the plaintiffs' appeal suffered from multiple procedural irregularities and warranted a finding that certain claims and arguments had been waived.

- **Releases:** *St. Paul Fire and Marine Ins. Co. v. Nolen Group, Inc.*, 2006 WL 3208669 (E.D. Pa. Nov. 3, 2006)

This property defense case involved water damage as a result of a flood. The plaintiffs argued that certain contractors cleared the land on a nearby construction site before certain precautions were in place, thereby increasing the water flow and damage to the subject properties. The trial initially resulted in a \$28.3 million verdict against the owner, general contractor, and several subcontractors. One subcontractor, a land clearer, was found only 1% liable. Due to a combination of *pro rata* and *pro tanto* settlements entered into by the plaintiffs with the other defendants, the land clearer subcontractor remained significantly exposed. Through post-verdict motions, the Appellate Practice Group convinced the court that the releases were suspect, resulting in reduction of the judgment by \$20 million instead of the \$4 million reduction sought by the plaintiffs.

- **Insurance Broker Liability:** *Sankhla v. Kirwan Financial Servs., Inc.*, 460 F.3d 494 (3d Cir. 2006)

This case concerned the liability of those who marketed and administered sophisticated employee benefit plans sold to businesses. The promised tax benefits ultimately were disallowed by the IRS, and certain participating businesses sued the plan's originator, brokers, and administrators. The case involved some 13 different counts including ERISA, federal and state RICO, the New Jersey Consumer Fraud Act, and numerous common law claims. The Third Circuit Court of Appeals agreed with the Appellate Practice Group that the benefit plans were sophisticated tax-avoidance schemes marketed to certain types of businesses, and not the general public. Thus, they were not ordinary consumer transactions within the purview of the Consumer Fraud Act.

- **Insurance Coverage:** *Egger Estate v. Gulf Insurance*, 864 A.2d 1234 (Pa. Super. 2004), *aff'd*, 588 Pa. 287, 903 A.2d 1219 (2006)

This insurance coverage matter arose out of a fatal industrial accident in which our attorneys represented the insurance broker for the target defendant. At issue was the validity of a post-loss assignment of the insured's rights under the policy as well as the construction of the insurance policy that provided coverage for medical services, but not for professional medical services. The Appellate Practice Group successfully argued before the

Pennsylvania Superior Court that there was coverage based on the validity of the assignment and certain ambiguities contained in the policy, thus exonerating our insurance broker client.

- **Communications Decency Act:** *D'Alonzo v. Truscello*, 2006 WL 1768091 (Pa. Com. Pl. 2006)

In this case, White and Williams represented the alleged owner and operator of a political website. The website was a repository of information and articles that were critical of a state politician. The website republished an article from the Philadelphia Daily News, which stated that various members of the politician's staff had been subpoenaed in connection with a criminal probe, including the plaintiff. However, the article was factually incorrect, in that the plaintiff was not among those subpoenaed. The Appellate Practice Group moved for summary judgment on a number of grounds, including the federal Communications Decency Act, which immunizes interactive computer services for civil liability, including claims of defamation. The court agreed and found that the plaintiff's claims were barred in their entirety under the Communications Decency Act. A later appeal was voluntarily withdrawn by the plaintiff.

- **Insurance Coverage:** *Re/Max 440 Realty, Inc. v. Fireman's Fund Insurance Companies*, No. 111 EDA 2005 (Pa. Super.) (mem.), appeal denied, 589 Pa. 732, 909 A.2d 305 (2006)

Taking over on appeal, the Appellate Practice Group won the reversal of a declaratory judgment on the insurer's duty to defend in favor of two large insurance companies. The Pennsylvania Superior Court agreed with our argument that three separate policy exclusions barred coverage under an errors and omissions liability policy, and entered judgment in the insurers' favor. White and Williams also successfully defended against the plaintiff's petition for allowance of appeal to the Pennsylvania Supreme Court.

- **Products Liability:** *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003); *Phillips v. Cricket Lighters*, 584 Pa. 179, 883 A.2d 439 (2005);

In this case, the Appellate Practice Group was called upon by the Pennsylvania Defense Institute to author amicus curiae briefs in successive appeals before the Pennsylvania Supreme Court. The case involved a child who started a fire while playing with a cigarette lighter that lacked child-resistant features. The lighter was safe for its intended users (i.e., responsible adults), but not for children. The plaintiffs argued in the first appeal that the lighter was defective because it was foreseeable that children play with lighters, and thus, the failure to include child-resistant features rendered the lighter defective. The Supreme Court agreed with our position and rejected the foreseeable-user approach. It held that a plaintiff may only recover under strict liability if the product is unsafe for its intended user. Because the child was not an intended user of the lighter, there could be no recovery under a theory of strict liability.

At issue in the second appeal two years later was whether the cigarette lighter was unmerchantable for purposes of the plaintiffs' claim for breach of warranty. The Supreme Court again agreed with our position that the ordinary purpose of the lighter was to allow an adult user to produce a flame, and not to be a two-year-old child's plaything. Further, the fact that the product was tragically misused in such a way did not alter the ordinary purpose of the product. Because the lighter was fit for its ordinary purpose of producing a flame, the Court found that it was merchantable, and thus, no claim for breach of the implied warranty of merchantability was cognizable against the manufacturer.

- **Local Governmental Immunity:** *Christy v. Cranberry Volunteer Ambulance Corps, Inc.*, 579 Pa. 404, 856 A.2d 43 (2004)

This file was transferred to the Appellate Practice Group from another firm following a plaintiff's verdict. We represented a volunteer ambulance company on a claim that its paramedic negligently treated the plaintiff, who

suffered a heart attack. The Appellate Practice Group raised the defense of local government immunity for the first time on appeal. After the Commonwealth Court rejected the immunity defense, our attorneys prepared a successful petition for allowance of appeal in the Pennsylvania Supreme Court. In vacating the decision of the Commonwealth Court, the Pennsylvania Supreme Court clarified that certain non-profit organizations that exist to assist the municipality in meeting the needs of its citizens, or that perform services of a public character, may be entitled to Political Subdivision Tort Claims Act immunity. In so holding, the Court rejected the Commonwealth Court's reliance on a *per se* rule that volunteer ambulance companies are not entitled to immunity. The Supreme Court also clarified the principle that parties are entitled to the benefit of changes in decisional law while a case is on appeal, and held that the Commonwealth Court erred by not remanding this case for application of a change in the decisional law governing immunity.

- **Insurance Coverage:** *Regis v. Woody's Bar*, 852 A.2d 346 (Pa. Super. 2004)

This case arose out of a bar fight in which an injured patron sued a tavern. The tavern's insurer refused to defend the tavern in the patron's tort suit due to a recent change in the policy which excluded coverage for assault and battery. In a declaratory judgment action filed by the insurer, the court determined the exclusion did not preclude coverage because the tavern was not properly notified of the policy change. The insurer paid for the tavern's defense and indemnification costs in the underlying tort action. The tavern, thereafter, sought from the insurer the attorney's fees it incurred in the defense of the declaratory judgment action. The Pennsylvania Superior Court held that neither the Declaratory Judgment Act nor any other statutory provision or rule of civil procedure permitted the tavern to recover its attorney's fees in the defense of the declaratory judgment action.

- **Medical Malpractice:** *D'Orazio v. Parlee & Tatem Radiologic Associates, Ltd.*, 850 A.2d 726 (Pa. Super. 2004), app. denied, 582 Pa. 699, 871 A.2d 191 (2005)

The Appellate Practice Group successfully defended on appeal a defense verdict in a medical malpractice action involving a claim that the defendant-physicians missed suspicious findings on the plaintiff's mammogram. The Superior Court agreed that the trial court properly refused plaintiff's invitation to include non-standard instructions based on the "error of judgment" rule in its charge to the jury, particularly where the court found that the issue in this straightforward medical malpractice action was not one to which the error of judgment rule, or its exceptions, applied.

Stay Current

Court Crier

As an added service for the firm's clients, the group publishes Court Crier, a weekly e-newsletter that monitors the state and federal appellate courts in Pennsylvania, New Jersey and Delaware, as well as the Supreme Court of the United States, to report breaking appellate decisions. To subscribe to Court Crier, please sign up.

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