Schnader ATTORNEYS AT LAW
Aviation Group

AVIATION HAPPENINGS

WINTER 2016-2017

Volume 2, Issue 5b

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Supreme Court Affirms Presumption Against Preemption Does Not Apply to Express Preemption Provisions

Julie Randolph, Philadelphia
jrandolph@schnader.com

This summer the Supreme Court issued an opinion that has broad implications for interpreting express preemption provisions. In *Puerto Rico v. Franklin California Tax-Free Trust*, the Court examined an express preemption clause in the Federal Bankruptcy Code to determine whether it preempted Puerto Rico's act allowing its public utilities to implement a debt recovery or restructuring plan.

While the specifics of this case, which hinged on whether Puerto Rico is a "State" with respect to certain Federal Bankruptcy Code sections, may not be of great interest to this newsletter's readers, the Court's treatment of express preemption clauses should be. The Court explicitly stated that the presumption against preemption does not apply to express preemption clauses: "And because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent" (internal quotation marks omitted). As a result, parties now have a succinct – and definitive – argument against attempts to introduce the presumption against preemption in express preemption cases.

***Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 195 L. Ed. 2d 849 (2016).**

Government Contractor Defense for Manufacturers Is Expanded in the Fourth Circuit Court of Appeals

Denny Shupe, Philadelphia
dshupe@schnader.com

Although decided in the context of asbestos claims, a recent panel decision of the United States Court of Appeals for the Fourth Circuit in *Ripley v Foster Wheeler LLC, et al*. is very important to manufacturers who have to defend failure-to-warn claims related to aviation products provided to the federal government.

In this decision addressing an issue of first impression in the Fourth Circuit, the panel found that long-standing precedent in the United States District Court for the Eastern District of Virginia, which denied the defense in connection with failure-to-warn claims, was in error. In so holding, the panel found that the government contractor defense is available in cases such as this one, in which a U.S. Navy contractor was accused of failing to warn a

shipyard worker of the risks of asbestos in products sold to the government.

By finding that the government contractor defense applies to failure-to-warn claims against government contractors, the Fourth Circuit joined courts in the Second, Fifth, Sixth, Seventh, Ninth and Eleventh Federal Circuits in applying this defense to such claims. The panel also noted that "the multidistrict litigation court for asbestos products – tasked with handling thousands of such claims – has also applied the defense and allowed removal on this basis in failure to warn cases." Finally, the Fourth Circuit panel found that "[n]o other jurisdiction in the country to have considered the issue is in accord with the Eastern District of Virginia." Courts previously had held that the government contractor defense applied to design defect cases, so only the applicability of the defense in failure-to-warn cases was at issue here.

Procedurally, the defendant had removed this action from state court to federal court on the basis that the government contractor defense set forth in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988) provided federal court jurisdiction. In its removal papers, the defendant asserted that the suit arose from its contract with the U.S. Navy to construct and provide certain equipment, and as a result, argued that removal was proper under the Federal Officer Removal Statute, 28 U.S.C. Sect. 1442(a)(1). The district court then granted the plaintiff's motion to remand the case back to state court on the basis of "longstanding precedent in the district court that denies the government contractor defense in failure to warn cases."

An immediate appeal was taken to the Fourth Circuit, which reversed the remand to state court, holding that the government contractor defense applies to failure-to-warn claims, and, therefore, the Federal Officer Removal Statute provided a proper basis for removal.

Recall that in *Boyle,* the United States Supreme Court decided that **design** defects in military equipment do not give rise to state law tort claims if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." The Fourth Circuit held in this case that the *Boyle* Court's application of the defense to design defect cases also shields defendants from liability in **failure-to-warn** cases, as the rationales stated in *Boyle* are equally applicable in failure-to-warn cases, and therefore provide a basis for federal jurisdiction and removal under Sect. 1442.

As the Fourth Circuit noted in its opinion, remand decisions by trial courts only recently became appealable, after Congress in 2011 amended federal law to allow appeals from remand orders pursuant to Sect 1442.

***Ripley v. Foster Wheeler LLC*, No. 15-1918, 2016 U.S. App. LEXIS 19631 (4th Cir. Nov. 1, 2016)**

Different Product Does Not Constitute Safer Alternative Design

Barry S. Alexander, New York
balexander@schnader.com

The consolidated appeals in *Hosford v. BRK Brands, Inc*., arose from the death of four-year-old Nevaeh Johnson in a fire that destroyed the mobile home her family was renting. The fire began in a faulty electrical outlet in Nevaeh's bedroom, and at some point triggered one of the two smoke alarms in the home. The two parents were able to escape with their nine-month-old son, who was sleeping in their bedroom, but were unable to rescue Nevaeh.

The lawsuit was commenced against BRK Brands, Inc., the manufacturer of two smoke alarms in the mobile home, and other defendants, and the appeal sought review of the (1) judgment as a matter of law entered on the failure-to-warn, negligence, and wantonness claims, (2) judgment entered on the jury's verdict following the trial of the products-liability claim asserted under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), and (3) judgment as a matter of law dismissing the breach-of-warranty claim seeking compensatory damages on behalf of Nevaeh for pain and mental anguish she allegedly suffered before her death.

On appeal, the court first reviewed the AEMLD claim, noting that review of the other claims would be unnecessary if the judgment in favor of BRK on this claim was affirmed. To establish the AEMLD claim, the plaintiffs had to show that the product alleged to have caused an injury " [was] sufficiently unsafe so as to render it defective"; this, in turn, required proof "that a safer, practical, alternative

design was available to the manufacturer at the time it manufactured the allegedly defective product." The existence of a safer, practical, alternative design is established by showing (1) that the injuries inflicted by the product would have been less severe or eliminated by the use of the alternative design and (2) that the utility of the alternative design outweighed the utility of the design actually used.

The plaintiffs alleged that the two BRK smoke alarms installed in the mobile home were defective and unreasonably dangerous by design because they relied solely on ionization technology, which fails to give adequate warning to allow an escape in the event of a slow smoldering fire, as opposed to a faster flaming fire. Smoke alarms using photoelectric technology are generally more sensitive to smoke originating from smoldering fires, but they are less sensitive to smoke coming from flaming fires. Accordingly, the plaintiffs argued that a safer, practical alternative to the ionization smoke alarm was a dual-sensor smoke alarm incorporating both ionization and photoelectric technology.

BRK argued in response that it manufactures dual-sensor smoke alarms, which generally are more expensive than alarms relying solely on one technology, but that they should be considered an entirely different product from, and not a safer, practical, alternative design to, an ionization smoke alarm. The Alabama Supreme Court agreed with BRK, relying on the Supreme Court of Texas' explanation in *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 385 (Tex. 1995) that "[i]t is not rational ... to impose liability in such a way as to eliminate whole categories of useful products from the market." Even the plaintiffs' smoke-alarm expert witness acknowledged that ionization smoke alarms can and do save lives, including, in this case, the lives of three of the four family members. Although a dual-sensor smoke alarm might have saved Nevaeh's life as well, the testimony was mixed as to whether the plaintiffs could afford a dual-sensor alarm, leaving a possibility that there would have been no smoke alarm being present in their mobile home at the time of the fire and, consequently, three additional deaths.

Because the plaintiffs could not establish a safer alternative design, the court affirmed dismissal of the AEMLD claims, which resulting in affirmance of the dismissal of the remaining claims, which the plaintiffs had conceded could proceed only if the AEMLD claim was deemed viable.

Although not an aviation case, this case nevertheless provides important guidance for defective design product liability cases. Before arguing that a proposed alternative design is not feasible or safer, defendants first should examine whether the alternative design is the same product at all.

***Hosford v. BRK Brands, Inc.*, 2016 Ala. LEXIS 91 (Ala. Aug. 19, 2016)**.

Pennsylvania Supreme Court to Clarify the Standard for Establishing Insurer Bad Faith

Paul S. Jasper, San Francisco
pjasper@schnader.com

Despite the passage of twenty-six years since the enactment of Pennsylvania's bad faith statute, Pa.C.S §8371, the standard for establishing insurer bad faith under Pennsylvania law remains unclear. Fortunately, help is on the way. The Pennsylvania Supreme Court recently granted *allocatur* in *Rancosky v. Washington National Insurance Co*., No. 28 WAP 2016 (Pa. Aug 30, 2016) and will consider whether an insurers' "motive of self-interest or ill-will" is a discretionary factor, or mandatory prerequisite, to proving insurer bad faith.

Since 1994, Pennsylvania courts considering bad faith claims have relied upon the analytic framework established in *Terletsky v. Prudential Prop. and Cas. Ins. Co*. 437 Pa.Super 108 (1994). In that case, the Superior Court of Pennsylvania held that to establish

insurer bad faith under Pa.C.S §8371, a plaintiff must satisfy a two-prong test by proving that (a) the insurance company did not have a reasonable basis for denying benefits under the policy and (b) the insurance company knew or recklessly disregarded its lack of reasonable basis in denying the claim. Citing the definition of "bad faith" in Black's Law Dictionary, the *Terletsky* court further stated that "For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith." Since *Terletsky*, courts have differed as to whether an insurers' "motive of self-interest or ill will" is a third prong of the test, or a discretionary factor that supports a finding of bad faith.

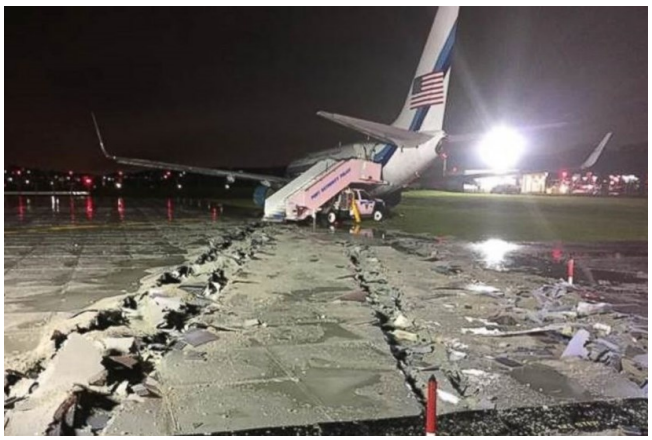
The *Rancosky* case arose out of a dispute over whether the insured had a right to benefits under a cancer insurance policy. Ms. Rancosky was diagnosed with ovarian cancer and attempted to collect benefits under the policy. When a dispute arose, she filed suit alleging bad faith in the Court of Common Pleas of Washington County. The trial court entered judgment in favor of the insurer, finding that Ms. Rancosky failed to prove the first prong of the *Terletsky* test. In particular, the trial court concluded that Ms. Rancosky's claim failed because she had not proven that the insurer had motive or self-interest or ill-will in denying her claim.

Ms. Rancosky appealed to the Pennsylvania Superior Court, which reversed. The Superior Court held that proof of a "dishonest motive" or a "motive of self-interest or ill-will" is not a necessary element of a bad faith claim. Moreover, the Superior Court determined that the trial court had erred by considering the insurer's motive when deciding the first prong, i.e. whether the insurer had a reasonable basis to deny benefits. A dishonest motive or self-interest or ill-will may be considered in determining the second prong of the test, i.e. whether the insurer knowingly or recklessly disregarded its lack of reasonable basis for denying the claim; but only after first establishing that the insurer lacked a reasonable basis for denying the claim. According to the Superior Court, bad faith can be established by "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, [or] abuse of power to specify terms."

The Pennsylvania Supreme Court will address two questions: (1) Whether the requirements of *Terletsky v. Prudential Property & Casualty Insurance Co.* for establishing insurer bad faith under 42 Pa.C.S. § 8371 should be ratified; and, if so, (2) whether the Superior Court erred in holding that the *Terletsky* factor of a "motive of self-interest or ill-will" is merely a discretionary consideration rather than a mandatory prerequisite to proving bad faith.

This will be a closely-watched case. Establishing a "motive of self-interest or ill will" is a difficult evidentiary burden, so the determination of whether such a showing is a prerequisite to success on a bad faith claim will have a substantial impact on the viability of bad faith claims in Pennsylvania going forward.

***Rancosky v. Washington National Insurance Co*., No. 28 WAP 2016 (Pa. Aug 30, 2016).**



Remand of Removal Based on Federal Officer Jurisdiction

Jonathan M. Stern, Washington, DC
jstern@schnader.com

In a case in which Schnader's Aviation Group is acting as coverage counsel, the United States District Court for the Southern District of West Virginia recently remanded to state court litigation arising from the collapse of a mountaintop runway on which an EMAS system had been installed. EMAS, which is an acronym for engineered material arresting system, uses crushable material inlaid beyond the departure end of a runway to stop an overrunning airplane. EMAS took on some notoriety recently when, days before the Presidential Election,

the 737 carrying Vice President-Elect Mike Pence overran the runway at LaGuardia Airport in New York. Early news reports stated that the airplane had done severe damage to the runway.

In *Carter v. Central Regional West Virginia Airport Authority*, the court remanded to the state court multiparty litigation arising from the collapse of the southern portion of the RSA for Runway 23 at Charleston's Yeager Airport. In addition to the damage to the Airport itself, the resultant landslide affected property in the community downslope from the airport.

Engineered Arresting Systems Corporation d/b/a Zodiac removed the action to federal court on the basis that the plaintiffs' claims were subject to "complete preemption" and that federal officer removal jurisdiction applied. Complete preemption transforms a case pleaded as one under state law when federal law completely preempts state law and provides the only viable cause of action. Federal officer removal applies when the United States, an agency of the United States, or a person or entity acting on behalf of the United States or an agency is sued.

Of note, after Zodiac filed the notice of removal, the Airport Authority voluntarily dismissed Zodiac from the case.

The federal court first acknowledged that the usual presumption against removal does not apply to federal officer removals. Nonetheless, the court dealt with federal officer removal in two steps. First, the court noted that the alleged federal officer, Zodiac, had itself been removed. While the court appeared to believe that it would have some discretion in keeping or remanding a case properly removed by a federal officer no longer a part of the case, it concluded that remand would be appropriate and more efficient where the alleged federal officer was dismissed very early in the life of the federal case. Second, the court held that federal removal was "decidedly improper in the first instance."

The arguments for federal officer removal centered on compliance with detailed federal regulations and close supervision by the FAA. The court ruled that the argument was foreclosed by *Watson v. Philip Morris Companies, Inc*., 551 U.S. 142, 145 (2007), in which the Supreme Court held that "[a] private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official[]' [a]nd that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored."

The court observed that the advocates of removal faced an "uphill battle" in arguing that the Federal Aviation Act completely preempted a state law cause of action because "the Aviation Act generally lays out a system of public, not private, enforcement" and because Congress had considered but rejected a federal cause of action for aircraft accident injuries. In this section of the opinion, the court cited *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash*, 23 Villanova L. Rev. 657, 668 (1977-1978), a law review article by Schnader lawyers James D. Crawford and Deena Jo Schneider.

The parties seeking to sustain removal relied on a statutory right of action that the court held applied only to conflicts between air carriers, 49 U.S.C. § 46108. The court could not find a fit between section 46108 and the claims advanced in the litigation and, furthermore, could not see the plaintiffs as potential plaintiffs under 46108. It therefore rejected the complete preemption argument. Finding all other proffered bases of federal jurisdiction absent from the removal notice, the court remanded the case to the state court where the litigation is ongoing.

***Carter v. Central Regional West Virginia Airport Authority*, No. 2:15-cv-13155 (S.D.W. Va. July 25, 2016).**

Federal Court Decision Shows Airlines' Heavy Burden to Obtain *Forum Non Conveniens* Dismissal in Passenger Injury Cases

Richard A. Barkasy, Philadelphia
rbarkasy@schnader.com

The United States District Court for the Northern District of Indiana recently denied Austrian Airlines' motion seeking *forum non conveniens* ("FNC") dismissal of a lawsuit involving a passenger injury that took place in Canada. The plaintiff, an Indiana resident, suffers from *spina bifida* and is confined to a wheelchair. As a result of her condition, the plaintiff's right leg is outstretched and rigid. She was traveling on Austrian Airlines from Chicago to Skopje, Macedonia with her mother. To accommodate the plaintiff's disability, her mother purchased two seats in the bulkhead section of the plane, which provides more space for passengers.

The aircraft encountered mechanical difficulties and made an emergency landing in Toronto. On the new flight leaving Canada, Austrian Airlines did not assign the plaintiff and her mother to the bulkhead section; rather they issued them boarding passes for regular seats. Plaintiff alleges that, despite her mother's protests, the Austrian Airlines' employees or agents forced the plaintiff's outstretched leg into an inadequate space, causing her leg to break.

Austrian Airlines moved to dismiss the plaintiff's complaint pursuant to the doctrine of FNC. FNC dismissal is appropriate if (1) there is an adequate alternative forum, and (2) the relevant private and public interests favor dismissal. It is well-settled that a plaintiff's choice of forum should seldom be disturbed unless the balance of convenience tips strongly in the defendant's favor.

The court determined that the private interests favored the exercise of jurisdiction in Indiana, rejecting Austrian Airlines' contention that the case was more appropriately litigated in Canada, where Austrian Airlines asserted key witnesses and evidence are located. The court stated that Austrian Airlines "merely speculates about the location of evidence and witnesses rather than producing any proof, such as the inflight manifest, which contains actual information about where the crew and other passengers may reside." The court also considered the relative burdens of transporting witnesses, concluding that "it is hard to escape the fact that the very business of Austrian Airlines is transporting people so it can spread its cost to its consumers, whereas [the plaintiff] is disabled and does not have an income."

In addition, the court decided that the public interest also favored litigation of the dispute in the United States, noting that the plaintiff was not a Canadian tourist and her flight was not supposed to land in Canada. The court found that the U.S. had the stronger ties to the case than Canada because (1) the plaintiff is a U.S. resident; (2) the original flight departed from Chicago; (3) Austrian Airlines conducts substantial continuous business in the U.S., including in Indiana; and (4) the ticket was contracted for in the U.S.

Finally, the court weighed the relative hardships upon the parties. The court explained that: "[I]t is probably inconvenient for Austrian Airlines to defend the case in the United States. But let's be pragmatic. Which one of these parties is in a better position to litigate in a foreign country? A multinational transportation company who is accustomed to business dealings and litigation around the world, on the one hand, or [the plaintiff], a wheelchair-bound woman afflicted with *spina bifida*, who has no income, on the other?"

This decision highlights the legal and practical problems that airlines have in seeking FNC dismissal of passenger injury lawsuits. Further, it serves as caution to defendants bringing FNC motions that they must present detailed facts and evidence to convince the court that the burden on the defendants of litigating in the plaintiff's chosen forum would be real and substantial.

***Dordieski v. Austrian Airlines, AG, 2016 U.S. Dist. LEXIS 112090* (N.D. Ind. August 23, 2016).**

Courts in Ninth Circuit Continue to Apply a Nuanced Approach to Enforcing *Touhy* Regulations

William D. Janicki, San Francisco
wjanicki@schnader.com

Obtaining evidence from a federal government agency, when the United States is not a party to the action, can be difficult, time-consuming and ultimately leave the party seeking evidence dissatisfied. The ability to obtain testimony or documents often turns on whether the underlying litigation is in state or federal court, and, if in federal court, the specific circuit where the action is pending.

In *Lam v. City of Los Banos,* the plaintiff sought to compel testimony from a non-party federal agency, the Veterans Administration, in a federal lawsuit where the U. S. was not a party. A dispute arose as to whether plaintiff could compel testimony from the VA with a federal subpoena, rather than complying with the VA's so called "*Touhy*" regulations governing the agency's production of documents and testimony. The District Court in *Lam* struck a middle ground. The *Lam* Court held that the VA did not have absolute discretion to prevent its employees from testifying pursuant to its *Touhy* regulations, while the plaintiff was not entirely excused from following the agency's procedural rules for requesting testimony. The Court ordered the parties to meet and confer under these guidelines and attempt to reach an agreement on the number and scope for the depositions.

Background Regarding *Touhy* Regulations

The head of a federal agency may promulgate procedural regulations governing "the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property." Such regulations are known as *Touhy* regulations for the Supreme Court's decision in *U. S. ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) upholding the validity of such regulations.

Touhy is part of a line of authority which directly supports the contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations.

Challenge to a Federal Agency Determination Under *Touhy*

When a federal agency determines it will not provide documents or allow its employees to testify pursuant to its *Touhy* regulations, such a determination may be reviewed in federal court. If the underlying action where evidence is sought is in a state court, then principles of sovereign immunity preclude any action to enforce a state-court subpoena against the United States. Therefore, in order to challenge a federal agency's denial of evidence in a state court proceeding, a separate claim must be filed in federal court under the Administrative Procedure Act ("APA").

If the underlying action is in a federal court, then a challenge to a federal agency's denial of evidence can be made in the same federal action in which the evidence is sought. No separate action is required.

Majority View For Resolving a *Touhy* Dispute in Federal Court

Under the majority view, to obtain information from a federal agency, a party must first file a request pursuant to the agency's *Touhy* regulations, and may seek judicial review only under the Administrative Procedures Act. Whether a federal agency complies with a discovery request, therefore, turns on the procedures outlined in its *Touhy* regulations. As summarized by the Fourth Circuit, "[w]hen an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources."

A challenge under the APA to such a "policy decision" is reviewed under an arbitrary and capricious standard.

The Ninth Circuit's Minority View Regarding *Touhy* Regulations

In *Lam*, the district court relied upon Ninth Circuit precedent in reaching its determination that the VA did not have absolute discretion to prevent its employees from testifying pursuant to its *Touhy* regulations and the plaintiff was not entirely excused from following the agency's procedural rules for requesting testimony. Rather than provide specific guidance as to what needed to be done, however, the court suggested that the parties attempt to resolve their disagreement privately. The court intimated that it would look closely at each side's actions and arguments if an agreement could not be reached, with the inference being that either of the parties, or both, might end up unhappy if the court was required to resolve this dispute. This is not an uncommon practice in federal court, where judges frequently call upon parties to resolve discovery disputes, even after an initial impasse is reached.

Conclusion

In the Ninth Circuit, the Federal Rules of Civil Procedure govern the production of evidence from federal agencies rather than the agency's *Touhy* regulations; the regulations and cooperation among the parties nevertheless continue to play a role in obtaining desired discovery.

***Lam v. City of Los Banos*, Case No. 2:15-cv-531-MCE -KJN (E.D. Cal. May 11, 2016).**

Cartoon Caption Contest

"It's much cheaper than the jury consultant and still has a 50 percent chance of being right."
—*Jonathan M. Stern, Washington, D.C.*

CONGRATULATIONS to Jonathan M. Stern of Washington, D.C., for garnering the most online votes for his cartoon caption. Stern's caption, left, was among more than 100 entries submitted in the *Journal*'s monthly cartoon caption-writing contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon above. All entries should be emailed to captions@abajournal.com by 11:59 p.m. CT on Sunday, Oct. 9, with "October Caption Contest" in the subject line.

For complete rules, links to past contests and more details, visit ABAJournal.com/contests.

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Philadelphia Office
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Pittsburgh Office
Fifth Avenue Place
120 Fifth Avenue, Suite 2700
Pittsburgh, PA 15222

New Jersey Office
Woodland Falls Corporate Park
220 Lake Drive East, Suite 200
Cherry Hill, NJ 08002

San Francisco Office
650 California Street, 19th Floor
San Francisco, CA 94108

Washington, D.C. Office
750 9th Street, NW, Suite 550
Washington, DC 20001

New York Office
140 Broadway, Suite 3100
New York, NY 10005

Delaware Office
824 N. Market Street, Suite 800
Wilmington, DE 19801