



THE

DEFENSE LINE

August 2020



A Publication From Maryland Defense Counsel, Inc.

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PRESIDENT'S MESSAGE

Welcome to the Summer 2020 edition of *The Defense Line*. Since MDC's Executive Board's term runs from June to June, this is my first President's Message. I would like to start off by congratulating the new Executive Board: Katherine Lawler of Nelson Mullins as President-Elect, Chris Jeffries of Kramon & Graham, P.A., as Secretary, and Sheri Tirocchi of Godwin Tirocchi, LLC as Treasurer. In recognition of her Defense Line editorial services, Sheri Tirocchi was the well-deserving recipient of an Exceptional Performance Citation from MDC this year. MDC also issued an Exceptional Performance Citation to Crystal Walk of Miles & Stockbridge to recognize her support of the MDC Treasurer position over the past several years. Credit also goes out to Dwight Stone of Miles & Stockbridge for wrapping up a successful Presidency with MDC, and for his continued advisory role to the Executive Board as Immediate Past President.



Colleen K. O'Brien,
Esquire

Travelers

Although I am pleased to celebrate the hard work of our members, I also realize that this message is still finding all of us in the midst of trying times as our community continues to navigate the COVID-19 pandemic. That said, as I speak with colleagues, I am impressed with how as a profession, we have continued to deliver excellent service to our clients. As we continue to adapt to the "new normal," I am looking forward to MDC providing a platform for our membership to connect remotely. This coming year, we will be leveraging technology so that we can continue MDC's tradition of bringing informative and exceptional programs to our membership. As we have already started to do, we will continue to find innovative ways to enhance our profession. MDC will continue to strive to be a substantial asset to your practice. If you want to be more involved, or if you have ideas for improvement, please get in touch with me or any of the other officers. I look forward to working with you this year, and in the meantime, stay safe and be well.

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Reopening Business: Mitigating Potential Liabilities

James C. Doub and Dwight W. Stone, II



Dwight W. Stone, II As shutdown orders expire and businesses reopen, questions arise on the possible liabilities created and the ability to mitigate them. Standards are emerging; some will be second-guessed. Previous modes of operation may continue or be rapidly changed. Trust and loyalty of customers and employees will soon be tested. Rules and recommendations will vary widely based on the nature of the business, its workspace footprints, exposure to the public and availability of necessary resources. What can be offered are not stringent guidelines, but a process for each business to determine on its own the preventative measures and practices to be pursued. In some cases, those measures and practices may depend on a sustained source of resources like adequate cleaning supplies and personal protective equipment.

Standard of Care. The process starts with trying to determine the standard of care for the facilities and operations. In general, a business may be liable for physical harm caused to its patrons if the business: (i) knows

of, or by exercising reasonable care would discover, a dangerous condition present in the business premises, and should realize that it involves an unreasonable risk of harm to those patrons; (ii) should expect that the patrons will not discover or realize the danger, or fail to protect themselves against it; and (iii) fails to exercise reasonable care to protect its patrons against the danger. With COVID-19 likely to be considered a known and obvious danger, the required care to protect patrons and employees remains uncertain. Laws, regulations, rules and standards will continue to emerge, but for now a few sources can be references:

- **CDC Guidelines:**
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- **OSHA Guidelines:**
<https://www.osha.gov/pls/publications/publication.html>
- **State and Local Health Provisions:**
<https://coronavirus.maryland.gov/>
- **Recommendations of Insurance Broker**
- **Established Industry Groups, such as the Maryland Department of Commerce Industry Recovery Advisory Groups**

Preplanning. Prior to reopening, the business needs to assess the possible hazards in its workplace and plan and implement recognized required facility investigations and changes. For rented facilities, this entails coordination with the landlord and possibly adjacent facilities. Inspecting and flushing mechanical, water and other building systems may be required depending on results of investigation. Evaluations should be made of points of access and accountability for those entering the business premises. Special consideration needs to be given to reception areas and open space seating and whether partitions or screens may be appropriate. Consider what new policies may be needed to implement changes and draft them prior to reopening, and consider how to communicate that plan to customers, vendors, employees and visitors.

Cleaning. Prior cleaning practices need to be evaluated with particular attention to addressing contact surfaces in heavy-use and public-use areas, such as entrance and reception areas, conference rooms, restrooms, elevators, and drink and kitchen facilities. Changes in furniture and practices may be required in order for cleaning to be com-

Continued on page 6

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(REOPENING) *Continued from page 5*

prehensive and effective. Food service or consumption on business premises might need to be restricted or modified. Special treatment for fabric furniture may need to be considered and objects exchanged frequently by hand, such as tickets, name tags and cash, may need to be eliminated. Specific rules may be required for employees and the public to clean certain areas or equipment after use. One might consider the new CDC guidance for cleaning and disinfecting and posting of signs to that effect.

Employee Practices. Change should be considered in employee routines and practices to minimize unnecessary contact with other employees and the public. Work from home may be a viable alternative, but may require updated policies. Staggered hours could be implemented to reduce density in workspaces and provide safer and less-congested use of public transportation. Shared work spaces might not be permitted where practicable, and breakrooms or other areas where employees might congregate may need to be closed or have access limited. Protective masks and gloves might be provided, with appropriate training, and required to be worn within and outside facilities as appropriate. Strict rules following CDC guidelines for staying home when ill could be implemented with daily self-testing or employer testing or self-certification on entry to the business premises, in accordance with privacy laws. Flexible leave policies may need to be reconsidered accordingly.

Controlling and Restricting Non-Employee Access. For facilities open to the public or non-employee invitees, consideration needs to be given to the level of control and restriction to the business workspace. Depending on the exposure likelihood and consequences, temperature screening or health and travel questionnaires and certification of the absence of COVID-19 risk factors may be necessary. Density control in public space may be advised, as well as restricted access to non-public space. Protective masks, hand washing and sanitizing and adherence to CDC guidelines may be required. Dressing and changing areas may need to be closed.

Personal Protection. Adequate hand-washing stations and sanitizers will need to be made available to employees and invitees with appropriate informative signage and monitored for their use under CDC guidelines. Employees may need to be provided supplies for cleaning their individual work

spaces, and those employees involved in shipping and receiving will need to have sufficient and appropriate supplies to sanitize packages as received.

Social Distancing. As it is now being projected that social distancing will continue for some time, businesses will need to focus on how that guideline can be accomplished in the workspace. Foot traffic may need to be regulated, with appropriate signage, to avoid close passage in corridor areas. Protective shields or panels may be recommended for adequate separation, and shared spaces such as conference rooms may need to be limited to fewer individuals, taking into account the square footage required for adequate distancing.

Response Plan. A response plan will need to be developed to provide reasonably possible and appropriate notice to potential contacts if an employee or invitee, or household

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member of either, is diagnosed with the virus. On-site access of the employee would need to be prohibited or restricted under the CDC and public health guidelines. Notifications to third parties in contact with the employee, or to employees in contact with the invitee, would need to be provided under established protocols and public health guidelines. Generally, any health-related and personal information should be kept confidential, and the name of the individual should not be

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Editors' Corner

The editorial staff are pleased to present this edition of *The Defense Line*. The articles in this edition focus on the continued challenges and difficulties that our community faces in the midst of this pandemic as businesses re-open and in-person proceedings resume. This publication would not be possible without the contributions from MDC members and we want to thank the following individuals: **James C. Doub** and **Dwight W. Stone, II** of Miles & Stockbridge, **Maryan Alexander** of Wilson Elser, **Aidan Smith** of Pessin Katz Law. As the MDC begins a new year, we are excited for new opportunities to serve our members and be a resource to you and your practice.

If you have any comments or suggestions, or would like to submit material for a future edition, please contact the Publications Committee.



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(REOPENING) *Continued from page 6*

disclosed except on a need-to-know basis to protect the health of the workforce and any affected invitees.

Claim Defense. The effective defense against future claims of virus exposure may be supported by the records maintained by the business on its employees and visitors. If a claimant is not reflected on a visitor list, claimed exposure on the business site could be questioned. Questionnaires concerning the absence of COVID-19 factors used to restrict access may also provide an additional defense to claims of exposure to other invitees. Registration or questionnaires required for access by the general public may not be possible or practiced so that other means, such as maintaining credit card receipts for extended periods might need to be considered.

Written Waivers and Releases. If the business currently utilizes liability waivers, releases or other forms of exculpation provisions in customer agreements, and faces potential future claims for novel coronavirus exposure, it should review these provisions with an eye toward strengthening them by specifically referencing such claims. Legal requirements for enforceability of such provisions vary state-by-state, making drafting by counsel a good idea. If the business does not currently utilize liability waivers, but could face claims that a customer contracted COVID-19 while on their premises or while an employee performed services at the customer's premises, it should consider whether to begin using them.

Avoiding Misrepresentation Claims. One can expect plaintiffs' attorneys to look for opportunities to bring claims (including consumer class actions) based on a company's alleged misrepresentation or concealment regarding COVID-19 risk. All states have consumer protection statutes that prevent



companies from making false or misleading statements about their products or services, some of which provide for statutory damages even if a consumer is not injured. Companies need to resist the temptation to "over promise" in their marketing when it comes to coronavirus safety, such as a retailer claiming that their stores are "coronavirus safe." Misleading statements can also result in false advertising claims, either from government regulators or private plaintiffs.

For Providers of PPE or Other Pandemic Products, Understand Coverage of the PREP Act. Pursuant to the Public Readiness and Emergency Preparedness Act ("PREP Act"), the Secretary of HHS has issued a declaration that provides certain immunity from tort liability claims for "Covered Persons" who manufacture, develop, test, prescribe, distribute or dispense countermeasures for COVID-19. While the full scope of protection under the PREP Act is subject to interpretation, it would include a drug, device or biological product manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat or cure COVID-19 or limit the

harm COVID-19 or the coronavirus might otherwise cause. Companies involved in the manufacture or distribution of PPE, drugs or devices intended as countermeasures to COVID-19, or their components, are likely covered by the PREP Act and should understand the contours of their protection.

This alert was written by James C. Doub and Dwight W. Stone, II, lawyers in the Baltimore office at Miles & Stockbridge.

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or Maryland Defense Counsel, Inc.

Jim Doub is a Principal at Miles & Stockbridge, P.C. His practice focuses on the representation of European based clients and their activities in North America. He advises those clients in a wide variety of legal matters and general business issues with a goal of proactively identifying and mitigating the risks in their daily operations, using a practical approach targeted to their industries. He is also involved in their various corporate and contract matters, including customer contracts and mergers and acquisitions. He is also part of the firm's Coronavirus Task Force, a cross-disciplinary team that can quickly and efficiently deploy talent from relevant practices to address concerns and issues in real time.

Dwight Stone is a Principal at Miles & Stockbridge, P.C. Dwight's varied litigation practice includes business and products liability, class action defense, and other complex disputes. He regularly represents clients before the U.S. Consumer Product Safety Commission (CPSC) in connection with product recalls, reports, civil penalties and investigations. As part of the firm's Coronavirus Task Force, he also advises clients in a range of industries on mitigating liability risks involving COVID-19. Dwight is Immediate Past President of MDC and is Vice Chair of the DRI Commercial Litigation Committee.

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An Injured Party's Contractual Subrogation Waiver Shields A Third-Party from Joint Tortfeasor Contribution

Maryan Alexander



As a matter of first impression, and in a reported opinion of significance to the construction industry, the Court of Appeals in *Gables Construction, Inc. v. Red Coats, Inc.*, *et al.*, No. 23, September Term, 2019, held that a party against whom the injured party contractually waived subrogation cannot be a joint tortfeasor liable in tort to a third-party under the Maryland Uniform Contribution Amount Joint Tort-Feasors Act (“UCATA”) Md. Code (1974, 2013 Repl. Vol., 2019 Cum. Supp.), Courts and Judicial Proceedings Article (“CJ”) § 3-1401, *et. seq.* This decision is significant in that it precludes the beneficiary of a contractual waiver, which is a common provision in construction contracts, from being brought into litigation by a third-party who seeks contribution, and it serves as a reminder to legal practitioners to examine the rights and obligations set forth in the relevant contracts.

Gables v. Red Coats arose from litigation relating to a large fire occurring in 2014 that caused \$22,150,000 in property damage to a 139-unit apartment building. Gables Construction, Inc. (“Gables”), the general contractor on the project, had a standard construction contract (“the Prime Contract”) with Upper Rock II, LLC (“Upper Rock”), the property owner, to perform work at the site. Upper Rock contractually agreed to insure the property against fire loss and to transfer the risk of loss for fire-related claims to its’ insurer, to waive all claims against Gables caused by fire loss, and to waive rights by its’ insurer to subrogate any such losses against Gables. These contractual waivers prevented Upper Rock and its’ insurer from pursuing a direct claim against Gables. Instead, Upper Rock, through its insurer, filed a subrogation action against Red Coats, Inc. (“Red Coats”), the subcontractor hired to perform security and fire watch for the project, and Red Coats subsequently filed a third-party action against Gables seeking contribution. Red Coats was not a party to the Prime Contract.

Gables moved for summary judgment,

arguing that Upper Rock’s waiver of subrogation precluded Gables from being liable in tort to Upper Rock and precluded Gables from fitting the definition of a joint tortfeasor under the UCATA. The motion was denied and the case proceeded to trial. The jury found Red Coats was entitled to contribution from Gables in the amount of \$7 million. The Court of Special Appeals affirmed Red Coats’ right to contribution, but reduced the amount to \$2 million, which represents half of the amount Red Coats paid out-of-pocket to settle with Upper Rock.

The issue before the Court of Appeals was whether Gables could be liable for joint tortfeasor contribution to Red Coats given that Upper Rock, the injured party, had contractually waived its’ rights against Gables in the Prime Contract and intended for the fire loss to be covered by insurance. While Maryland jurisprudence has long recognized that a waiver of subrogation is intended to shift the risks, such as the risks inherent in performing construction projects, and to avoid the economic inefficiency of parties procuring insurance for the same risks, it had not previously addressed whether the beneficiary of a contractual waiver could be liable in tort to a third-party for contribution under the UCATA.

A claim for contribution pursuant to the UCATA arises where wrongdoers are “jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.” CJ § 3-1401(c). By definition, the right to contribution under the UCATA is predicated on the wrongdoer’s direct liability to the injured party and the “joint tortfeasor must be legally responsible to the plaintiff for his or her injuries.” *See, Montgomery Cty. v. Valk Mfg. Co.*, 317 Md. 185, 199–200 (1989).

Whether a defendant is liable in tort and shares common liability under the UCATA has been interpreted in the context of interspousal immunity (*see Ennis v. Donovan*, 222 Md. 536, 540 (1960)); workers’ compensation immunity (*see Balt. Transit Co. v. State ex rel. Schriefer*, 183 Md. 674, 679 (1944)); and contributory negligence (*see Valk Mfg. Co.*, 317 Md. at 190–91). In each instance, Maryland courts have held that there is no right to contribution under the UCATA where the

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injured party has no right to recover directly against the third-party defendant. In each instance, courts have held there can no contribution between concurrent tortfeasors unless they share a “common legal liability” to the plaintiff because the contribution action arises from “the original obligation that the party cast in contribution owed to the plaintiff.” *Id.* at 195 (citing *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1434 (5th Cir. 1988)). Thus, a joint tortfeasor must have legal responsibility, not mere culpability, to the injured party to be liable for contribution. The statutory right to contribution is not an independent cause of action, but rather it is a derivative right arising out of common liability to the injured party.

In *Gables v. Red Coats*, the Court of Appeals wrote that there is no reason to deviate from this rationale in the context of contractual waivers. The holding clarifies that a contractual waiver of subrogation prevents liability from arising between the injured party and a third-party and, therefore, the third-party defendant cannot be liable to another wrongdoer for contribution under the UCATA. Even though Red Coats was not a party to the Prime Contract, the subrogation waiver between Upper Rock and Gables precludes Gables from being a joint tortfeasor and Red Coats from seeking contribution from Gables under UCATA.

Maryan Alexander, a Partner at Wilson Elser, focuses her practice on complex commercial and civil litigation involving financial services, products liability, construction matters, toxic torts and other general casualty claims. She also handles contract negotiations and advises clients on insurance regulatory matters and third-party risk management.

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A Zoom link for the webinar will be circulated to registrants prior to the event.



Christina Billiet is a trial attorney and Partner at Waranch & Brown, LLC. She defends medical malpractice cases and represents physicians, nurses and other health care providers in a variety of Board of Physician, guardianship and hospital privileging matters. Ms. Billiet has successfully handled cases and appeals in Maryland state and federal courts, as well as the Fourth Circuit Court of Appeals, and has tried numerous high-exposure cases.



Lindsay Coulter is a medical illustrator and owner of ION Medical Designs, LLC. She creates medical demonstratives for medical malpractice and personal injury cases to assist attorneys with their demand packages, mediations and/or trials. She helps to create visuals of complex surgeries and injuries that are compelling and educational for a broad audience. Lindsay has had the opportunity to work on some very high profile and medically complex cases globally.

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Coronavirus and Contracts — Impossible, Impracticable, and Frustrating?

Aidan Smith



Many business owners may feel as if the Coronavirus and its consequences are making it, impossible, impracticable, and frustrating to perform their contractual obligations.

They may be unable to get the supplies they need to produce products. They may have been forced to shut down their business or significantly reduce their business operations. They may simply not have the demand for their services that they had pre-Coronavirus. The legal doctrines of impossibility, impracticability, and frustration — legally known as frustration of purpose — don't necessarily have the same definitions that a business owner may expect and in Maryland there is no court ruling or statute that makes it clear that the pandemic will excuse a business owner from performing their contractual obligations.

Generally under the doctrine of impossibility, a party's contractual obligations can be excused if performance becomes objectively impossible because of a supervening event. For a party to successfully use this excuse, performance must be impossible, not just financially unappealing or slightly more difficult, regardless of any amount of time, money or energy spent. For example, performance may be excused when the subject matter of the agreement is destroyed.

Under the doctrine of impracticability, performance, or delays in performance, are excused if a supervening event materially changes the inherent nature of a party's obligations to become substantially more difficult, complex, or challenging. These material changes result in excessive and unreasonable increase in performance costs.

Frustration of purpose is a limited excuse that applies when, due to a supervening event, a party's principle purpose for entering the transaction is destroyed or obviated. With this excuse, performance is not impossible but one party's reason for doing the deal no longer exists. It can only be used if the party seeking to be excused can no longer accomplish his purpose for the transaction, both parties knew of the frustrated party's

principal purpose for entering the contract, and a qualifying supervening event caused the frustration of purpose. It is important to note that, unlike impossibility, performance remains possible, but is excused when one party would no longer receive the expected value of their counterparty's performance.

A review of Maryland cases where courts have applied these doctrines indicates that Maryland has moved away from the strict impossibility standard and requires "impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Baltimore Luggage Co. v. Ligon*, 208 Md. 406, 417-18(1955).

For a contract to be impracticable three factors must be present. First, "[c]ircumstances existing at the contracting date and foreseeability" of the impracticability have to be considered. *Heat Exchangers, Inc. v. Map Constr. Corp.*, 34 Md. App. 679, 688 (1977). If the circumstance that causes performance to be impracticable was foreseeable when the contract was executed, then the contract will likely be enforceable. The other two factors are you did not assume the risk of the event that made it impracticable or impossible and you did not cause the event to occur.

Frustration of purpose is similar to impossibility and impracticability. Frustration of purpose requires that "the purpose that is frustrated must have been a principal purpose of that party in making the contract." Restatement (Second) of Contracts, § 265 cmt. a. "Second, the frustration must be substantial." *Id.* "Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Id.*

Maryland courts have also looked to frustration of purpose when determining parties' obligations under a contract. In finding that a former husband was not excused from paying monthly spousal support and maintenance payments after his ex-wife began cohabitating with another man, the court noted that the frustration of purpose is when a contract is completely frustrated and rendered impossible to perform by a supervening event or circumstance. *Panitz v. Panitz*, 144 Md. App. 627, 639 (2002). The three part test the court applied in the case was whether the intervening act was reasonably foreseeable, whether

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the act was an exercise of sovereign power and whether the parties were instrumental in bringing about the intervening event.

Determining whether you will be excused from performing your contractual obligations due to impossibility, impracticability, or frustration will turn on the language in your contract and specific facts that are present in your industry. This will almost certainly not be a one size fits all approach and any business owner seeking to apply these doctrines to excuse or delay their performance under a contract or have a party comply with their contract obligations should consult with an experienced commercial litigation attorney in their jurisdiction.

Note: This article appeared previously at www.pkllaw.com on April 10, 2020.

Aidan Smith is an AV rated trial attorney who has represented individuals and businesses of all sizes in state and federal courts and before arbitration panels throughout the State of Maryland. He practices in the areas of commercial litigation, real estate litigation, general civil litigation, criminal defense and family law. He can be reached at 410-339-6764 or asmith@pkllaw.com.



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A Safe Return to In-Person Litigation: The Planet Depos Guide

Planet Depos



Planet Depos is heavily invested in the safety and health of our staff, contractors, and guests. As areas stabilize from the pandemic and government stay-at-home orders are lifted, Planet Depos will begin to safely reopen administrative and satellite offices. We are introducing advanced cleaning and disinfection standards so employees and visitors to our offices will have a safe environment in which to work.

Safety At Planet Depos Offices & Conference Centers

Upon Office Entry

Our receptionists and hosts are the frontline of safety in our offices and conference center locations. They will be trained on safe interactions with staff, contractors, and guests. They will ensure that occupancy of all buildings and conference rooms are at appropriate levels for safe distancing. They will also ensure that anyone entering the office is wearing a face covering; if not, one will be provided for them.

Social Distancing in Offices

To accomplish safe social distancing within our offices and conference centers, we ask that our staff, contractors, and guests maintain the recommended six feet spacing whenever possible. We will also increase distances between desks when necessary, reduce maximum capacity in common areas, and place clear floor markings for safe distance at entry points.

Office Cleaning

We will introduce routine cleaning and disinfecting of high-touch spaces and surfaces per health authority guidelines. In addition, we will sanitize daily all workspace areas, including offices, conference rooms, restrooms, and other areas. Appliances, countertops, and other high-touch areas in kitchens will be cleaned and sanitized. We will provide tissues, no-touch trash cans, hand soap, alcohol-based hand sanitizer and wipes containing at least 60 percent alcohol, disinfectants, and disposable towels.

Staff Safety In The Field

Preparing our Workforce

We are committed to the safety of staff returning to the field, in addition to all contractors and guests present at our various locations around the world. Planet Depos is staying up to date with local, state, and federal orders regarding safe return to the workplace, along with recommended safety guidelines. As soon as we are made aware of any changes or new recommendations, we will immediately communicate with our staff in the field.

Before a Job

Prior to each job, workers are reminded to inform headquarters immediately if they have symptoms or have been exposed to or diagnosed with COVID-19. We are equipped and prepared to offer alternative arrangements, such as remote depositions, that will allow proceedings to go forward as scheduled while keeping everyone safe.

At a Job

Upon arrival to a job location, all Planet Depos staff are required to wear a face mask. In addition, all Planet Depos staff and contractors are reminded and encouraged to continue practicing good personal hygiene, including touchless greetings, frequent handwashing, and respiratory etiquette.

We recognize that communicating with our staff, contractors, and guests is more important now than ever. Safety has always been our number one concern, and it will remain so. Throughout the migration back into the physical workplace, we will not sacrifice the safety of staff for jobs. No staff, contractor, or guest will be intentionally placed in an unsafe condition, and we will do our utmost to maintain meticulous cleaning and social distancing standards.

To learn more about our plans to return to offices, download our guide: planetdepos.com/reopening.



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SPOTLIGHT

Goodell DeVries's Insurance Allocation Win Affirmed by Maryland Court of Appeals

Kamil Ismail

On April 3, 2020, Maryland's highest court, the Court of Appeals, affirmed a ruling by the Circuit Court for Baltimore City in favor of Goodell DeVries's client, Zurich American Insurance Co. See *Rossello v. Zurich Am. Ins. Co.*, No. 24, Sept. Term, 2019 (Md. Apr. 3, 2020). Under this ruling, the insurer's obligation to cover an asbestos-related judgment was limited to a fraction of the entire judgment, pro-rated in proportion to the time its policies were in effect.

In 2016, the claimant, Patrick Rossello, who had been exposed to asbestos in 1974 and developed mesothelioma in 2013, obtained a jury award for \$2.7 million against contractor Lloyd E. Mitchell, Inc. He sought to garnish this amount against the proceeds of insurance covering Mitchell from 1974 to 1977, issued by Zurich's predecessor, Maryland Casualty Co.

Zurich, which was represented in the trial court by two Goodell DeVries partners, the late **Chuck Dann** and **Kamil Ismail**, argued that Zurich was only liable for less than one-third of the judgment, accounting for four out of the 12 years after Mr. Rossello's exposure during which insurance was available to Mitchell, and further reduced to the remaining available limits in those four years after prior amounts paid under the policies. The trial court agreed, and held that Zurich was liable for no more than \$894,282, and potentially as little as \$613,233, depending on the prior exhaustion of limits.

After bypassing Maryland's intermediate appellate court to take direct review of the appeal, the Maryland high court held that pro rata allocation was appropriate in cases involving coverage for bodily injuries that span multiple years. In so doing, the court adopted the holding of the intermediate appellate court in *Mayor and City Council of Baltimore v. Utica Mutual Ins. Co.*, 145 Md. App. 256 (2002), where Zurich, represented

by Goodell partner Linda S. Woolf, was among several insurers who successfully urged application of pro rata allocation to coverage for asbestos property damage. In the intervening years since 2002, that ruling had also been adopted by several other state and federal courts.

The *Rossello* court extended the intermediate court's *Utica* holding to cases involving personal injury and adopted it as the controlling law in Maryland.

It thus unanimously affirmed the trial court's ruling in favor of Zurich, which was represented at the appellate level by Harry Lee and Catherine Cockerham of Steptoe & Johnson LLP, along with Mr. Ismail. (Mr. Dann passed away in 2018.) The court concluded that this "pro rata" approach was not only consistent with the terms of standard liability policies but had also become the majority rule across the nation.

Previously, insurance claims handlers and policyholders may have been uncertain about the extent to which the *Utica* holding applied, including whether it applied to claims involving bodily injury and whether it would be adopted or rejected by the Court of Appeals. The new ruling by Maryland's highest court brings welcomed predictability and ease-of-application to the interpretation of CGL policies in the context of continuous or progressive, long-tail injuries, in a manner that is consistent with the policy language under Maryland law.

The case was reported by Law360. See "Zurich Not Liable For Full \$2.7M Asbestos Award In Md."

Kamil Ismail is a partner with Goodell DeVries. He practices in the areas of product liability, insurance coverage, and commercial and business tort litigation. He has represented clients in bench and jury trials in state and federal courts, and in mediations and other proceedings.





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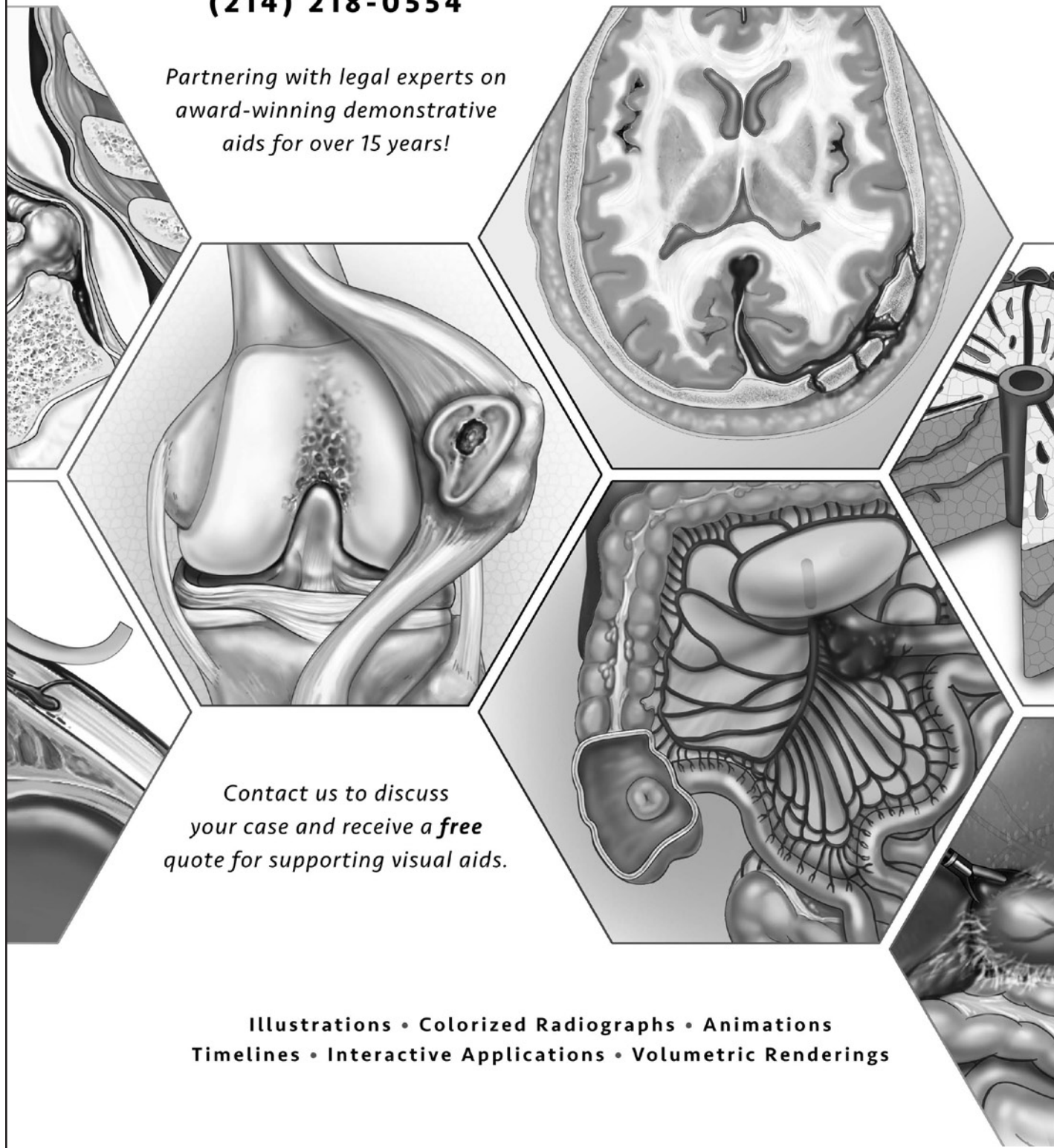
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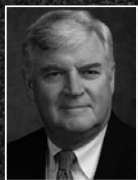
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