July 2021

THE DEFENSE LINE

A Publication From Maryland Defense Counsel, Inc.

Featured Articles

President's Message

Katherine A. Lawler, Esquire
Nelson Mullins Riley & Scarborough LLP

Welcome to our Summer 2021 edition of *The Defense Line*! It was wonderful to see our members in person — finally — at last month's Crab Feast! Thank you very much to now-Immediate-Past-President, Colleen O'Brien, and to our Executive Director, Marisa Capone, for their time and efforts in making the evening a success. In addition to the many Maryland friends who joined us on the beautiful, breezy deck at Nick's Fish House, we had special guests Jon Berkelhammer of Ellis & Winters LLP from Greensboro, NC who is the Mid-Atlantic Regional Director for our parent organization, the Defense Research Institute (DRI), Lindsay Coulter, the owner of ION Medical Designs, LLC from Castle Rock, CO, as well as special guests from The McCammon Group, Planet Depos, Rimkus, SEA, and Veritext. Many thanks to our out-going Executive Committee and Board Members, our continuing Board and Committee Members, and our vendors for making the 2020 – 2021 year memorable with several virtual events in addition to the Annual Meeting. Special thanks go to Mary Malloy Dimaio of Crosswhite Limbrick Sinclair for her years of excellent service to MDC maintaining our Expert Database. Please let me or any of the Executive Board members know if you are interested in assuming this very important role!

The Crab Feast served to energize me for what promises to be an exciting new year with the Maryland Defense Counsel as we emerge from our WFH offices, (safely) remove our masks and greet each other again with more opportunities to network and collaborate in person. Joining the Executive Committee this year as voted in at the Crab Feast is Amy Askew of Kramon & Graham, P.A., our new Secretary. Chris Jeffries, also of Kramon & Graham, P.A., was elected to the President-Elect position, Sheri Tirocchi of Godwin Tirocchi, LLC will continue as Treasurer, and Colleen O'Brien of Travelers will stay on as our Immediate Past-President. Thank you and congratulations to these lawyers and to the Board and Committee Members continuing to serve the MDC this year! I look forward to working with all of you to help our members stay connected and abreast of the legislative and judicial happenings in Maryland that affect us and our clients.

Until we meet again, please enjoy the quality content of *The Defense Line*. The success of this edition is owed to the many contributors, to our co-editors Rachel Gebhart and Nicholas Phillips, and to our graphics consultant Brian Greenlee — thank you!

I hope everyone enjoys the rest of the summer, and stays safe and healthy as we reopen and (hopefully) emerge from the pandemic. I am very much looking forward to seeing all of you at our Past Presidents' Reception in a few months, if not at a happy hour or CLE event sooner!

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1962 59 Years of Service to Our Members 2021

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Maryland Defense Counsel
P.O. Box 575
Riderwood, MD 21139

E-mail:
ed@mddefensecounsel.org
www.mddefensecounsel.org

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Insurance Coverage for Losses Arising from the Pandemic — Thousands of Lawsuits, Few Definitive Answers

Joseph L. Beavers, Alexander P. Creticos, & Daniel L. Adamson

As of mid-June 2021, more than 1,900 lawsuits had been filed over disputed insurance coverage claims arising from COVID-19.[1] In the coming months, many hundreds — if not thousands — more will undoubtedly follow. So far, this litigation has not provided policyholders or insurers with definitive answers about what coronavirus-related losses are, and are not, covered under standard commercial insurance policies. Although certain key issues are always determinative, how a given court will rule on them in a given case is far from predictable at this point. In this article, we will discuss this evolving legal landscape in connection with two types of coverage claims arising from COVID-19: (1) first-party business interruption claims under commercial property insurance policies and (2) third-party liability claims under commercial general liability policies.

Business Interruption Coverage

The insurance coverage issue that has come up most frequently in the wake of the pandemic is whether business interruption coverage is available for coronavirus-related business losses. A standard provision in most commercial property insurance policies, business interruption insurance covers losses resulting from loss of or damage to property that causes an operational slowdown or shutdown. This type of coverage can take many forms, including business interruption[2], civil authority[3], contingent business interruption[4], and leader[5] coverage. Each type has the same foundation, however: "suspension of operations"[6] caused by "direct physical loss of or damage to property."[7]

In the COVID-19 context, courts have principally grappled with two business interruption coverage issues: (1) whether "physical loss of or damage to property" has occurred, and, if so, (2) whether a viral exclusion bars coverage. Thus far, insurers and policyholders have both demonstrated that they have viable arguments on each of these issues.

1. "Physical loss of or damage to property"

Although each policy is unique, "physical loss of or damage to property" is typically a precondition to business interruption coverage. While the coronavirus may be a novel issue, litigation over the scope of this language is not, providing ample authority for both sides to draw on in arguably analogous contexts. For example, bacterial well water contamination[8], toxic gases and vapors[9], wildfire smoke[10], foul or harmful odors[11], asbestos and lead[12], and Chinese drywall contamination[13] have all been deemed sufficient to establish "physical loss of or damage to property" in other circumstances.

Drawing on these principles, policyholders have argued that the presence of coronavirus particles within their premises constitutes "physical . . . damage to property." They have also argued that the inability to use their property because of the virus's presence constitutes "physical loss of . . . property." In response, insurers have argued that the mere presence of virus particles, which sanitizing can remove, falls short of establishing "physical loss of or damage to property." As might be expected, courts have come down on both sides of this issue.

SAS International, Ltd. v. General Star Indemnity Co. is a good example of the insurer's side of the argument.[14] There, a real estate business owner filed a lawsuit seeking business interruption coverage, arguing that COVID-19 damaged its property "by attaching to surfaces on and within" it, rendering the property "dangerous, unfit, and unsafe for its intended and insured use."[15] The court was not convinced, reasoning that construing "physical loss . . . to cover

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[1] *Covid Coverage Litigation Tracker*, University of Pennsylvania Carey School of Law, https://cclt.law.upenn.edu/ (referenced June 17, 2021).
[2] "Business interruption" coverage applies when loss of or damage to the policyholder's property leads to operational slowdown or shutdown. *See, e.g.*, ISO form CP 00 30 04 02.
[3] "Civil authority" coverage applies when loss of or damage to property within a certain radius of the policyholder's property causes the government to limit or prohibit access to the policyholder's property, leading to operational slowdown or shutdown. *See, e.g.*, ISO form CP 00 30 04 02.
[4] Some policies provide "contingent business interruption" coverage, which applies when loss of or damage to property of a policyholder's customer or supplier leads to operational slowdown or shutdown. *See, e.g.*, *Zurich American Ins. Co. v. ABM Indus., Inc.*, 397 F.3d 158, 168–69 (2d. Cir. 2005).
[5] "Leader" coverage is another optional business interruption coverage, which applies when loss of or damage to another's property that attracts customers to the policyholder's property leads to operational slowdown or shutdown. *See, e.g.*, *ABM Indus.*, 397 F.3d at 170.
[6] Defined as the "slowdown or cessation of [the policyholder's] business activities." *See* ISO form CP 00 30 04 02.
[7] *See, e.g., id.*
[8] *See, e.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005); *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002).
[9] *See, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 (WHW)(CLW), 2014 WL 6675934 (D.N.J. Nov. 24, 2014) (release of ammonia in a packaging facility); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (accumulation of gasoline around and under church building); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-049-B, 1998 WL 566658 (Mass. Super. 1998) (carbon monoxide inside the policyholders' apartment building).
[10] See, e.g., *Or. Shakespeare Festival Assoc. v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016), *order vacated by joint stipulated request of parties*, No. 1:15-CV-01932-CL, 2017 WL 1034203.
[11] *See, e.g.*, *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (odors caused by cat urine); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. App. 1993) (odors from a methamphetamine laboratory); E*ssex Ins. Co. v. Bloomsmouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (foul odor caused by allegedly defective carpet).
[12] *See, e.g.*, *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002); *Sentingel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. 1997).
[13] *See, e.g.*, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010).
[14] No. 20-11864-RGS, 2021 WL 664043 (D. Mass. Feb. 19, 2021), *appeal pending*.
[15] *Id.* at *1, *2.
[16] *Id.*

(INSURANCE COVERAGE) *Continued from page 5*

the deprivation of a property's use absent any tangible damage to the property distorts the plain meaning of the policy."[16] The court ultimately concluded that "the policy does not cover a mere threat to the insured property without any actual physical damage having occurred," and therefore dismissed the policyholder's claims.[17] A number of other courts have reached similar conclusions.[18]

Other courts, however, have sided with the policyholder on nearly identical facts. For example, in *Studio 417, Inc. v. Cincinnati Insurance Co.*, a group of salon and restaurant owners alleged that "customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus," rendering them "unsafe and unusable."[19] The insurer argued, in turn, that business interruption coverage is available "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease."[20] The court found that the policyholders "adequately stated a claim for direct physical loss" by alleging that COVID-19 "attached to and deprived [the policyholders] of their property," noting that "other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose."[21] The court also rejected the insurer's argument that such a holding would mean "physical loss would be found whenever a business suffers economic harm," reasoning that the "economic harm" here was sufficiently "tethered to [the policyholders'] alleged physical loss caused by COVID-19" and related governmental orders.[22] Numerous other courts have reached the same conclusion on similar reasoning.[23]

2. Viral exclusions

Another key issue in any COVID-related business interruption analysis is whether and to what extent a viral exclusion may apply to limit or bar coverage. In 2006, ISO introduced the "Exclusion of Loss Due to Virus or Bacteria" endorsement, excluding "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease."[24] Since then, many insurers have incorporated viral exclusions in their policies in some form. That said, not all property policies contain viral exclusions, and not all those that do mirror the ISO form. Thus, like any coverage issue, the applicability of a viral exclusion is always a case-specific issue.

Not surprisingly, insurers have relied heavily on viral exclusions in denying coverage for coronavirus-related business interruption losses.[25] In response, policyholders have advanced a variety of creative counterarguments, including that viral exclusions do not "exclude losses related to saliva or respiratory droplets";[26] that such exclusions do not contemplate a "worldwide pandemic . . . that result[ed] in statewide shutdown orders";[27] that governmental orders, not COVID-19, were the proximate cause of their losses;[28] and even that COVID-19 is not a "virus."[29] To date, insurers have generally gotten the better of these arguments, though each case, necessarily, has turned on the specific language of the viral exclusion at issue and the facts presented.

Highlighting that every viral exclusion case is fact-specific, *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.* involved a combination "Fungi, Bacteria or Virus Coverage" limitation that excluded coverage for "loss or damage caused directly or indirectly by" the "[p]resence, growth, proliferation, spread or any activity of 'fungi,'

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17 *Id.* at *3, *5.

18 *See, e.g.*, *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868, 879 (11th Cir. 2020) (ruling that "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct and physical,'" and that a "suspension of operations" due to COVID-19, standing alone, did not constitute a "direct physical loss of or damage to . . . property"); *Vandelay Hosp. Group LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2021 WL 462105 (N.D. Tex. Feb. 9, 2021) (ruling that the policyholder "has not adequately alleged that the presence of COVID-19 caused any distinct, demonstrable physical alteration of [its] property so as to trigger coverage"); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-CV-23661-BLOOM/Louis, 2021 WL 86777, *7 (S.D. Fla. Jan. 11, 2021) ("There is no 'direct physical loss' where the alleged harm consists of the mere presence of the virus on the physical structure of the premises.").

19 478 F. Supp. 3d 794, 798 (W.D. Mo. 2020).

20 *Id.* at 799.

21 *Id.* at 800–801.

22 *Id.* at 802.

23 *See, e.g.*, *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *10–*11 (N.D. Ohio Jan. 19, 2021) (holding that the phrase "direct physical loss" could reasonably be interpreted to include the policyholders' inability to use their properties for their intended purpose — i.e., as dine-in restaurants, rather than carry out-only locations); *NeCo, Inc. v. Owners Ins. Co.*, No. 20-CV-04211-SRB, 2021 WL 601501, at *4 (W.D. Mo. Feb. 16, 2021) (finding that the policyholder adequately stated a claim for "direct physical loss" when it alleged the presence of COVID-19 on their premises impaired the property's "value, usefulness, and/or normal function"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 874 (W.D. Mo. 2020) (finding that policyholders sufficiently pled a "direct physical loss" by alleging that "COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties"); *Goodwill Indus. of Orange Cnty., Cal. v. Phila. Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CCX, 2021 WL 476268, at *2–*3 (Cal. Super. Jan. 28, 2021) (finding allegations of the presence of COVID-19 at the policyholder's properties at the time of government closure orders were sufficient to state a claim for "direct physical loss"); *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Ct. Oct. 9, 2020) (holding that that the "ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something," and the policyholders' inability to access their properties due to virus-related restrictions was "unambiguously a 'direct physical loss'" for which the policies afforded coverage).

24 ISO form CP 01 40 07 06.

25 *See, e.g.*, *The Eye Care Ctr. of N.J., PA v. Twin City Fire Ins. Co.*, No. 20-05743 (KM) (ESK), 2021 WL 457890, at *2 (D.N.J. Feb. 8, 2021) (ruling that a viral endorsement excluding coverage "for losses caused directly or indirectly by the presence, growth, proliferation, spread or any activity of . . . virus" barred coverage for the policyholder's losses, which were deemed to have been "caused directly or indirectly by COVID-19"); *100 Orchard St., LLC v. The Travelers Indem. Ins. Co. of Am.*, No. 20-CV-8452 (JMF), 2021 WL 2333244, at *2 (S.D.N.Y. June 8, 2021) (dismissing policyholder's claims and explaining that the policyholder's "business losses were plainly 'caused by,' or at least 'resulted from,' a 'virus' that is capable of inducing physical distress, illness, or disease, and are unambiguously excluded from coverage under [the] policy").

26 *See, e.g.*, *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, 497 F. Supp. 3d 678, 678–79 (N.D. Cal. 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020).

27 *See, e.g.*, *Quakerbridge Early Learning LLC v. Selective Ins. Co. of New Eng.*, No. 20-7798 (MAS) (LHG), 2021 WL 1214758, at *3 (D.N.J. March 31, 2021), *appeal pending*.

28 *See, e.g.*, *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178, 1188–90 (S.D. Fla. 2020).

29 *See, e.g.*, *Stern & Eisenberg, P.C. v. Sentinel Ins. Co., Ltd.*, No. 20-11277 (RMB/KMW), 2021 WL 1422860, at *4, n.6 (D.N.J. April 14, 2021); *Raymond H Nahmad DDS PA*, 499 F. Supp. 3d at 1190.

30 489 F. Supp. 3d 1297, 1301 (M.D. Fla. 2020).

31 *Id.* at 1302.

(INSURANCE COVERAGE) *Continued from page 6*

wet rot, dry rot, bacteria or virus."[30] In a rare win for the policyholder on this issue, the court denied the insurer's motion to dismiss in finding the exclusion ambiguous as applied to COVID-19.[31] Specifically, the court reasoned that "[d]enying coverage for losses stemming from" the coronavirus "does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses."[32]

Policyholders may also be able to turn viral exclusions to their favor on the "physical loss of or damage to property" issue: if viruses could not give rise to covered harm in the first place, there should be no need for these exclusions. That is to say, the very existence of viral exclusions suggests that viruses can, in fact, cause "physical loss of or damage to property"; otherwise, these exclusions would serve no purpose.[33]

CGL Coverage

Given the potential for personal injury claims arising from the pandemic, COVID-19 may also implicate CGL insurance coverage issues. Thus far, there is a dearth of case law surrounding the application of CGL policies to coronavirus-related tort claims. As customers, vendors, and others begin to return to business premises, however, these cases could start to crop up with more frequency.

1. "Occurrence"

To trigger CGL coverage, there must be an "occurrence," which is typically defined as "an accident, including continuous repeated exposure to substantially the same general harmful conditions."[34] Whether an "occurrence" exists is an inherently fact-specific issue, and coronavirus-related cases will likely involve a broad spectrum of scenarios. Key issues could include:

- whether and to what extent policyholders have implemented safety measures to avoid exposure (e.g., enforcing mask and social distancing mandates, enforcing occupancy limits, undertaking regular sanitizing, ensuring proper ventilation, etc.);
- whether the policyholder knew of or contributed to the potential exposure risk (e.g., by forcing infected employees to continue to work); and
- how long allegedly "harmful conditions" remained in place.

2. "Bodily injury"

Whether "bodily injury" exists is likewise an inherently fact-specific issue, particularly because coronavirus can present without apparent physical symptoms. The standard ISO form defines "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time."[35] Whether asymptomatic COVID-19 cases meet this language could be an arguable issue necessitating expert opinion. Similarly, whether emotional distress caused by potential exposure to COVID-19 is sufficient to establish "bodily injury" may be a disputed issue.[36] Outside of the COVID-19 context, a majority of jurisdictions have ruled that emotional distress unaccompanied by any physical manifestation is not a covered harm.[37] That said, this too is necessarily a fact-specific issue, as some policies expressly include "mental anguish" in the definition of "bodily injury."

3. Communicable disease exclusions

Similar to commercial property policies, CGL policies may also include exclusions that could operate to limit or bar coverage for coronavirus-related losses, including the so-called "communicable disease" exclusion. Like property policies, however, these exclusions can take a variety of forms. For example, some policies simply exclude communicable diseases from the definition of "bodily injury,"[38] while others have stand-alone communicable disease endorsements.[39] Moreover, some policies expressly define "communicable disease,"[40] while others (including the standard ISO form) leave the term open to interpretation.[41] Thus, like viral exclusions, whether and how communicable disease exclusions may apply to coronavirus-related coverage claims is necessarily a fact-specific analysis.

Conclusion

The extent to which businesses are covered for COVID-related losses will take several years to sort out in thousands of lawsuits filed throughout the country. Given the current volume of litigation, the variety of arguments available to both sides, and the limited (and often conflicting) opinions to date, there are very few hard and fast rules that can be relied on by either side when analyzing a given claim. Although both insurers and policyholders may already be claiming victory in certain cases and on certain issues, every claim is unique and warrants careful consideration based on the underlying facts and specific policy language at issue.

Joe Beavers and Alex Creticos are Principals, and Danny Adamson is an Associate, at Miles & Stockbridge, P.C. They represent policyholders in insurance coverage claims, litigation, trials, and appeals.

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32 *Id.*

33 *Accord, e.g., Actuant Corp. v. Axis Surplus Ins. Co.*, No. 3:10-CV-1741-P, 2012 WL 13020093, at *4 (N.D. Tex. June 22, 2012) ("An insurance policy should be read as a whole and construed such that none of the language is discarded as superfluous or meaningless. In construing an insurance contract, a construction that gives reasonable meaning to every provision is preferable to one leaving part of the language useless or meaningless.") (internal quotations and citations omitted).

34 *See, e.g.*, ISO form CG 00 01 04 13.

35 *Id.*

36 That is, assuming emotional distress arising from potential coronavirus exposure is even actionable in the first instance. *See, e.g., Weissberger v. Princess Cruise Lines, Ltd.*, No. 2:20-CV-02267-RGK-SK *et al.*, 2020 WL 3977938 (C.D. Cal. July 14, 2020) (dismissing plaintiffs' claim for negligent infliction of emotional distress and reasoning that permitting claims from plaintiffs who were placed in "immediate risk of physical harm" but did not actually contract COVID-19 could lead to a "flood of trivial lawsuits, and open the door to unlimited and unpredictable liability").

37 *See, e.g., Nat'l Fire Ins. Co. of Hartford v. NWM-Okla., LLC, Inc.*, 546 F. Supp. 2d 1238, 1246 (W.D. Okla. 2008) ("[T]he majority of courts hold that a claim for emotional distress, absent any physical injury, does not constitute 'bodily injury' in the insurance context."); *Moore v. Cont'l Cas. Co.*, 746 A.2d 1252, 1255 (Conn. 2000) (same); 9 Couch on Ins. § 126:33 (same).

38 *See, e.g., Clarke v. State Farm Fla. Ins.*, 123 So.3d 583, 584 (Fla. Dist. Ct. App. 2012) (involving a policy that "defined 'bodily injury' to specifically not include" certain "communicable" conditions to the extent "transmitted by any insured to any other person," including "disease, bacteria, parasite, virus, or other organism").

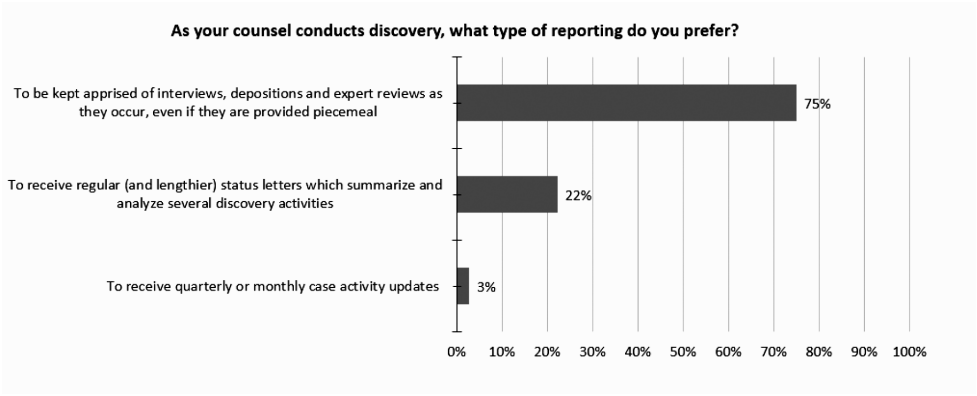
39 *See, e.g.*, ISO form CG 21 32 05 09.

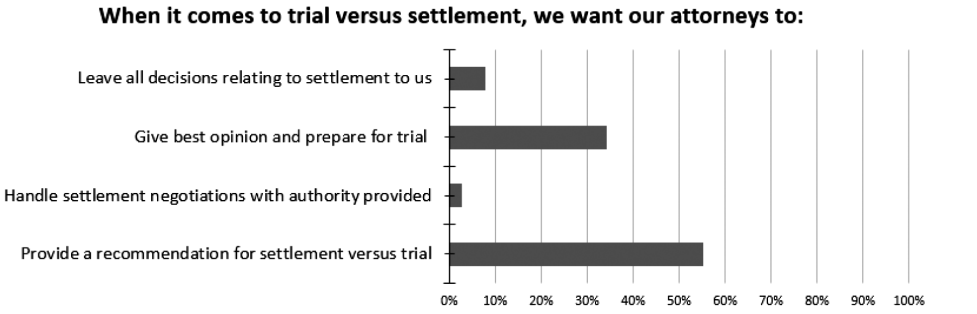
40 *See, e.g., Colony Ins. Co. v. Nicholson*, No. 10-60042-CIV, 2010 WL 2844802, at *1 (S.D. Fla. July 19, 2010) (involving a policy with a "Communicable Disease Exclusion" that expressly defined "communicable disease" to include any "contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products").

41 *See, e.g.*, ISO form CG 21 32 05 09.

Reading Your Clients' Minds

Christina N. Billiet & Rachel E. Brown





If you could have a superpower, what would you choose? We would choose mindreading. We all ponder the question: what do our clients find *most important* when selecting and working with defense counsel? Mindreading would certainly give us the answers. Unfortunately, we have not mastered this skill. So Waranch & Brown commissioned a study to find out what our clients *really* want from us, their defense counsel.

Researchers from an outside consulting agency sought input from over 500 healthcare and insurance industry professionals on LinkedIn. The purpose of this study was to evaluate the considerations facing healthcare professionals in the process of selecting and working with legal counsel, and to report on our findings. We found that many healthcare providers, statewide hospital systems and national insurance carriers were eager to contribute.

Selecting Experts

We know that healthcare professionals are sensitive to the costs of litigation. Measuring cost versus value, however, can be challenging. In our survey, 51.28% of respondents indicated they would prefer their counsel to consult with them before choosing the best expert. Most of the remaining respondents (44%) prefer counsel to choose the best expert, as long as fees are reasonable.

This reiterates the importance of communicating with the client. We work to ensure each client is comfortable with how we select experts and trusts us to choose or recommend the best experts in each case, while also being mindful of cost.

Reporting

We wanted to understand the experience versus expectation of clients who have worked with counsel conducting discovery. Nearly 70% of respondents indicated a desire to be kept apprised of interviews, depositions and expert reviews as they occur, even if they are provided piecemeal.

Bottom line: People like to be kept informed timely, and it is important that their counsel take note of preferences in this regard. Healthcare professionals need the data to fulfill their *own* reporting requirements, and different organizations prefer different formats and different methods of delivery.

Motions

Healthcare professionals often have "big picture" insights that may be important in determining whether a motion will be helpful (or successful). They may also be interested in how that motion will or could impact their overall defense strategy across multiple cases (and multiple law firms).

We asked: If a motion can be made in good faith and can assist in the defense of the case, what are your expectations of counsel? A healthy 64.10% of respondents said they prefer counsel to discuss the proposed motion with them and obtain approval before drafting.

Questions such as when and whether to file often introduce a variety of considerations, so it's good to discuss. Often, such discussions lead to a broader analysis of case issues, which is always valuable.

Trial v. Settlement

In our experience, most healthcare professionals would like us to use our case-specific expertise to assist them in developing an overall valuation of the case. It is not uncommon for them to ask for a percentage likelihood of success at trial. But we wanted to understand what is most valuable to healthcare professionals in this regard.

More than half of the respondents prefer counsel to provide a recommendation for

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www.mddefensecounsel.org/leadership.html

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settlement versus trial, including an estimated settlement value. A third want counsel to provide their "best opinion, then prepare for trial until told otherwise." These two responses are not at odds—we often find that our healthcare professional clients want both!

Case Assignments

Of our respondents, 32% said "experience" is the most important factor they consider when assigning new cases. We find that experience brings with it other important qualities that healthcare professionals look for in counsel — communication skills, responsiveness, and outside-of-the-box aggressive tactics. Interestingly, legal fees are not a primary focus, particularly when the individual receives excellent service in return.

Conclusion

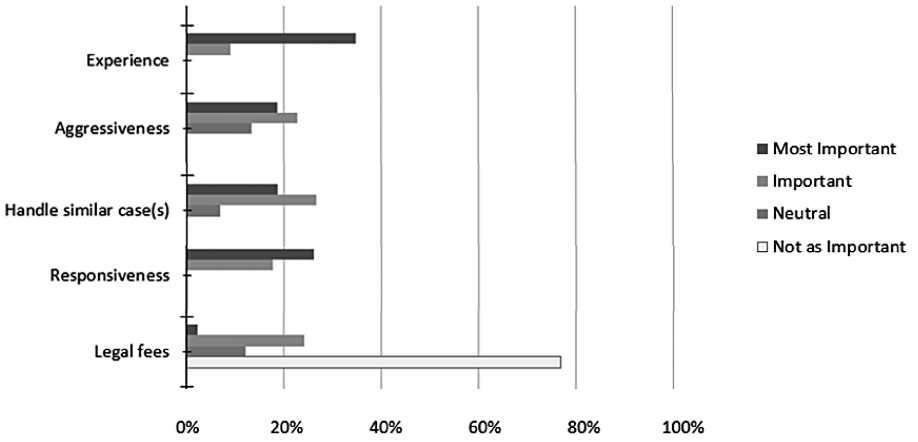
Taken as a whole, the data opens up an interesting perspective. Perhaps defense counsel really do have a superpower, after all. While we can't read minds, each of us possesses the education, training, experience and innate curiosity required to ask good questions about what's important to healthcare professionals, so we can make sure they are working with the liability defense team that's best for them.

Key Takeaways

The information we learned helps us define the expectations of those whose opinions matter most — our healthcare clients and those healthcare professionals working in related professions. Here are the key takeaways from our study:

- Healthcare professionals prefer that counsel guide and consult them through the process of choosing the best expert — though they still trust counsel to use their judgment.
- Healthcare professionals like to be kept informed and find value in regular reporting.
- Healthcare professionals want counsel to discuss the proposed motion with them and obtain approval before drafting.
- More healthcare professionals want counsel to provide a recommendation when faced with choosing settlement or trial, and to recommend a settlement value.
- Legal fees are not as important as quality of service.
- The experience level of the firm and lawyer is most important — experience brings communication skills, responsiveness, and outside-of-the-box aggressive tactics.

In deciding which attorney will be asked to handle a new case assignment, the most important factors we consider are:



Christina N. 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 at trial and in a variety of Board of Physician, guardianship and hospital privileging matters.

Rachel E. Brown is a trial attorney and associate at Waranch & Brown. She defends medical malpractice cases, as well as representing health care providers in professional licensing matters .

Editors' Corner

The editorial staff are pleased to present this edition of *The Defense Line*. We enjoyed the opportunity to meet and thank some of our past and current contributors in person at the Annual Meeting and Crab Feast, and look forward to gathering with MDC members at future live events. We appreciate the outstanding response to our call for articles, advice, resources, and spotlights for this edition. In particular, we wish to thank the following individuals for their contributions: **Jennifer Alexander** and **Kelly Kylis** of McNamee Hosea; **Christina Billet** and **Rachel Brown** of Waranch & Brown, LLC; **Joshua Kahn**, **Taylor McAuliffe**, **Joseph Beavers**, **Alexander Creticos**, and **Daniel Adamson** of Miles & Stockbridge, and **Jeff Trueman, Esq.**, Mediator & Arbitrator.

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

Rachel L. Gebhart
Co-Chair, Publications Committee
GodwinTirocchi, LLC
(410) 418-8778

Nicholas J. Phillips
Co-Chair, Publications Committee
Gavett, Datt & Barish, P.C.
(301) 948-1177

Joyce Miser v. Walmart

Jennifer Alexander & Kelly Kylis

Plaintiff was a shopper at Walmart when she slipped on an unknown glittery substance on the floor in the main aisle way. Plaintiff fractured her patella as a result of the fall, and required two surgeries to repair the fracture. The fall was captured on store surveillance video. Plaintiff filed suit in the Circuit Court for Howard County seeking damages of up to $74,995. Plaintiff primarily alleged that Walmart had actual notice of the hazardous condition due to Walmart's manager and other associates seen on the video in close proximity to the substance on the floor prior to the fall, and alleged in the alternative that Walmart was on constructive notice of the hazard. Plaintiff further asserted that the video proved that the store manager saw the substance on the ground when he looked in that direction, and then used his walkie-talkie to report the spill approximately 45 minutes prior to the fall . Walmart's former store manager (who had subsequently moved to China, but was back in the States briefly for vacation and agreed to sit for a deposition) testified that he did not see the substance at any time, did not know where it came from or what it was, and did not know how long it had been on the floor. Walmart also argued that the Plaintiff and her teenage granddaughter walked over the area several times while shopping, and did not notice anything on the floor as recently as several minutes prior to the fall.

Walmart filed a Motion for Summary Judgment, arguing no genuine dispute that Walmart did not have actual or constructive notice. Plaintiff opposed the motion citing the video as evidence. After oral argument, Judge Lenore Gelfman granted summary judgment on September 15, 2020. Plaintiff filed a timely request for an In Banc Review. Briefing was submitted, and oral argument took place on March 18, 2021 before Judges Berhnardt, Kramer and McCrone. On April 9, 2021, the Panel issued a Memorandum and Order stating that the trial court properly entered summary judgment in favor of Walmart based on Plaintiff's inability to prove that Walmart had actual or constructive notice of the dangerous condition.

Jennifer Alexander is a Principal at McNamee Hosea, former prosecutor, and veteran trial attorney with experience handling complex civil and criminal matters in both state and federal courts. She regularly defends retailers and other business throughout Maryland, as well as other states in wrongful death and complex civil cases.

Kelly Kylis is an Associate at McNamee Hosea, and former law clerk on the Court of Appeals. Kelly is very experienced both as a trial attorney and appellate attorney, having argued multiple times before the Court of Special Appeals and Court of Appeals. Kelly's practice focuses on premises liability, business litigation and appeals.

Recent Events

Virtual Scavenger Hunt & Happy Hour

Maryland Defense Counsel ("MDC") held its first ever **Virtual Scavenger Hunt and Happy Hour** on **Wednesday, May 12, 2021**. The event hosts included Lindsay Coulter of ION Medical Designs, LLC and Colleen K. O'Brien, MDC President. Participants competed against their MDC colleagues to see who could be the quickest to locate common and uncommon objects around the home or office. The winning player received a gift courtesy of ION Medical Designs.

MDC would like to thank ION Medical Designs for sponsoring this event and participants who helped to make it a fun and memorable experience.

Event Sponsor ION MEDICAL DESIGNS

Best Practices for Remote and Video Depositions

Maryland Defense Counsel ("MDC") held the seminar **"Best Practices for Remote and Video Depositions"** on **Wednesday, April 14, 2021**. Sharon Rabinovitz and Barbara Landes of Veritext presented, and the event was moderated by Katherine Lawler, Nelson Mullins Riley & Scarborough LLP. Covered topics included:

- Exhibit Distribution Best Practices
- Considerations When Preparing the Witness
- Swearing in the Witness Remotely from any State or Globally
- Importance of Videotape Depositions
- Making and Showing Video Clips for trial, arbitrations and mediations

MDC would like to thank Veritext for sponsoring this event and members who attended this educational seminar.

Event Sponsor VERITEXT LEGAL SOLUTIONS

MDC's 2021 Crab Feast

Maryland Defense Counsel ("MDC") held its **Annual Meeting and Crab Feast** at Nick's Fish House Upper Deck in Baltimore on Thursday, June 17, 2021. MDC would like thank our members and sponsors for their support of MDC and the new board. It was great to finally be able to meet with everyone in person again!

New board members include:

President: Katherine A. Lawler, Nelson Mullins Riley & Scarborough LLP

President-Elect: Christopher C. Jeffries, Kramon & Graham PA

Treasurer: Sheryl A. Tirocchi, GodwinTirocchi, LLC

Secretary: Amy E. Askew, Kramon & Graham PA

Immediate Past President: Colleen K. O'Brien, Travelers

Official Event Sponsor

ION MEDICAL DESIGNS

Overconfidence and Risk (mis)Management

Jeff Trueman

Imagine a wrongful death case where a bicyclist dies after colliding into a trailer that was parked behind a landscaping truck. The deceased rider suffered trauma to the top of his head and his helmet was cracked down the middle, suggesting he wasn't looking where he was going. Apparently the truck did not stop suddenly and the trailer was probably parked legally. Jury research indicates these points will be important.

The defendant has two insurance policies, one for $2 million dollars in primary coverage and another for $10 million in excess coverage. Assume a comparative fault jurisdiction where any award to the plaintiff may be reduced by a percentage if she or he is found partially at fault for the accident. As defense counsel or claims professional, would you reject a settlement demand made by the surviving family to settle within the limits of the primary coverage?

This was a real case in Texas. Unfortunately for the defense team, who rejected three demands to settle for $2 million or less, the jury awarded the surviving family almost $28 million dollars. Ultimately, the surviving family accepted almost $10 million in order to avoid an appeal. But that's not all. Because it failed to accept reasonable settlement demands from the plaintiff, the primary carrier was liable under Texas law for the entire settlement amount.

Some might say the jury's verdict of $28 million dollars is a good example of a "nuclear verdict" or "social inflation." Carriers and the defense bar have been talking about these phenomena for a number of years so it seems to me the defense team in the Texas case knew a socially inflated verdict was possible but seemed remote enough to reject three demands to settle for $2 million or less.

Of course, plenty of cases go the other way. Sometimes plaintiffs walk away from decent settlement offers only to get less or nothing at trial. Talented lawyers on both sides can be blinded by confirmation bias and overconfidence. These biases, or mental shortcuts called heuristics, may be invisible but they are powerfully real and handicap our ability to make good decisions. The famous physicist, Richard Feynman, said "The first principle is not to fool yourself – and you are the easiest person to fool." When something bad happens to us, we blame our environment, such as social inflation or a biased judge (who may or may not have been "plaintiff friendly" in the Texas case). But when we see bad things happen to others, we think there's something wrong with their character or personality.

Over a decade ago, researcher Randall Kiser documented how often attorneys did better or worse at trial compared to their opponents' last settlement proposal. Generally, Kiser found that plaintiffs' attorneys did worse at trial almost 60% of the time at a cost of about $40,000 per error. On the defense side, Kiser found that they did worse at trial in about 25% of cases at a cost of approximately $1.1 million dollars per error.

Because most cases settle at some point, perhaps these findings have resonated with the bar. On the other hand, some cases really need to be tried by a judge or jury; some fights are worth having. As Kiser's research shows, a bad outcome at trial for one side is a great outcome for the other. My point is not that counsel should default towards settlement. Instead, consider practices that might improve decision-making.

First of all, recognize the possibility that unexpected factors may substantially interfere with your assessment. Although we feel empowered when we say "no" to a settlement offer or demand, does that feeling of satisfaction make us blind to what may lie ahead? Second, defense litigators seem to ignore a powerful cognitive bias leveraged by the plaintiff's bar when its members ask juries to make awards: anchoring (decisions are biased in favor of a reference point that can be suggested in advance of a decision). You can read more about anchoring elsewhere but I wonder why defense litigators don't counter this bias more often during their closing arguments. It may be unorthodox and scary at times but you could say the same thing about trials in general and the Texas case in particular.

Third, can your team talk about how its evaluation may be off? Granted, some teams have no interest in lawyers who recommend settlement; they want counsel to focus on winning the case – period. But I wonder whether the defense team in the Texas case permitted or encouraged its members to challenge the assumption that a verdict above $2 million may not be so remote. Considering what's at stake in some cases, it's too risky not to have that discussion. Lady Justice may uphold the scales of justice in one hand, but don't forget she carries a large sword in her other hand, while blindfolded.

Jeff Trueman is a commercial mediator. He can be reached at jt@jefftrueman.com

For Immediate Release

Kramon & Graham Trial Attorney M. Natalie McSherry Inducted as 125th President of the Maryland State Bar Association

Baltimore, MD
(June 14, 2021)

Kramon & Graham, a leading Maryland law firm providing litigation, real estate, and transactional services, announced today that principal **M. Natalie McSherry** has been installed as the 125th President of the Maryland State Bar Association. Natalie was sworn in during the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland on June 11 for the 2021 – 2022 bar year.

"I am honored to be inducted as the 125th President of the Maryland State Bar Association," said Natalie. "The MSBA is an outstanding organization that is supported by many talented people, from its dedicated membership to its energetic staff. I look forward to keeping the momentum of our work moving forward as we strive to improve member services, promote professionalism, and provide access to justice for all members of our community."

Nationally known, and with more than 40 years of experience in commercial litigation, health care law, and alternative dispute resolution, Natalie is recognized as one of the State's preeminent trial lawyers. For her competence, professionalism, civility, and commitment to public service, she has received numerous awards, including the Daily Record Leadership in Law Lifetime Achievement Award, Maryland Volunteer Legal Services Winnie Borden Pro Bono Leadership Award, and the Maryland Legal Services Corporation Arthur W. Machen Award. Last year she received the 2020 University of Maryland Carey Law Distinguished Graduate Award and was elected to the Maryland Carey Law Board of Visitors.

Natalie has served the MSBA in various leadership roles, including service as a member of the MSBA Board of Governors and Executive Committee, and Treasurer. She has been a Fellow of the Maryland Bar Foundation since 1984 and, until earlier this year, had served on the organization's Board of Directors since 2011, including service as President from 2017 – 2019.

Natalie is chair of the board of Woodsboro Bank and a trustee of Catholic Charities of Maryland. She is a Fellow of the American College of Trial Lawyers, and a member of the American Health Lawyers Association, Maryland Society for Healthcare Risk Management, Bar Associations of Baltimore City and Frederick County, and the American Bar Association, among many other professional and community organizations. She is a graduate of the University of Maryland Francis King Carey School of Law (J.D., 1974) and Manhattanville College (B.A., 1971).

About the Maryland State Bar Association

The MSBA exists to effectively represent Maryland's lawyers, to provide member services, and to promote professionalism, diversity in the legal profession, access to justice, service to the public and respect for the rule of law. With over 23,000 members, the organization represents every corner of the state, every career stage, and every area of practice. The MSBA works to expand members' careers and practices, as well as partner with organizations across the state to give all Marylanders access to justice. Visit the MSBA website at msba.org.

About Kramon & Graham

Consistently recognized as one of Maryland's leading law firms, Kramon & Graham provides litigation, real estate, and transactional services to clients both locally and across the country. The firm's practices include commercial litigation, white-collar and criminal defense, class actions, government contracts, professional liability defense, personal injury and wrongful death claims, state and federal appeals, asset recovery, real estate, transactions, and insurance coverage. For more information about Kramon & Graham, visit www.kramonandgraham.com.

Media Contact:
Mary Ellen Chambers
Marketing Director
Kramon & Graham, PA
Phone: 410-347-7431

Not Too Specific: Personal Jurisdiction After *Ford Motor Co. v. Montana Eighth Judicial District Court*

Joshua F. Kahn & Taylor M. McAuliffe

The Supreme Court's latest personal jurisdiction opinion — *Ford Motor Co. v. Montana Eighth Judicial District Court* — seems to raise more questions than answers regarding the contours of specific jurisdiction. A curious result, given the eight-member panel[1] unanimously agreed that Ford *was* subject to specific jurisdiction in the forums — Montana and Minnesota — where the underlying suits were filed.

Writing for the five-member majority, Justice Kagan reached this conclusion by recognizing that specific jurisdiction may exist where a defendant's extensive activity is "related to" the plaintiff's claims, even if not the but-for cause. The concurring opinions heavily criticized the majority's "new test," lamenting that the majority offered lower courts and litigants little guidance for discerning the limits of "related to" specific jurisdiction.

Here, we analyze the Court's opinion and its practical impact on personal jurisdiction litigation moving forward.

I. A Personal Jurisdiction Primer

Before jumping into the deep end, a brief review of personal jurisdictions basics is in order. As a matter of due process, a court must possess personal jurisdiction over a defendant before it may determine that defendant's rights and liabilities. In the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Supreme Court proclaimed that personal jurisdiction requires that a defendant have "minimum contacts" with the forum state. Since *International Shoe*, the Court has identified two types of personal jurisdiction — general and specific — and expounded on the "minimum contacts" requirement for each. Specific jurisdiction exists where the claims against the defendant arise out of or relate to the defendant's contacts with the state. General jurisdiction, on the other hand, is established when the defendant has continuous and systematic contacts with the state, such that the defendant is "at home" in the state. A corporation is subject to general jurisdiction where it is incorporated, maintains its principal place of business, and wherever its operations are so substantial that the corporation is deemed "at home." Unlike general jurisdiction, the existence of specific jurisdiction requires a more extensive analysis of the plaintiff's claims and how they relate to the defendant's contacts with the forum.

II. Case Overview

Ford was sued in separate product liability lawsuits in Montana and Minnesota. Although the plaintiffs were residents of and injured in these states, the Ford vehicles at issue were originally sold in other jurisdictions to other individuals. General jurisdiction was not at issue, and Ford argued specific jurisdiction was lacking because it neither sold nor designed the vehicles in Montana or Minnesota. While Ford acknowledged its significant contacts with each state — marketing, dealerships, servicing of vehicles, sales of replacement parts, to name a few — Ford argued that, because these activities did not "give rise" to the plaintiffs' product liability claims, specific jurisdiction could not be exercised.

The majority rejected Ford's "causation-only" approach to specific jurisdiction:

> *None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. … [O]ur most common formulation of the [specific jurisdiction] rule demands that the suit arise out of* ***or relate*** *to the defendant's contacts with the forum. The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum.*

141 S. Ct. 1017, 1026 (2021) (cleaned up; emphasis in original). In this case, the majority found that Ford's "veritable truckload of contacts with Montana and Minnesota" — including extensively promoting, selling and servicing the allegedly defective vehicle models at issue — supplied a sufficient nexus between the litigation and the forums to permit the exercise of specific personal jurisdiction over Ford. *Id.* at 1031-33.

Justice Alito wrote a concurring opinion to "quibble" with the majority's "new gloss" on specific jurisdiction case law, namely, the recognition of "a new category of cases in which personal jurisdiction is permitted: those in which the claims do not 'arise out of' (*i.e.*, are not caused by) the defendant's contacts but nevertheless sufficiently 'relate to' those contacts in some undefined away." *Id.* at 1033. Justice Alito explained that these phrases did not create separate groups for jurisdiction, but simply expressed "the basic 'minimum contacts' standard adopted in *International Shoe*." *Id.* Moreover, despite the majority's assurance that the "relate to" brand of specific jurisdiction "incorporates real limits," Justice Alito predicted that lower courts will struggle identifying those boundaries, which are more clearly established by a "rough causal connection" prescribed by prior case law. *Id.* at 1033-34.

Justice Gorsuch, in his concurring opinion, expressed equal concern over the amorphous "relate to" test and lack of "meaningful guidance" as to what, among "virtually infinite" permutations of contacts with a forum, will suffice. *Id.* 1034-35. Justice Gorsuch explained that the majority's "new test" unnecessarily risks "adding new layers of confusion to our personal jurisdiction jurisprudence." *Id.* at 1035.

III. Practical Impact

While scholars may debate whether *Ford* has broken new ground or merely recognized a category of specific jurisdiction that has

Continued on page 20

[1] Justice Barrett abstained.

(FORD MOTOR COMPANY) *Continued from page 19*

existed since *International Shoe*, one thing is clear: the majority's opinion will inspire new and creative efforts by plaintiffs to haul corporations into unfavorable forums. Even before *Ford*, corporations knew that, to limit or eliminate their exposure to unfavorable forums, they needed to reduce or eliminate purposeful contacts with those forums. *Ford* does not materially alter that analysis. Rather, by allowing specific personal jurisdiction to be exercised wherever the corporation has "extensive" contacts that somehow "relate to" the plaintiff's claims, *Ford* gives plaintiffs greater leeway to forum shop wherever the corporation does business. Ultimately, *Ford* seems to lower the bar for establishing specific jurisdiction.

Corporations with multi-state operations — particularly marketing and sales — should prepare for a surge in filings in the "worst" jurisdiction where they operate. Undoubtedly, a certain percentage of those filings that would have flunked a pre-*Ford* personal jurisdiction challenge now may survive. Of course, *Ford* does nothing to diminish venue and forum non conveniens challenges, which remain powerful tools to counter forum shopping.

As with any new test articulated by the Supreme Court, the focus now shifts to lower courts tasked with interpreting the limits of "related to" jurisdiction. While all litigants and courts would benefit from a consistent and predictable line of case law developing "related to" specific jurisdiction, this seems unlikely. Applying the phrase "related to," particularly in the context of a jurisdictional analysis, "is a project doomed to failure" because "everything is related to everything else." *Id.* at 1033 (Alito, J., concurring) (cleaned up).

Finally, it is unclear if and how the "related to" test will apply to jurisdictional decisions regarding corporations that are "present" in a forum strictly via internet marketing and sales. The majority's opinion specifically noted that its analysis did not consider "internet transactions, which may raise doctrinal questions of their own." *Id.* at 1028 n.4. An internet-based corporation may find more success arguing that their contacts do not amount to purposeful activities in a jurisdiction, and thereby avoid the question of whether their contacts "relate to" the plaintiff's claims altogether.

While *Ford* leaves many questions, one thing is certain: as with all landmark personal jurisdiction decisions since *International Shoe*, unique facts, creative lawyering and logical opinion writing will, slowly but surely, fill the gaps until the Supreme Court speaks again on this issue.

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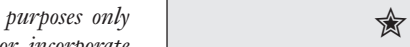
Note: This article appeared previously at www.mslaw.com on April 22, 2021.

Joshua F. Kahn is a principal in the Products Liability & Mass Torts Practice Group at Miles & Stockbridge. His practice spans products liability and toxic tort defense, class actions, and high-stakes business and personal injury disputes.

Taylor M. McAuliffe is an associate in the practice group and works on a broad range of products liability, business, personal injury, and environmental disputes.

The MDC Expert List

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.



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Spotlights


The defense team secured a trial victory in the Circuit Court for Baltimore County in this wrongful death medical malpractice case relating to the death of a 75-year-old woman in 2018. The Plaintiffs, represented by Dugan, Babij, Tolley & Kohler, LLC, claimed the Defendant hospital, ED physician and nurses failed to diagnose and treat sepsis, resulting in their mother's death.

The hospital and nursing staff were represented by **Christina N. Billiet** and **Kaitlan M. Skrainar** of Waranch & Brown, LLC. The ED physician was represented by Ronald Shaw and Wilson Barnes of Shaw & Morrow, PA.

Parker, et al. v. Greater Baltimore Medical Center, et al.; The Honorable Colleen Cavanaugh; Circuit Court for Baltimore City; date of verdict May 19, 2021.

Christina N. Billiet, Esquire, is a trial attorney and Partner at Waranch & Brown.

Kaitlan M. Skrainar, Esquire, is a trial attorney and Associate at Waranch & Brown.

Upcoming events will be announced at MDdefensecounsel.org.


Debra Wynne and **Mary Malloy Dimaio** obtained summary judgment in favor of their respective clients in a recent case in Montgomery County, *Elliott v. Fernando's Marble Shop, Inc., et al.* Ms. Wynne represented the lessee of a condominium unit in a commercial building in Rockville. Ms. Dimaio represented the owner of the condo. Plaintiff was a utility technician called to the building by the lessee, which had suffered a cable outage. He reported to the condo unit first and saw the large skylight in that space, then proceeded onto the roof of the building to trace the location of the cable. In doing so, he walked along the edges of two sides of the building and found that the cable then ran down the side of it, so he needed to get back to the ground floor. Taking a shortcut instead of retracing his steps, which he knew to be safe, he walked diagonally across the roof, stepping onto the skylight of another condo unit owner and crashing through it onto a concrete floor. The skylights are a different color as compared to the rest of the roof.

Plaintiff maintained that the lessee and owner of the business which called for service owed him a duty of care to warn him about the skylights on the roof when he responded to the service call, and that the owner of the unit whose skylight he crashed through was negligent in failing to warn of the presence of the skylight by making it more obvious. All three defendants were granted summary judgment as the lessee and owner had no duty to prevent an injury to the plaintiff on a neighbor's property, and the neighbor owed him no duty as he was a trespasser as to it.

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