COHEN SEGLIAS
PALLAS GREENHALL & FURMAN PC

2020 | VOLUME 1

CONSTRUCTION IN BRIEF

BUILDING SUCCESS

COVID-19

What's New?

Ashling A. Ehrhardt
Co-Editor-in-Chief

Christopher W. Sexton
Co-Editor-in-Chief

Sydney Pierce
Associate Editor

In our first issue of 2020, you will learn about the impacts of the coronavirus pandemic on the construction industry. As a party to a construction contract, we address how you can effectively adapt to this fluid and perilous situation. In addition, you will learn about recent developments pertinent to non-compliance with wage and labor laws, as well as the Pennsylvania Supreme Court's consideration of subsurface property rights. In the Q&A on page 6, you will learn more about our newest partners, Matthew Gioffre and Michael Metz-Topodas. Please reach out to us with any concerns during these challenging times. We are here to help you navigate through them.

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Christopher D. Carusone
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Matthew T. Gioffre
John A. Greenhall
Brian A. Lawton
Michael Metz-Topodas
Jackson S. Nichols
Steven M. Williams

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Cohen Seglias Coronavirus Update

As the effects of the coronavirus pandemic evolve, the rules are changing every day as federal, state, and local lawmakers issue new regulations, restrictions, and reporting requirements. Cohen Seglias attorneys are closely monitoring the legal and regulatory landscape to provide clients and contacts with up-to-date information and advice. For all updates and webinars, please visit www.cohenseglias.com/covid-19.

During this pandemic, our focus remains on the health and well-being of our employees, clients, and communities. The firm is fully open for business, but we are working remotely.

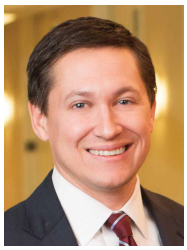
Please do not hesitate to contact us with any questions you may have. We hope that you and your loved ones stay safe as we navigate through the challenges that lie ahead.

New Faces

Stephen A. Venzie joined Cohen Seglias as senior counsel in the Wilmington, DE office. As an experienced construction litigator, Steve counsels public and private owners, engineers, general contractors, construction managers, subcontractors, suppliers, and sureties through all stages of public, private, and federal projects. Before joining Cohen Seglias, he served as a vice president of a well-respected, boutique law firm specializing in construction law and litigation.

Congratulations to Matthew Gioffre and Michael Metz-Topodas!

We are pleased to announce the promotions of Matthew Gioffre and Michael Metz-Topodas to partners of the firm, effective January 1, 2020.



Matthew Gioffre focuses his practice on complex construction law claims on behalf of general contractors, subcontractors, design-builders, and material suppliers. He has broad experience litigating claims involving construction and design defects, product defects, delays, unforeseen conditions, and out-of-scope work claims on public, private, and federal projects. Matt also pursues and defends lien claims, bond claims, and Miller Act claims. In addition, he negotiates contracts on behalf of project owners, general contractors, and subcontractors on large commercial construction projects. Matt has been recognized on the Super Lawyers' Pennsylvania Rising Stars List for Construction Litigation every year since 2013.

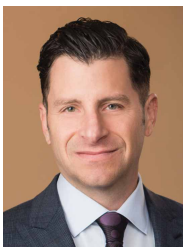
Michael Metz-Topodas represents general contractors, subcontractors, owners, designers, and suppliers on private, public, and federal projects. He handles cases in state and federal court dealing with a range of construction issues, such as delay and inefficiency claims, design and construction defects, unforeseen site conditions, project scope disputes, and bond and mechanics lien claims. Michael also helps clients navigate enforcement and investigations by the Occupational Safety and Health Administration. His commercial litigation work includes disputes over corporate ownership and shareholders' rights and insurance coverage issues, as well as Telephone Consumer Protection Act and Fair Debt Collection Practices Act claims.

Firm Promotions

Cohen Seglias is excited to announce several additional promotions. To meet the needs of our growing firm, we have made changes to our management structure. In addition to serving as Managing Partner, **George E. Pallas** is now Chief Executive Officer and will focus on client relationships and firm strategic growth. **Steven M. Williams** is the Administrative Partner, a new role responsible for legal operations within the firm. Steve will work closely with Chief Operating Officer **Kathleen Garrity** on administrative operations. Both George and Steve will continue their legal practices and representations of clients.

In addition, **Christopher D. Carusone** was named Managing Partner of the firm's Harrisburg office and **Jonathan A. Cass** was promoted to Chair of the Commercial Litigation Group.

Congratulations to Lane F. Kelman!



Congratulations to Lane Kelman, Chair of the firm's Green Building Group, who was named a shareholder and joined the firm's Board of Directors. Lane has made significant contributions to Cohen Seglias' success and growth over the past 19 years. In his construction litigation practice, Lane represents developers, general contractors, and trades in complex construction matters throughout the United States and internationally. He has extensive experience with both private and public projects. Lane's work ranges from contract negotiations to claim prevention and management, construction defects, and suspension and debarment proceedings.

Cohen Seglias Continues Tradition of Holiday Season Giving

Cohen Seglias is proud to continue our tradition of supporting various children's charities throughout the holiday season with toy collections and monetary donations. Cohen Seglias matches all contributions.

Lisa M. Wampler, Managing Partner of the Pittsburgh office, with the office's donations.

For more information about Cohen Seglias news and events, contact the firm's Marketing Director, Kerstin Isaacs, at 267.238.4730 or kisaacs@cohenseglias.com.

From the Sky and to the Depths: PA Supreme Court Considers Subsurface Trespass

By Brian A. Lawton

A maxim of real property rights is "to whomever the soil belongs, he owns also to the sky and to the depths," which is derived from the Latin expression *cujus est solum, ejus est usque ad coelum et ad infersos*. This maxim, referred to as the *ad coelum doctrine*, proposes that a landowner owns everything above and below the property to an indefinite extent.

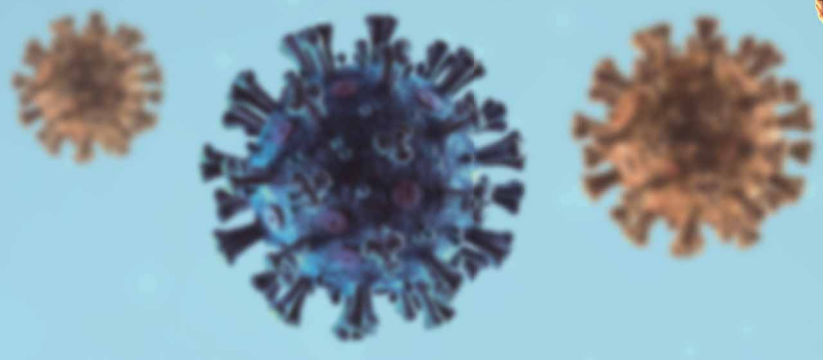
Since the nineteenth century, Pennsylvania courts have applied the "rule of capture." This is a principle of oil and gas law stating that there is no liability for the drainage of oil and gas under the lands of another so long as there has been no physical trespass on the surface. The principle is derived from a physical property of fluids, in which fluids naturally move across a pressure gradient from high to low. This flow does not respect property boundaries. If a property owner drills a well on their property but the well does not physically pass onto her neighbor's property, she is not a trespasser if oil and gas are drained from her neighbor's property into her well through a common reservoir that extends through both of their properties.

In an attempt to address the application of ancient legal precepts to the modern world, the Pennsylvania Supreme Court recently issued its much-anticipated ruling in *Briggs v. Southwestern Energy Production Company*. *Briggs* addressed a topic of great interest to the oil and gas industry: whether the rule of capture is applicable when the means of production is a technique known as hydraulic fracturing. Hydraulic fracturing, commonly referred to as "fracking," involves pumping large quantities of fluids at a high pressure down a wellbore, creating fractures in the target rock formation. Hydraulic fracturing fluid commonly consists of water, proppant, and chemical additives that open and enlarge fractures within the rock formation. These fractures can extend several hundred feet away from the wellbore. The proppants—sand, ceramic pellets, and other incompressible particles—hold open the newly created fractures. The fluid is withdrawn from the well, leaving the proppants in place to hold the fissures open. The technique enhances the drainage of oil or gas into the wellbore, where it can be captured.

While fracking is not a new production technique, it has gained recognition as a cost effective means to produce oil and gas from unconventional reservoirs. Unconventional reservoirs are so named because the oil and gas are often highly dispersed within the surrounding rock formations, rather than

Continued on page 4

Construction Impacts During the Coronavirus Crisis: Force Majeure and Other Tools in Your Contract



By John A. Greenhall and Jackson S. Nichols

The novel coronavirus disease, alternatively referred to as COVID-19, recently attained pandemic status as it sweeps across the globe. Markets everywhere are being disrupted and, while the extent of its impact is still uncertain, it is clear that there will be a significant fallout for the world economy.

Coronavirus originated in China at the end of 2019 and quickly resulted in dramatic countermeasures by the country's government. Chinese government containment efforts and quarantines have slowed or shut down factories in dozens of the country's cities and provinces, leading to forecasts of a sharp falloff in the production of everything from cars to smartphones. The construction industry has not been spared these effects: even by conservative estimates, some American construction firms rely on China for up to 80% of their materials. As a result, many U.S. firms are seeing material delays, price increases, and logistics breakdowns, leading to project delays and higher-than-expected costs. Even worse, contractors will experience labor shortages as more states order region-specific quarantines and shutdowns of business activities. These effects will be deeply felt by the industry now, and, in all likelihood, contractors will continue to face serious challenges going forward.

Contractors should prepare for these dramatic disruptions by reassessing their supply chains and sources of labor, and ensuring that their current contracts adequately protect them from the ongoing shocks to the industry.

Force Majeure Clauses

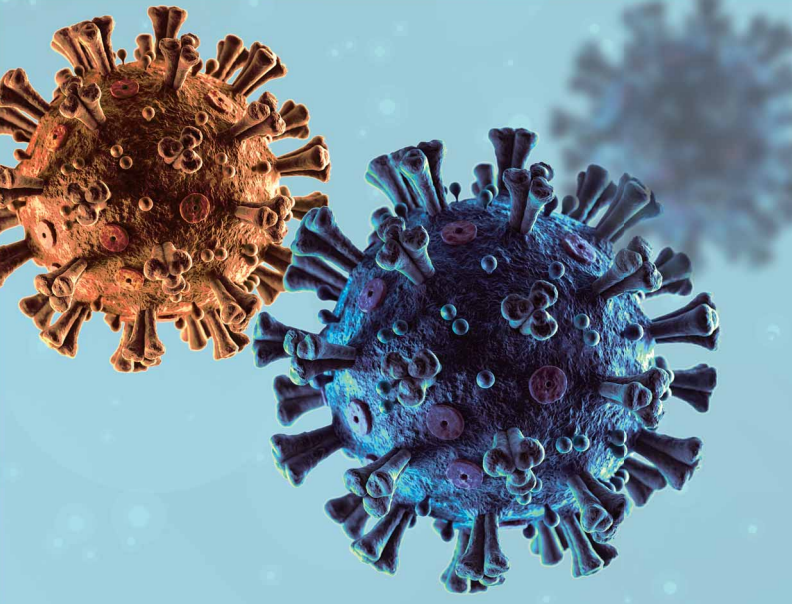
In the wake of coronavirus, a great deal of legal commentary has focused on the "force majeure" clause in contracts. While the clause can be useful, contractors should be wary of overly relying on it, as its application can be limited. A force majeure clause is a contractual provision that expressly spells out when an unanticipated event would excuse the performance of one or more parties to a contract. Traditionally, the clause covers catastrophic or otherwise unexpected events considered to be so-called "Acts of God," such as extreme weather, wars, strikes, and even changes in the law that would make contractual performance impossible. Importantly, it requires a causal link between the force majeure event and the failure to perform.

However, such clauses must be carefully drafted to protect a contractor. Courts are reluctant to treat force majeure provisions as a get-out-of-jail-free card and accordingly will interpret such provisions narrowly. A force majeure clause will not be interpreted to excuse non-performance for normal, expected risks. For example, a key employee becoming ill, even from a pandemic disease like coronavirus, likely would not trigger the clause.

A recent case involving supply chain disruptions, *Kyocera Corp. v. Hemlock Semiconductor, LLC*, became a bitter lesson for one company on the limits of the force majeure clause. Kyocera, a solar panel producer, was impacted by unforeseen tariffs levied by the U.S. on Chinese-manufactured solar panel components in retaliation for illegal Chinese subsidies. The tariffs meant that Kyocera was forced to pay Hemlock well above the newly suppressed market price for the polysilicon components in the panels, making the contract no longer commercially viable for Kyocera. In an attempt to escape the contract, Kyocera filed suit and invoked its force majeure clause to excuse its obligation under the contract to purchase the components. Even though the clause specified that it applied to "delays or failures in performance of its obligations... that arise out of or result from causes beyond such party's control, including... acts of the Government," the court dismissed the suit, holding that Kyocera was still able to perform, albeit under circumstances not to its liking.

Because of the narrow latitude given to such clauses, it is crucial that they are drafted to anticipate and specify force majeure events. Take the current coronavirus crisis—the World Health Organization declared that it had grown from an epidemic (a widespread occurrence of an infectious disease in a community at a particular time) to a pandemic (a worldwide spread of a new disease) on March 11, 2020. A force majeure clause specifying that it may be invoked in the event of a "pandemic" may not have been properly invoked prior to March 11 when the disease was still considered only an epidemic. The use of the word "epidemic" versus "pandemic" in the clause could be critical to determining whether the clause applies.

A properly drafted clause should specify the unanticipated event(s), state which party is allowed to invoke the clause to suspend its performance, and specify the agreed-upon outcome if the clause is properly invoked. Parties may decide to limit the outcome to excusing the performance of one party, or the provision may provide for other remedies, such as a suspension of work until the unanticipated event is no longer present or a termination for convenience by the owner. Force majeure clauses will often include notice provisions that provide a time limit for the party invoking the clause to inform the other party.



Given the current coronavirus pandemic, contractors are advised to consult their existing contracts to determine whether the clause can be invoked to alleviate any material cost increases, labor shortages, or other issues affecting their performance.

Other Legal Tools

While it can be helpful if properly drafted, force majeure may not be the best tool in a contractor's legal toolkit. Another option is a material price escalation clause, which allows for a price adjustment to be made in the event of a change based on an agreed-upon metric. The metric could be the difference between the price quoted at bid time and the price of the material when delivered.

If the pandemic is creating delays, a contractor also may find it worthwhile to invoke the delays clause in a contract, a common feature in most construction agreements. The AIA form A201-2017, for example, allows a contractor to recover for delays "in the commencement or progress of the Work by… unusual delays in deliveries" or "by other causes that the Contractor asserts, and the Architect determines, justify delay."

The coronavirus crisis is just beginning to impact the construction industry in ways that will continue to reverberate for many months, if not longer. To help navigate these treacherous waters, contractors should conduct a thorough review of their existing contracts, as well as the forms that they typically use with their subcontractors, to ensure that they are well prepared to ride out the storm. If you have any concerns about the impact of the coronavirus pandemic on your business, please contact the Cohen Seglias attorney with whom you work.

***John** is the chair of the Construction Contracts & Risk Management Group and can be reached at 267.238.4704 and jgreenhall@cohenseglias.com. **Jackson** is an associate in the Construction Group and can be reached at 202.587.4756 and jnichols@cohenseglias.com.*

From the Sky and to the Depths: PA Supreme Court Considers Subsurface Trespass

Continued from page 2

occurring in concentrated underground locations, as are found in conventional reservoirs. The development of these unconventional reservoirs has led to the United States assuming its role as a leader in global oil and gas production.

In *Briggs*, the Pennsylvania Supreme Court addressed application of the rule of capture to the use of fracking. This issue rested on the determination of whether a physical intrusion on the neighboring landowner's property takes place any time oil or natural gas migrates across property lines as a result of fracking. The argument opposing application of the rule of capture was that fracking should be viewed differently because it involves an artificially-created means of drainage. The Court rejected this view, holding that the key to determining whether the rule of capture applies is not the production technique used to extract the oil and gas. Instead, the key issue is whether, irrespective of the means of production, there has been a physical intrusion on the neighbor's property.

By focusing on whether hydraulic fracturing resulted in an intrusion to the neighbor's subsurface, the Court's ruling appears to reaffirm the traditional notion that whoever owns the land owns everything below it. The extent to which a property owner can preclude intrusion into the subsurface has a wider application than the energy industry. The Pennsylvania Supreme Court noted Southwestern Energy's position that uncertainty over this issue could imperil carbon sequestration projects, energy storage wells, and waste disposal sites. The Pennsylvania Supreme Court, however, declined to squarely address this issue on the basis that it had not been properly framed for the Court's consideration.

The *ad coelum* doctrine is not an absolute principle, having given way to technological developments where air rights are concerned. It is well established that property ownership does not extend upward, indefinitely. Air traffic can pass over a property without trespass, but a neighboring property owner may not be permitted to build a sign that overhangs a property boundary. The extent of a property owner's interests in the space of the air above the surface is measured by the extent that he can make use of his property.

Left unanswered by *Briggs* is whether there is a downward limit to the *ad coelum* doctrine. The extent to which absolute subsurface rights remain in place will no doubt continue to be challenged as more subsurface areas are developed.

***Brian** is chair of the Energy & Utilities Group. He can be reached at 412.227.5952 and blawton@cohenseglias.com.*

OAG Brings Criminal Charges Against Company, Owner for Wage Violations



By Christopher D. Carusone, Steven M. Williams, and Carl L. Engel

Employers in Pennsylvania should stay on their toes as the Pennsylvania attorney general (AG) announced charges against a major mechanical contractor engaged in numerous public works projects for crimes arising from a prevailing wage dispute. This marks the first time that the attorney general has brought criminal charges for prevailing wage violations, which was previously enforced only through civil actions.

In September 2019, after a 21-month grand jury investigation, Attorney General Josh Shapiro brought charges against Goodco Mechanical, and its owner, Scott Good, arising from violations of the commonwealth's prevailing wage laws by underpaying their employees and claiming credits for benefits not given. The violations occurred in connection with Goodco's participation in the construction of a new Pennsylvania Department of Transportation (PennDOT) district headquarters in Clearfield County. According to the attorney general's criminal complaint, the charges came after the grand jury found that Goodco and Good had "engaged in a misclassification scheme, whereby journeymen electricians and plumbers were directed to record a portion of the hours they worked each workday as lower-paid laborers, in order to reduce labor costs." The AG alleges that "this misrepresentation of the proper wage classification allowed Good and Goodco to bid projects with lower wage and fringe benefit costs."

The grand jury investigation also found that Goodco's scheme was not limited to the PennDOT project. On the contrary, the criminal complaint states that the grand jury found that "the same scheme was used by Good and Goodco on all prevailing wage projects dating back to at least 2010." The attorney general affirms that Goodco's employees initially were fearful of reporting the company's wage violations because they believed that they would be fired or face other workplace retaliation from Good, but that upon completion of the PennDOT project, several workers reported that Goodco had wrongly withheld compensation and benefits from them.

Although the new crime called "prevailing wage theft" has not been created in Pennsylvania, the attorney general charges that Good and Goodco violated existing criminal statutes prohibiting deceptive or fraudulent business practices, theft by unlawful taking, theft by deception and other related crimes. While the Office of the Attorney General (OAG) historically has enforced prevailing wage laws through civil action, the charges against Goodco mark the first time that the OAG has sought to enforce them with criminal penalties. Cases of this nature are being prioritized by the OAG's recently formed fair labor section. When Shapiro ran for AG in 2016, he pledged to create a unit that would "enforce Pennsylvania's labor laws in partnership with the Department of Labor & Industry and the Pennsylvania Human Relations Commission," among other pro-worker actions. Accordingly, the fair labor section has made a mission of fighting wage theft, tip stealing, worker misclassification and workplace discrimination.

This newly stringent enforcement should serve as a warning to any Pennsylvania employer who is not careful with its wage-payment policy. Not only has Goodco been charged with numerous crimes following the 21-month grand jury investigation, but its owner has also been charged with perjury, tampering with public records and false swearing—all of which are felonies that can carry significant penalties. As Pennsylvania has turned to criminal prosecution against employers who violate wage laws (rather than the more typical civil cases), business owners are obliged to treat prevailing wage disputes with greater seriousness. Even unintentional errors in wage payments may result in criminal charges that can bring on grave consequences for businesses and their owners alike.

It is a vital time for Pennsylvania businesses to undertake a meticulous review of their payment practices in consultation with their attorneys, to eliminate the unnecessary risk of prosecution by ensuring ongoing compliance with labor and wage laws.

***Chris** and **Steve** are partners in the Consumer Protection & Defense Group. Chris can be reached at 717.480.5306 and ccarusone@cohenseglias.com. Steve can be reached at 717.480.5302 and swilliams@cohenseglias.com. **Carl Engel** is an associate in the Commercial Litigation Group and can be reached at 267.238.4758 and cengel@cohenseglias.com.*

Q&A with Cohen Seglias' New Partners, Matthew Gioffre and Michael Metz-Topodas

Our newsletter team recently sat down with our new construction partners, Matt Gioffre and Michael Metz-Topodas, to discuss their careers and legal practices.

Q: Tell us a little about your practice and the services that you provide to your clients.

A: Michael: My litigation practice focuses on the construction industry and involves three areas of services. For clients with project-related disputes, I litigate cases from initial assessment through resolution. Drawing on litigation lessons, I also support contract review for negotiation and risk analysis purposes. Finally, I provide day-to-day business counseling on construction project disputes to prevent them from growing a life of their own or to position clients best should litigation arise.

A: Matt: I work with clients to solve problems that arise on commercial construction projects and consult with and advise them about their legal and contractual rights. I also represent clients in negotiations with the opposing party and, if necessary, assert or defend claims either in arbitration or in court. With an eye toward reducing the risk that is inherently part of every construction contract, I advise clients and assist in negotiating contracts on prospective jobs.

Q: How did you get started in your career, and what first drew you to Cohen Seglias?

A: Michael: I started my career at a larger law firm in a more general litigation practice. However, I was introduced to Cohen Seglias in 2006 while looking for a summer associate position and became fascinated about how unique a construction law practice is. When Cohen Seglias posted an opening, I applied and had the opportunity to meet lawyers at the firm. Those meetings confirmed the Cohen Seglias' reputation of strong collegiality, deep construction industry knowledge, and excellent advocacy for their clients. From my first day working at Cohen Seglias, I have never had an idle moment and have loved every minute of it. I remain grateful for the opportunity to join the firm and for the mentoring I have received here.

A: Matt: I worked as a summer associate at Cohen Seglias before my last year of law school. That summer was an eye-opening experience for me—I was introduced to an area of the law and an industry that was far more complex and interesting than I ever expected. I enjoyed the work, the clients, and the people at the firm and accepted the subsequent offer. In the 14 years since, I have continued to be fascinated by the projects our clients build and the unique issues facing each project. I am the first "home-grown" summer associate to become a partner and, as our firm continues to grow, I will not be the last.

Q: What do you enjoy most about your practice?

A: Michael: A construction law practice affords unique client relationships. Often conversations involve a company's business head, usually the owner, who either founded the company or is related to the one who did. That gives the conversation special dynamics. Reaching back to my earlier career as a teacher, I often find myself educating clients about how the law operates in relation to their problems. They also readily grasp and accept finding business solutions to their problems, making those discussions very easy. Our clients' personal connections to their business give the conversations a special energy and passion. Finally, practicing in construction law invariably entails working with people who take great pride in their work and do it with dedication, integrity and honest values, which I find motivating.

A: Matt: The clients we deal with are proud of their work and are passionate about what they build. I enjoy the appreciation I get when I solve a client's problem, provide good advice that keeps a client from making a critical mistake, or simply recover the money that a client is rightfully owed. I try to bring that same level of passion to my services and I enjoy the sense of satisfaction when I achieve a good result for my clients.

Q: What made you stay and grow here? What is it that you like about the firm?

A: Michael: My fellow partners demand each day I become a better lawyer than I was the day before, and our clients inspire meeting that demand.

A: Matt: As cliché as it may sound, the people of the firm are the reason that I initially wanted to stay and grow with the firm. There are fantastic lawyers here who are generous with their time and have mentored me in many ways. The firm is focused on satisfying clients but is also dedicated to maintaining a culture and atmosphere that is positive and uplifting for all who work here.

Matt and Michael are partners in the Construction Group. Matt can be reached at 267.238.4748 and mgioffre@cohenseglias.com. Michael can be reached at 267.238.4755 and mmt@cohenseglias.com.

CAPABILITIES

At Cohen Seglias, we are committed to providing legal services of the highest professional standard and achieving the best results for clients. The firm and its attorneys are consistently recognized as top leaders in legal rankings such as *Chambers USA*, Best Lawyers, Super Lawyers, and Martindale-Hubbell.

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