



# THE DEFENSE LINE



A Publication From The Maryland Defense Counsel, Inc.

December 2019



## Featured

**Sexual Harassment in the #MeToo Era and Minimizing Risk**  
**What to Do When You Find Yourself in the Data Breach Club**  
**Liability For Mass Shootings: Coverage Issue**

## Also Included

**MDC's 2019 Past Presidents Reception**  
**Fall 2019 Deposition Bootcamp Recap**  
**Spotlights and Trial Wins**

## PRESIDENT'S MESSAGE

Welcome to the latest edition of *The Defense Line*. Many thanks to our excellent editor Sheryl Tirocchi and our graphics consultant (and much more) Brian Greenlee for their great work putting this issue together. As usual, in this issue we are able to provide you with a number of articles and spotlights, which we hope you will find valuable and interesting. In this introductory column I'd like to give you a capsule summary of what MDC has been doing, where we are going, and how you can get more involved.

MDC's Executive Committee, President-Elect Colleen O'Brien of Travelers, Treasurer Katherine Lawler of Nelson Mullins, and Secretary/PAC Chair Chris Jeffries of Kramon & Graham, assisted by our Executive Director Marisa Capone, has been working hard to keep the organization moving forward. I am very grateful for their dedication and focus on making MDC stronger than ever. This is also the goal of MDC's full Board, including the chairs of our various committees and subcommittees.

What do we mean by "stronger"? Our core benchmark is whether we are able to provide more value to our members and their clients. In the Spring of 2018, we held a Board retreat, led by Steve Manekin of Ellin & Tucker, in which a large group of past MDC presidents discussed how we can best provide value to our members. What became clear from that day's discussions was that MDC must continue providing top-notch practical skills programs, in addition to everything else we do, year in, year out. Law firms vary in terms of their ability to deliver focused training of young lawyers in crucial areas like how to try a case and how to take a deposition, and MDC can help fill this need. Our award-winning Trial Academy held in past years was always a huge success, and for the past couple of years we have held a day-long Deposition Bootcamp which has proved just as popular. We also hold regular "Lunch and Learn" presentations, in which our members and sponsors speak on cutting-edge litigation issues in an informal lunch-hour setting.

On November 7th we held our Deposition Bootcamp. Attendees learned the basics and some finer points of taking depositions of fact and expert witnesses and corporate designees. We thank Mike Dailey and Tina Billiet for their presentations. We are honored and grateful that Judge Stuart Berger and Judge Judith Ensor joined

us for a lunch panel discussion of the use of depositions in trials. The afternoon sessions allowed attendees to practice their examination skills in small groups, guided and critiqued by very experienced trial attorneys. This was an outstanding program and I am proud of the group, led by Chris Jeffries, who put this together.



Dwight W. Stone, II,  
Esquire

Miles & Stockbridge P.C.

Of course, we do much more than skills training. We will continue to be a leading voice in Annapolis for our clients and members. John Stierhoff of Venable helps us anticipate and understand the bills being considered by the legislature and advises us in how to best advocate for our positions. Our Legislative Committee co-chairs, Nikki Nesbitt of Goodell DeVries and Mike Dailey of Schmidt, Dailey & O'Neill, work with their committee to testify on bills of interest to our members and clients and otherwise engage with state leaders on emerging issues. Our Judicial Selections Committee, chaired by Amy Askew of Kramon & Graham and

Chris Dunn of DeCaro Doran, is a team of member volunteers who interview every willing candidate for appellate and Circuit Court judgeships and provide ratings to the respective Judicial Nominating Commissions. If you want to participate in these interviews, or learn more about them, contact Amy or Chris.

Our Appellate Committee, among other things, is responsible for MDC's filings of appellate *amicus curiae* briefs in selected appeals where we believe we can aid the courts' understanding of issues important to the defense bar. Our Workers' Compensation Committee meets with commissioners and drafts new legislation designed to make the process fairer and more efficient. These are just a few examples of what our committees and subcommittees are doing. To get a more comprehensive view, visit our website: [www.mddefensecounsel.org](http://www.mddefensecounsel.org).

If all of this sounds quite serious and businesslike, don't forget our social events. Building new relationships and strengthening friendships is also central to our mission. We held a fun and convivial Past Presidents Reception in September, are doing a number of happy hour gatherings sprinkled through the year, and we will of course have our always-popular crab feast again in June 2020.

We want MDC to be a substantial asset to your practice. If you want to get more involved, or if you have ideas for how we can do things better, please call me or any of the other officers or board members.



# THE DEFENSE LINE

December 2019



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# Sexual Harassment in the #MeToo Era and Minimizing Risk

Jennifer S. Jackman



The number of sexual harassment claims reported to the EEOC, as well as the amounts recovered by the EEOC and in jury awards, are on the rise.

In 2015, 6,870 sexual harassment complaints were filed with the EEOC. Between 2010 and 2016, private employers paid nearly \$700M to employees arising from harassment claims filed with the EEOC. As of October 2018, the EEOC had already filed 41 sexual harassment lawsuits – a more than 50% increase since 2017. Similarly, as of October 2018, sexual harassment charges filed with the EEOC in 2018 increased by more than 12% from 2017 and the EEOC has already recovered nearly \$70M in sexual harassment claims in 2018 — an increase from the \$47.5M it recovered in 2017.

What do sexual harassment claims cost a company? There are the obvious costs of the settlement (if resolved) and attorneys' fees, but there are many other indirect costs. These include increased insurance premiums, increased labor costs due to turnover, absenteeism from work, and, what is seen even more now, severe reputational damage. If the media takes hold of a claim, this can result in a public lashing, which can directly affect the profits and value of the company.

Given the significant cost associated with sexual harassment claims, organizations need to be proactive in addressing and preventing sexual harassment. There are multiple steps companies can take to minimize risk, including:

## • Strong Harassment Policies with Proper Reporting Channels

Companies should carefully review their harassment policies to ensure they prohibit retaliation, provide for confidentiality, and implement proper reporting channels. Once the policy is approved, it should be published to staff on an annual basis. In addition to having harassment policies in a handbook for employees, organizations should consider adopting a Code of Conduct for the Board of Directors that includes a prohibition against harassment.

## • Proper Training of Staff and Managers

In order for policies to be effective, companies must train their employees, managers

and staff. Staff needs to understand what conduct is prohibited and what to do if they witness or become the victim of harassment. Executives and managers are held to a higher duty under the law and should receive separate management training that clearly defines their duties and obligations in handling harassment claims, in order to minimize risk not only to the organization, but to themselves.

## • Codes of Conduct and Training Board Members

Board members need to understand their fiduciary duties in responding to concerns regarding sexual harassment. In addition, Board member sexual harassment of employees can create liability. Companies should adopt codes of conduct for their board members and conduct training annually.

## • Executive Agreements

Given the potential exposure to organizations for sexual misconduct/harassment by executives, employment contracts should expressly include harassment as one of the types of "cause" that allows for termination of employment.

## • Consensual Relationships

Harassment claims often arise from consensual relationships that have gone bad. Re-evaluating whether your organization should allow consensual relationships is advisable. If such relationships are allowed, there should be parameters implemented and notice to the organization of such relationships should be required.

## • Avoid Retaliation

Companies must be proactive in preventing retaliation of employees who complain of harassment or participate in investigations. Actions an organization takes to "protect" an employee must be carefully considered to ensure they do not provide a basis for retaliation.

## • Avoid Taking Action that Could Be Deemed Discriminatory

Similarly, disciplinary actions taken by an organization against an accused in response to the complaint could be seen as gender discrimination. For example, an organization that prohibits a male executive from working with or meeting with female employees in response to a complaint of harassment could face a gender discrimination claim if this action leads to fewer interactions with

key employees, and thus, fewer promotions, salary increases, etc.

## • Promptly and Properly Investigate

The only thing worse than not having a sexual harassment policy is having a policy and not following it. When a complaint of harassment is received, it must be promptly investigated in accordance with company policies.

## • Take Action

Once the investigation is complete, if there is a finding of inappropriate conduct, the organization must take prompt and appropriate action. Consideration should be given to whether the harassment was intentional and whether the person is a repeat offender. Action must, however, be taken to endeavor to stop the conduct from occurring in the future.

## • Obtaining and Maintaining EPL and D&O Insurance

While companies can take steps to minimize potential harassment claims, they cannot eliminate the risk altogether. Accordingly, it is imperative to have appropriate insurance coverage that provides a defense and indemnifies the organization and its Board members against such claims. Understand what a "claim" is under the policy and ensure proper notification is given to the insurer when a claim is made.

The #MeToo movement brought with it an increase in reporting of sexual harassment. Employers should invest the time and resources to review the organization's culture, ensure they have proper policies, and appropriately train staff, managers and Board members. When a concern is raised, organizations should promptly investigate and take appropriate action.

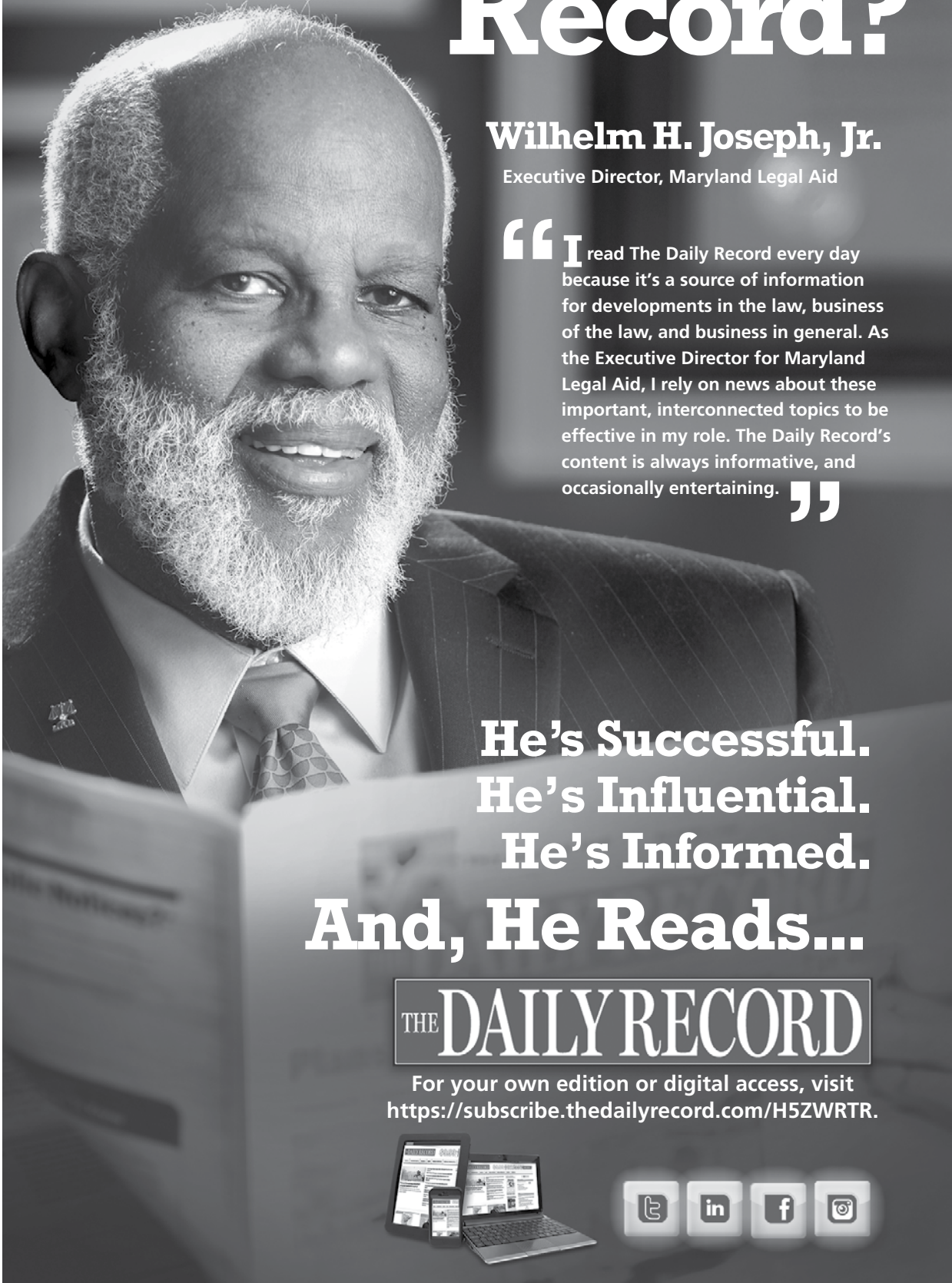
This article was originally published by Association of Corporate Counsel National Capital Region.

*Jennifer S. Jackman, Esq. is a Partner at Whiteford, Taylor & Preston and Co-Chair of the firm's Labor & Employment Section. She represents employers in state and federal courts in the District of Columbia, Maryland and Virginia, as well as throughout the United States, on all aspects of employment-related matters.*





# Who Reads the Record?



**Wilhelm H. Joseph, Jr.**

Executive Director, Maryland Legal Aid

“I read The Daily Record every day because it’s a source of information for developments in the law, business of the law, and business in general. As the Executive Director for Maryland Legal Aid, I rely on news about these important, interconnected topics to be effective in my role. The Daily Record’s content is always informative, and occasionally entertaining.”

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## How A Digital Repository Helps You Organize Your Case

There is a lot of talk right now about the Green New Deal. We're not going to weigh in on politics here (you're welcome!), but here's a green deal we're not tired of mentioning: Planet Depos Online Repository. This is a deal that works for everyone. The benefits of the repository are too big to ignore!

Paper files are steadily becoming obsolete. Storing files electronically is also more cost-effective, efficient and tidy, as files stay in pristine condition, take up less space and are easier to locate when needed. For legal professionals ordering transcripts and videos, electronic delivery is a no-brainer, and fewer and fewer firms request hardbound copies of transcripts and video CDs or DVDs. Most laptops don't even contain a CD/DVD drive anymore, after all. The repository is an easy way to access all the files. Access to the fully secure repository is complimentary with the purchase of transcripts in the case. All transcript and exhibit files will be accessible for download from the repository for a period of 3 years from the date they are uploaded, and video files for a period of 1 year.

When those transcript files show up in your inbox, simply follow the link to your complimentary repository login screen. Once you have successfully logged in, navigate to the "Transcripts" tab, where you can enter search criteria on the left. A "less is more" approach is best when entering search criteria. For example, just the witness' last name, or one unique word/name from the case name should bring up the files you are seeking. If you have a standing order, all your preferred files will be available for your perusal. Available load file formats include LiveNote (LEF), TrialDirector (CMS), TextMap (XMEF), Case Notebook (PTZ) and more. First-time users can contact Planet Depos for login instructions and case-specific standing order forms. Hardbound transcripts are still available upon request, along with CDs and DVDs. The repository simply provides a speedy, secure means of accessing the files you need for your case.

The repository is a fantastic organizational tool as well, not only storing files, but providing a calendar of your scheduled depositions. Support staff can use the repository to keep tabs on what has been scheduled, canceled, as well as communicate and track time and/or location changes. You can quickly log on, view the case schedule, submit any

changes in an instant, or request confirmation once the schedule is finalized. For paralegals, legal assistants, and secretaries always juggling so many important details, this is a terrific time-saving resource!

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surpassing clients' expectations. For added ease, you can schedule depositions domestically or even internationally by emailing [scheduling@planetdepos.com](mailto:scheduling@planetdepos.com) or calling us at 1-888-433-3767.

**Upcoming events  
will be announced at  
[MDdefensecounsel.org](http://MDdefensecounsel.org).**

### Editors' Corner

Welcome to a new edition of MDC's *The Defense Line*! We are privileged to publish this edition and showcase some of our esteemed colleagues and members of MDC. A big thanks to our contributors for this edition: **Jennifer Jackman** of Whiteford, Taylor & Preston, **Veronica Jackson** of Miles & Stockbridge, **Patricia McHugh Lambert** of Pessin Katz Law, numerous attorneys who shared their recent successes, and, of course, the MDC Board members. *The Defense Line* is here to serve you, the members of the MDC. The editors are committed to providing substantive information, case law updates, and practical information to assist you in your practice, as well as highlighting the people who matter most to our organization: YOU, the members of MDC. We want to celebrate with you and share your victories, promotions, and recognitions. We hope that you enjoy this edition of *The Defense Line*.

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



**Sheryl A. Tirocchi**  
*Chair, Publications Committee*

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*Vice-Chair, Publications Committee*

We have a vacancy on the Publications Committee. If you or one of your colleagues are looking to get involved with the MDC and are interested in joining the Publications Committee, please reach out to Sheryl Tirocchi or Dwight Stone.

# The McCammon Group

is pleased to announce our newest Neutral



**Hon. Sally D. Adkins (Ret.)**  
Retired Judge, Court of Appeals of Maryland

After over twenty years of distinguished judicial service, The Honorable Sally Adkins recently retired. Judge Adkins served admirably on three levels of the Maryland court system, most recently as a Judge of the Court of Appeals. Prior to her ascension to the Court of Appeals, Judge Adkins first served as an Associate Judge for the Circuit Court for Wicomico County and then as a Judge of the Court of Special Appeals. She enjoyed a successful general law practice before her appointment to the bench, and throughout her legal career Judge Adkins participated in numerous statewide and local bar associations and committees, including as a Past President of the Wicomico County Bar Association. Judge Adkins now brings this exemplary record of experience and dedication to The McCammon Group to serve the mediation, arbitration, and special master needs of lawyers and litigants in Maryland and beyond.



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# MDC's 2019 Past Presidents Reception

Maryland Defense Counsel (“MDC”) hosted its annual **Past Presidents Reception** at Miles & Stockbridge, PC in Baltimore on **Tuesday, September 24, 2019**. We were joined by members of Maryland’s trial and appellate courts as well as a number of former MDC Presidents. Also with us were many MDC sponsors and supporters.

MDC wishes to thank our sponsors, our Executive Director, Marisa Capone, and Miles & Stockbridge, PC for their contributions to a beautiful evening.





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# What to Do When You Find Yourself in the Data Breach Club

Veronica Jackson



More and more companies are likely wondering what they should do in the event that they are faced with a data breach that exposes the personal data of their employees or customers. Data security incidents involve complex legal issues that must be navigated carefully to reduce the risk of improper (or unnecessary) breach notification, attention from state and federal regulators, and potential class actions related to the exposure of personal information. There are several key steps a company should take upon discovery of a data breach. While these steps are numbered, many of them must happen both immediately and simultaneously.

First, immediately contact your company's incident response team pursuant to your Written Information Security Plan (or "WISP"). Second, contact law enforcement and any relevant insurance carriers to assist with coverage of costs for the data breach response effort and to prevent waiver of potential coverage for tardy notice. Third, quickly assess the scope of the breach (*i.e.*, whether the breach is ongoing, whether data was acquired or simply accessed by the hacker, who suffered a breach of their personal information, what type of information was exposed, and the likelihood that the affected persons will suffer harm as a result of the breach). Fourth, stop the breach, if possible, through remedial data security measures, possibly with the assistance of a forensic IT consultant to bolster your company's security systems. Organizations that have already suffered from a breach especially must consider what additional safeguards (including employee training) should be implemented to avoid another breach in the future. Fifth, analyze data breach compliance requirements by identifying the jurisdictions of residence for the affected population and assessing what notification requirements are triggered by each applicable statute.

Data breach compliance requirements also may be triggered by the regulatory framework covering the type of information that was exposed (*i.e.*, HI-TECH and HIPAA compliance for personal health

information). For affected persons residing in Maryland, for example, notification is not required if, after the requisite investigation, the business determines that personal information has not been or is not likely to be misused. (Documentation of that conclusion, however, must be retained by the entity for three years.) In instances where notification is required, even for just one Maryland resident, notice must first be sent to the Maryland Attorney General's data breach notification department. Maryland also recently amended its notification statute to, among other changes, require that companies make any requisite notices within forty-five days from when the company determines that notice is required. In the District of Columbia, on the other hand, there is no "likely harm" exception to the notification requirement and notice to the Attorney General is not required. In instances where 1,000 or more residents are receiving notice at a single time, both Maryland and the District of Columbia require that notice be sent to all nationwide consumer reporting agencies regarding the timing, distribution and content of the notices.

Finally, prepare a data breach response plan that attempts to mitigate potential harm to the affected population and complies with applicable data breach requirement statutes and regulations. Since the Supreme Court's decision in *Spokeo v. Robins* attempted (but failed) to clarify the legal standard for what constitutes sufficient harm to a person affected in a data breach for legal standing purposes, a Circuit split has emerged. Because it remains unclear what level of risk for future harm or actual harm is required (short of actual identity theft), efforts to minimize the risk of identity theft and other subsequent harm, as well as providing free

preventative services to affected people, are valuable tools that may provide a defense against subsequent litigation stemming from the data breach. Many organizations elect to provide an affected population with identity theft prevention services that monitor their credit and also aid them in any credit repair efforts they may need should they fall victim to identity theft. State attorneys general also look at whether an organization is providing such services to affected persons and for how long when reviewing data breach response notifications.

*Veronica D. Jackson is Counsel at Miles & Stockbridge, P.C. She represents employers in a broad range of employment litigation matters, employment discrimination, sexual harassment, ADA and FMLA litigation, and wrongful discharge. Veronica also has extensive experience conducting internal investigations for clients regarding allegations of workplace harassment, discrimination, retaliation under VII and ADA, and regarding incidents related to workplace violence concerns.*

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## MDC HAPPY HOUR

On Thursday, October 17<sup>th</sup> MDC hosted a happy hour at Blackwall Hitch in Baltimore. The event was well attended and provided those in attendance the opportunity to both catch up with old friends and make new professional connections. The happy hour was generously sponsored by Planet Depos and SEA.







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## Fall 2019 Deposition Bootcamp Recap

**O**n Thursday, November 7th MDC held another successful **Deposition Bootcamp** at the Baltimore offices of Miles & Stockbridge, PC. This is the third Deposition Bootcamp that MDC has conducted in recent years, and, just like the earlier versions of the program, this program was very well-attended and well received. Chris Jeffries, Colleen O'Brien and MDC Executive Director Marisa Capone, among others, worked very hard to organize the event.

The morning began with presentations by leading litigators on various aspects of deposition practice. Dwight Stone of Miles & Stockbridge spoke on the basics and some finer points regarding preparing for, taking and defending fact witness depositions. Mike Dailey of Schmidt, Dailey & O'Neill addressed expert witness depositions and Tina Billiet of Waranch & Brown explained how defense counsel should select, prepare and defend corporate representatives for deposition.

Bootcamp attendees then heard a lively lunchtime panel dis-

cussion on deposition practice and the use of depositions at trial by Judge Stuart Berger of the Court of Special Appeals and Judge Judith Ensor of Baltimore County Circuit Court. Chris Jeffries and Dwight Stone served as moderators and the judges answered numerous questions from the seminar participants.

In the afternoon sessions, participants worked in small groups and engaged in "mock deposition" questioning. Using case materials from a mock trial, participants examined witnesses provided by MDC Sponsors Exponent and Rimkus. The small groups were led by experienced trial attorneys who provided individual critiques and tips to the participants. MDC is very grateful to Natalie McSherry, Tom Bernier, Ed Buxbaum, Tony Breschi, Peter Sheehan, Dwight Stone and Chris Jeffries for serving as group leaders.

MDC would also like to thank The McCammon Group, Veritext, Minnesota Lawyers Mutual Insurance Company, The Daily Record and Courthouse Copy for their generous sponsorship of this event.



# Liability For Mass Shootings: Coverage Issue

Patricia McHugh Lambert



## What Constitutes Mass Shooting/Active Shooter Situation?

Currently, there is no universally accepted definition of “mass shooting,” the general understanding of the concept seems to be a combination of two sub-categories of violent events, “mass killings” and “active shooters.”

The Investigative Assistance for Violent Crimes Act of 2012 passed by Congress defines “mass killing” as “3 or more killings in a single incident” regardless of weapon. This definition, however, does not account for those injured, but who ultimately survived the incident. In contrast, “active shooter” is defined by the FBI as an individual or individuals actively engaged in killing or trying to kill people in a populated area.

These varying definitions may affect average statistics, legal definitions related to mass shootings, as well as terminology used in future insurance coverage policies.

## Statistics.

According to the *Washington Post*, 1,165 people were killed since 1966, focusing on 163 shootings in which four or more people were killed by a single shooter. The youngest victim was eight (8) months old and the oldest victim was ninety-eight (98) years old. Bonnie Berkowitz, Chris Alcantara, & Denise Lu, *The Terrible Numbers That Grow With Each Mass Shooting*, The Washington Post, <https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/> (last visited Aug. 6, 2019). These

numbers do not include the most recent shootings that have continued in places such as Ohio and Texas.

Based on statistics looking at a broader definition of Mass Shootings, *Vox Media* has determined that there have been at least 2,173 mass shootings since Sandy Hook, with at least 2,419 killed and 9,033 wounded. German Lopez & Kavya Sukumar, *After Sandy Hook, we said never again. And then we let 2,178 mass shootings happen*, *Vox* (last updated August 6, 2019, 6:30 AM), <https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence>.

Furthermore, as reported in a 2016 study on mass shootings, which looked at 292 incidents in which four or more people were killed, the study found that 90 of the shootings occurred in the United States of America. These numbers are significant because while the United States has about five percent (5%) of the world’s population, it has ultimately had thirty-one percent (31%) of all public mass shootings and those numbers are continuing to grow.

AJ Willingham & Saeed Ahmed, *Mass shootings in America are a serious problem — and these 9 charts show just why*, *CNN* (Nov. 6, 2017), <https://www.cnn.com/2016/06/13/health/mass-shootings-in-america-in-charts-and-graphs-trnd/index.html>.

## Other Forms of Work Place Violence.

In addition to mass shootings and active shooter situations there are other forms of work place violence that occur. Another term often thought to be synonymous with mass shootings is workplace violence. More than two million Americans report being victims

of violence in the workplace each year. The term encompasses all violence or threats of violence against workers. Patricia McHugh Lambert, Esq., *Named Perils Coverage For Mass Shootings*, PK Law, <https://www.pklaw.com/articles/named-perils-coverage-for-mass-shootings/> (last visited Aug. 01, 2019). Although what is defined as work place violence does not typically rise to the level of mass shooting or active shooter situations, instances of work place violence can play a role when courts interpret whether or not a mass shooting or active shooter situation could be deemed as reasonably foreseeable.

## What is the Likelihood That an Employer/Venue Will be Found Liable?

More than seventy-five percent (75%) of individuals who participated in mass violence exhibited signs beforehand. According to reports, statistics have shown that more than seventy-five percent of the perpetrators had, before the attack, made concerning statements or exhibited risky behavior. Once a threat is identified, prevention or risk reduction protocols can be employed. If the venue does not have identification or prevention protocols in place, there is a greater possibility that the venue, business/employer, school board, etc. will be held liable for its failure to protect people from injuries that were deemed “reasonably foreseeable.” Monica Sullivan & Matthew Novaria, *Insurance Considerations For Mass-Shooting Litigation*, Law 360, <https://www.law360.com/articles/1036307/insurance-considerations-for-mass-shooting-litigation> (last visited Aug. 01, 2019).

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**MASS SHOOTINGS**) *Continued from page 14*

## Rise of Civil Suits as a Result of Mass Killings or Active Shooter Situations.

Since the Columbine High School shooting in 1999, victims have increasingly brought civil suits against managers, property, owners, companies, and even gun manufacturers. The courts have typically sided with the defendants except in cases where it can be shown that the threat was foreseeable. Civil litigation deriving from mass killings or active shooter situations can cause a large amount of reputational harm to civil defendants ranging from negative media attention to law enforcement engagement which can lead to a financial decline. As a result schools, companies, venues, and other institutions at risk for mass shootings are seeking out active assailant policies and other protections. Monica Sullivan & Matthew Novaria, *Insurance Considerations For Mass-Shooting Litigation*, LAW 360, <https://www.law360.com/articles/1036307/insurance-considerations-for-mass-shooting-litigation> (last visited Aug. 01, 2019).

### Recent Cases.

*MGM Resorts International v. Zurich American Insurance Co.*

The *MGM v. Zurich* case derives from events that took place on October 03, 2017 in Las Vegas, Nevada. On October 03, 2017 a shooter opened fire outside of the window of the Mandalay Bay Hotel on participants of the Route 91 Harvest festival, which resulted in the deaths and injuries of hundreds of people. As a result of the events that took place during that shooting, MGM now faces claims from close to 4,000 claimants who are seeking compensation. MGM has continued to dispute any liability arising out of the event, and they currently bring this suit claiming that the insurance company has failed to pay legal costs to enable MGM to present an adequate defense against these claims which

is estimated to amount to millions of dollars.

On June 19, 2019, in U.S. District Court of Las Vegas there was a law suit filed by MGM Resorts against Zurich American Insurance Co. alleging breach of contract, for Zurich's denial to pay any defense costs for damage claims stemming from the 2017 shooting. The 2017 Las Vegas shooting resulted in fifty-eight (58) dead and more than eight hundred and fifty (850) injured. MGM Resorts owns the Mandalay Bay hotel, where the shooter shot out of the window on the 32nd floor, which is why MGM has been the sole focus of many of the claims deriving from the October shooting. *MGM Resorts Sues Zurich American Insurance for Las Vegas Shooting Defense Costs*, Insurance Journal (June 24, 2019), <https://www.insurancejournal.com/news/national/2019/06/24/530288.htm>.

The present case of *MGM Resorts International v. Zurich American Insurance Co.* is a prime example of what can take place as a result of a mass killing or active shooter situation when there is not adequate coverage. In addition, it exemplifies how mass shootings are generally not considered acts of terrorism which increases the possibility of parties being held liable for the acts of mass shooters. Depending on the results of this pending lawsuit MGM may be directly held financially liable for litigation costs and damages of over now 4,000 claimants without any insurance coverage. It is also important to note that previously on July 13, 2018 MGM technically filed law suits against the victims claiming that the company had "no liability of any kind" and that the lawsuits of around 2,500 people should be dismissed. The victims asserted claims attempting to hold MGM responsible for the "deaths, injuries, and emotional distress" from the attack. MGM argued that the Contemporary Services Corporation, who was certified by the Department of Homeland Security as being responsible "for protecting against and

responding to acts of mass injury and destruction" should be held liable for the damages derived from that day. Furthermore, MGM argued that they were free from liability under the 2002 Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act. However, in order to be covered from liability under this act the Department of Homeland Security would have to consider the shooter's acts an act of Terrorism, which it did not. *MGM's lawsuit against Las Vegas shooting victims, explained*, PBS NewsHour (Jul 18, 2018), <https://www.pbs.org/newshour/nation/mgms-lawsuit-against-las-vegas-shooting-victims-explained>. This ongoing litigation is what has led to MGM's case against Zurich.

### Why Do General Liability Insurance Policies Not Cover Mass Shootings?

Most general liability policies cover what they define as an occurrence. Many general liability policies do not interpret a mass shooting as an "occurrence". Monica Sullivan & Matthew Novaria, *Insurance Considerations For Mass-Shooting Litigation*, LAW 360, <https://www.law360.com/articles/1036307/insurance-considerations-for-mass-shooting-litigation> (last visited Aug. 01, 2019). Courts analyzing this issue, analyzed this issue by ultimately deciding that if criminal conduct is involved regardless of whether or not the negligent conduct is inextricably intertwined with allegations of intentional conduct, then it is not an occurrence.

In addition, general liability policies typically only apply to bodily injury. Therefore individuals that were present during the shooting and suffered emotional distress, but not physically harm, may not be covered under general liability policies. Which means all claims of emotional stress, trauma, etc. would not be covered under general liability policies. *See id.*

*Continued on page 17*

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(MASS SHOOTINGS) Continued from page 14

## What Do Peril Insurance Policies Cover?

In response to the increase in mass violence situations peril insurance policies are now being underwritten at an increasing rate and cover the following:

- Counseling and support resources.
- Medical, disability, funeral expenses and death benefits.
- Revenue loss/extra expenses caused by the shooting.
- Property damage and tear down expenses.
- Required post event security upgrades.
- Litigation expense.
- Liability coverage.

Patricia McHugh Lambert, Esq., *Named Perils Coverage For Mass Shootings*, PK Law, <https://www.pklaw.com/articles/named-perils-coverage-for-mass-shootings/> (last visited Aug. 01, 2019).

## What are the EXCLUSIONS to Peril Insurance Policies?

- Some policies exclude coverage for employees (presumably because there is worker's compensation coverage elsewhere).
- Many policies also expressly exclude coverage for injuries caused by vehicles.
- Other policies limit coverage to damage caused by firearms so that harm caused by explosive devices are not covered.
- These perils policies are also specific in terms of the triggers for coverage, such as limiting coverage to where four or more individuals are attacked.
- However, as the threats increase the named peril policy forms are beginning to evolve as for coverage, exclusions, conditions and limitations.

## The Rise of Peril Insurance Policies/Active Assailant Insurance.

Some are now recognizing this peril policies being established by insurance companies as "active assailant insurance" policies. According to recent data by the Bureau of Labor Statistics, homicides accounted for 10% of workplace death that occurred in 2016. Of those 500 work place homicides, 394 of them or 80% were caused by

shootings.

See Adjua Fisher, *Is Active Shooter Insurance Becoming a Risk Management Necessity?*, Risk & Insurance, <https://riskandinsurance.com/active-shooter-insurance-for-workplaces/> (last visited Aug. 01, 2019); see also *There were 500 workplace homicides in the United States in 2016*, U.S. Dept. of Labor, <https://www.bls.gov/opub/ted/2018/there-were-500-workplace-homicides-in-the-united-states-in-2016.htm> (last visited Aug. 01, 2019).

## What Do We Do As Insurance Professionals?

- Be aware of the current liability policies which may include some but not all coverage for mass shootings/active shooter situations, and also be aware of new policies that are likely to be underwritten.
- Understand that currently some liability policies do provide coverage for "crisis management" events which may include coverage for mass shooting related events such as public relations or media management costs and funding for emergency response.
- Be sure to watch and follow developments surrounding the Terrorism Risk Insurance Act (TRIA) enacted in November 2002, some policies may provide coverage for terrorism related events which may possibly include a mass shooting depending on the circumstances. In addition, in order for Terrorism coverage to apply the U.S. Department of the Treasury may have to certify the event as an act of terrorism.
- It is also important to note that as of April 23, 2018 the Department of the Treasury has not certified any event labeled as a mass shooting in the U.S. as an act of terrorism.

Monica Sullivan & Matthew Novaria, *Insurance Considerations For Mass-Shooting Litigation*, Law 360, <https://www.law360.com/articles/1036307/insurance-considerations-for-mass-shooting-litigation> (last visited Aug. 01, 2019).

## What Should We as Professionals Consider NEXT?

Professionals should start to consider the cost of what these new insurance policies may be for themselves and/or their clients.

**The MDC Expert List** is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

For example, the *Wall Street Journal* reports that school systems may have annual premiums for active shooter insurance which can possibly range from \$1,800 to \$20 million depending on the size of the schools.

Lastly, as active shooter policies and other similar insurance based products begin to be underwritten, it is important that all interested parties have an understanding of the differences between previously used commercial general liability policies and the newly established specialized insurance policies that will be offered. This understanding will allow professionals to have an in-depth understanding into what coverage they should look for in new policies and how the lack of certain coverage could potentially leave them vulnerable to financial liability in the future. See Adjua Fisher, *Is Active Shooter Insurance Becoming a Risk Management Necessity?*, Risk & Insurance, <https://riskandinsurance.com/active-shooter-insurance-for-workplaces/> (last visited Aug. 01, 2019); see also Monica Sullivan & Matthew Novaria, *Insurance Considerations For Mass-Shooting Litigation*, Law 360, <https://www.law360.com/articles/1036307/insurance-considerations-for-mass-shooting-litigation> (last visited Aug. 01, 2019).

**Note: This article appeared previously at [pklaw.com](https://www.pklaw.com) on September 28, 2019.**

*Ms. Lambert has over 35 years of experience in handling complex commercial litigation and insurance matters. Ms. Lambert is best known as an attorney who knows the field of insurance. She has represented insurers, policyholders, and insurance producers in disputes both in court and before the Maryland Insurance Administration.*







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## SPOTLIGHTS AND TRIAL WINS



John T. Sly and Barry Goldstein of Waranch & Brown, LLC obtained defense verdict for an orthopedic surgeon and hospital in the Circuit Court for Anne Arundel County



**John T. Sly** and **Barry Goldstein** of the law firm Waranch & Brown, LLC successfully obtained a defense verdict in the matter of *Guerrero v. Baltimore Washington Medical Center, et. al.* in June of 2019. The matter was tried to a jury in the Circuit Court of Anne Arundel County. Judge William C. Mulford, II presided.

The matter involved complications arising out of an anterior cervical discectomy and fusion (ACDF) in an adult woman with prior existing surgical pathology. It was alleged that as a result of the procedure an esophageal perforation occurred necessitating multiple surgeries over a number of years and permanent disability and disfigurement.

The defense demonstrated that the orthopedic surgeon performing the procedure was a highly trained and skilled physician who not only complied with the standard of care, he also had invented a number of the instruments used in ACDF procedures world-wide. The evidence suggested the perforation did not occur during the procedure but opened in the post-operative period as a result of movement and coughing. The jury found the physician and the Hospital not negligent on all counts.



Thomas P. Bernier and Jessica P. Butkera of Goldberg Segalla, LLC obtained summary judgment on behalf of a hotel in the Circuit Court for Howard County



In May of 2019, Goldberg Segalla attorneys **Thomas P. Bernier** and **Jessica P. Butkera** won summary judgment in a premises liability case pending in the Circuit Court for Howard County for their client, a hotel. Plaintiff alleged that she incurred \$250,000.00 in medical bills and \$300,000.00 in lost wages when she slipped and hit her head in her hotel room's bathroom shower. Mr. Bernier and Ms. Butkera successfully argued that Plaintiff assumed

the risk of her injuries and failed to provide admissible expert testimony that the hotel's design and installation of the shower fell below any applicable industry standard.



Jessica P. Butkera of Goldberg Segalla, LLP obtained a defense verdict for a private security company in the Circuit Court for Baltimore City

On September 13, 2019, following a two-week

jury trial, **Jessica P. Butkera** won a defense verdict on behalf of a private security contractor for a professional sports stadium. The Plaintiff alleged the security contractor was negligent in its operation of the stadium's security gates causing the Plaintiff's vehicle to strike security bollards that were lowered and raised from ground level. Plaintiff alleged the impact was so severe that he struck his head on the windshield and was unable to work for two years, the same period of time during which he continued to treat medically. Although Ms. Butkera focused her defense on Plaintiff's exaggeration of the impact and his \$350,000.00 in damages, the jury quickly returned a defense verdict agreeing with Ms. Butkera's argument that Plaintiff also failed to demonstrate the security company was negligent.



Amy E. Askew, John A. Bourgeois, and Bradley M. Strickland of Kramon & Graham, P.A. obtain summary judgment in the Circuit Court for Baltimore City following exclusion of Plaintiffs' experts



After a multi-day *Frye-Reed* evidentiary hearing, **Amy E. Askew**, **John A. Bourgeois**, and **Bradley M. Strickland** of Kramon & Graham, P.A., and Frank Gordon of Millberg Gordon Stewart, achieved the exclusion of the plaintiffs' experts in two similarly situated cases in the Circuit Court for Baltimore City in April 2019. The exclusion of the experts resulted in summary judgment. The plaintiffs in the two cases alleged they developed MDS (and for one, AML) from their purported exposures to diesel exhaust that contained benzene while employed by the defendant. Plaintiffs offered hemotologist and medical oncologist Dr. Evan Roy Berger as a causation expert and Dr. Michael Ellenbecker, chair of the ACGIH, as an industrial hygienist. The Court excluded both experts, finding that Dr. Berger's testimony failed to meet the requirements of the *Frye-Reed* test and Rule 5-702, and that Dr. Ellenbecker's failed to comply with the requirements of Rule 5-702. Because Dr. Berger's and Dr. Ellenbecker's testimony was excluded, plaintiffs could not prove the defendant was negligent, and summary judgment was required.

### Supreme Court Denies Cert in Two High Profile Education Law Cases Marking a Victory for PK Law's Education Group

On October 7, the Supreme Court denied certiorari in *R.F. v. Cecil County Public Schools*, 919 F.3d 237 (4th Cir. 2019). In this case, the parents of a special education student attending Cecil County Public Schools (CCPS) asserted a claim under the Individuals with Disabilities Education Act alleging a failure to provide a free appropriate public education as required by the Act. The parents requested public funding of a private educational placement which would cost

*Continued on page 21*



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(SPOTLIGHTS) Continued from page 19

approximately \$60,000 per year. In addition, the parents sought to recover their legal fees which exceed \$500,000.00. CCPS prevailed at the administrative hearing in this matter, on petition for judicial review in U.S. District Court, and on appeal to the Fourth Circuit Court of Appeals. The parents then petitioned the Supreme Court to hear the matter, and CCPS determined to submit briefing in opposition to the petition – which ultimately carried the day.

On October 15, the Supreme Court denied certiorari in *Wood v. Arnold, et al.*, 915 F.3d 308 (4th Cir. 2019). In this case, a student and her parents, represented by the Thomas More Law Center filed suit against the Board of Education of Charles County, the Principal of La Plata High School (Ms. Arnold) and the Assistant Principal (Ms. Morris) asserting claims for violation of the Establishment Clause and Free Speech Clause of the First Amendment of the United States Constitution, violation of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and Article 36 of the Maryland Declaration of Rights. In short, Plaintiffs alleged that the Board's World History curriculum endorsed Islam, that the Defendants forced Caleigh Wood to profess faith in Islam (it did not), and that the Defendants retaliated against Mr. Wood for his online speech opposing the aforementioned offenses by issuing him a "no trespass" letter banning him from the grounds of La Plata High School after he made what could reasonably be viewed as threatening remarks. The Board and individual defendants prevailed in the United States District Court and again at the Fourth Circuit. Wood then petitioned for certiorari at the Supreme Court, and the Court directed the filing of an opposition brief, which ultimately prevailed.

The Supreme Court does not typically direct the prevailing party at the federal appellate level to file an opposition brief in every case that is petitioned for certiorari. The fact that it did so illustrates the importance and difficulty of the complex issue of federal law presented. Both of these cases were receiving national attention from various education law groups and from United Educators, the national insurance group that provides excess coverage to the Maryland Association of Boards of Education Group Insurance Pool. As much as PK Law's Education Attorneys would have loved the opportunity to argue their cases before the Supreme Court, victory for their clients was to get the Court to deny certiorari and bring these cases to a final close.

**PK Law's Education Group** is comprised of eight attorneys with decades of experience assisting their education clients with all types of legal matters related to the running of an educational institution such as freedom of speech, child abuse, security, accommodating disabilities and providing special education, religious freedom, sexual harassment, immigration issues, labor negotiations and construction litigation. They have handled matters involving many federal laws including the Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, Family and Medical Leave Act, Americans with Disabilities Act, Title IX and Family Educational Rights and Privacy Act. The *R.F. v. Cecil County Public Schools* matter was handled primarily by PK Law Member **David A. Burkhouse**, with the assistance of Member **Rochelle S. Eisenberg** and Associate **Adam E. Konstas**. *Wood v. Arnold et al.* was handled primarily by Member **Andrew G. Scott** and Member **Lisa Settles**.



Tara Taylor and Rima Kikani of Rollins, Smalkin, Richards & Mackie, obtained appellate win in a \$1 Million construction engineering-geotechnical hazard case which involved shifting the interpretation of a 47-year-old statute.



Representing B. Frank Joy, L.L.C. ("BF Joy"), Partner **Tara Taylor** and Associate **Rima Kikani**, recently won an appeal in the District of Columbia Court of Appeals in *B. Frank Joy, L.L.C. v. District of Columbia Water & Sewer Authority*. Based on our attorneys' arguments, the D.C. Court of Appeals effectively shifted the interpretation of a 47-year-old statutory law in a nearly \$1 Million construction engineering-geotechnical hazard case.

This case stemmed from the 2013 collapse of a roadway near the intersection of 14th Street and F Street, NW, in Washington, D.C. Seventeen years earlier, in 1996, BF Joy had installed an access chamber for AT&T beneath the intersection, allowing the telecommunications company to access underground cables. The 2013 collapse of the roadway caused extensive damage, including damage to a sewer main and other underground utilities. The District of Columbia Water & Sewer Authority ("WASA") was responsible for repairing the underground water infrastructure, remediating the void, and repairing the intersection, incurring nearly one million dollars in damages.

In May 2016, WASA filed a Complaint against BF Joy, contending that BF Joy's negligent construction of the chamber caused the collapse seventeen years later. Specifically, WASA argued that BF Joy's installation of the access chamber bisected a storm water lateral, which blocked storm water from traveling into its sewer system, and instead, redirected the storm water back into the soil. According to WASA, years of water pressure from rainfall caused soil erosion, and the erosion, over time, caused the roadway above it to collapse.

In response, BF Joy denied any negligence, and among several affirmative defenses, argued that D.C.'s 10-year Statute of Repose barred WASA's claim for the 1996 installation. BF Joy moved to dismiss WASA's Complaint based on the 10-year limitation, but the Superior Court of the District of Columbia denied the request. After two years of discovery and litigation, the parties tried the matter in February 2018, and a jury found BF Joy liable for negligent installation of the access chamber.

BF Joy appealed the matter to the D.C. Court of Appeals, citing to the Statute of Repose as well as discretionary abuses by the trial court. WASA opposed the appeal, contending that the Statute of Repose did not apply to this case because: 1) the access chamber did not constitute an improvement to real property as required by the Statute given that it did not enhance the beauty or utility of the intersection; 2) the chamber did not constitute a defective condition under the meaning of the Statute; and 3) the Statute did not apply to the D.C. Government, of which WASA is a part.

Agreeing with BF Joy, the Court of Appeals reasoned that: 1) the underground access chamber does constitute an improvement to realty under the meaning of the Statute because it allows AT&T to access fiber optic cables that provide telecommunications services to surrounding buildings, including the U.S. Department of Treasury; 2) if an access chamber poses a geological hazard, then it is, by definition, a defective condition under the Statute; and 3) although the Statute

Continued on page 23

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exempts the D.C. Government from compliance, WASA, for purposes of this Statute, is a separate entity of the Government, but not the Government itself.

Thus, the Court held that the Statute of Repose does apply to this matter, and because WASA waited seventeen years to file suit instead of complying with the 10-year limitation, the trial court should have dismissed WASA's Complaint. Accordingly, the Court vacated the trial judgment and reversed the denial of BF Joy's motion to dismiss, barring WASA from any recovery.



Thomas J. Cullen, Jr., Kali Enyeart Book, and Ryan M. Cullen of Goodell, DeVries, Leech & Dann Obtained Dismissal of a Product Liability Action in Idaho

In a product liability action in the District Court of the Fourth Judicial

District of the State of Idaho, County of Ada, Impax Laboratories, LLC ("Impax"), represented by **Thomas J. Cullen, Jr., Kali Enyeart Book, Ryan M. Cullen,** and Goodell, DeVries, Leech & Dann, LLP, obtained a dismissal of an action involving the prescription drug terbutaline sulfate. In *Michelle Stirling, et al. v. Novartis Pharmaceuticals Corp., et al.*, Plaintiffs alleged that Impax failed to provide adequate warning of a side-effect of the generic drug terbutaline sulfate that was prescribed off-label by doctors to Ms. Stirling to delay her pre-term pregnancy labor. Plaintiffs claimed that exposure to terbutaline in utero caused Ms. Stirling's minor child to suffer cognitive injuries, including autism spectrum disorder. This "failure to warn" allegation, according to Plaintiffs, established liability against Impax under state tort law for fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. Impax moved to dismiss the claims because Plaintiffs had failed to specifically identify an Impax product taken by Ms. Stirling and because all of Plaintiffs' claims were preempted by *Mensing* and *Bartlett*. Impax argued that no amount of artful pleading — recasting a "failure to warn" claim into fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress claims — by Plaintiffs could shield their state tort claims from federal preemption law. The Honorable Judge Richard Greenwood granted Impax's motion to dismiss because Plaintiffs could not specifically identify an Impax product taken by Ms. Stirling and he further accepted that Plaintiffs could not make any claim that Impax's labeling was deficient as such a claim would necessarily be preempted pursuant to *Mensing* and its progeny.

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