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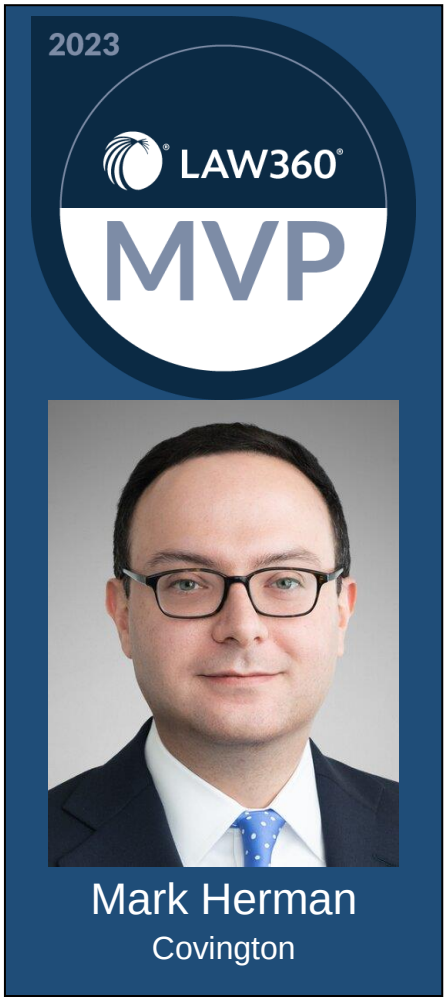
MVP: Covington's Mark Herman

By **Elizabeth Daley**



Law360 (October 17, 2023, 1:03 PM EDT) - Mark D. Herman of Covington & Burling LLP led Merck & Co. to a $1.4 billion victory, defeating its insurers' war exclusion to secure coverage for NotPetya malware attacks against the company, allegedly carried out by a Russian military intelligence agency, making him one of Law360's 2023 Insurance MVPs.

His biggest accomplishment over the past year:

The New Jersey appellate division in May affirmed Herman's victory in the cyber coverage case. He said the war exclusion insurers attempted to use to disclaim coverage had only been used to deny coverage for overt hostile physical acts by foreign entities.

"That kind of exclusion had never been used for a cyberattack," Herman explained.

The case involved 30 insurers around 100 depositions, and he co-led Covington's team, which had been fighting for coverage since 2018. Herman said much of the case took place during the height of the COVID-19 pandemic, making depositions more challenging.

In December 2021, after what Covington called "extensive briefing" — including two days of oral argument on a dozen dispositive motions — the trial court ruled for Merck, rejecting the insurers' war-exclusion defense. That ruling was later upheld.

Most insurers have settled at this point, but Herman said there are about five that have not.

"I think what we are seeing in the future is that there has been a big industry effort to revise war exclusions to address cyber ... they have tried to address it with new language," he said.

Other notable cases he's worked on:

Herman is proud of his work representing SPX Corp. in North Carolina Superior Court against 20 insurers regarding coverage of asbestos product liability claims. He joined the case in 2018.

"The underlying claims are about exposure to asbestos," he said, adding that "there are various coverage issues in the coverage litigation including questions surrounding which insurers should be liable."

Herman said many asbestos cases are similar in that they involve legacy insurance policies from the 1950s to the 1980s.

The case is still pending, but Herman said, "We've been able to secure favorable rulings on key coverage issues which should be able to help the client maximize the coverage for the underlying liabilities."

According to Covington, he led the team's briefing and argument on eight summary judgment motions in that case. His work "led to additional favorable rulings in 2022 on allocation, underlying exhaustion, and other issues," the firm wrote about his achievements.

Many of Herman's other successes can only be hinted at, due to confidentiality.

"I spent several years advising the client on insurance for underlying product liability suits related to a medical device and settled with the insurer without litigation," he explained. He helped that client recover more than $90 million, which was near the full limits of its tower.

Herman helped another client recover more than $100 million in defense coverage for securities litigation and coverage of a class action settlement.

And when he's not doing all that, Herman is volunteering his services. He was appointed by the Third and Ninth Circuits to appear pro bono and has already scored at least one victory there, according to Covington.

Why he practices insurance law:

Language is just part of the appeal of insurance law for Herman, who was an English major and the editor of his school newspaper at Dartmouth.

"I like reading the words of the contract closely and trying to figure out what they mean and make arguments about that," he said.

Herman didn't know he wanted to be in insurance law when he started, but said he was lucky to become involved with the practice in his early days at Covington. He enjoys the "problem-solving aspect" of his insurance practice.

"I like that we get to be plaintiffs lawyers, which is maybe a bit unusual for a big firm," he said.

"I realized that insurance was a fascinating area to practice in, because you get to learn about different businesses and different coverage issues that arise," and it became a primary motivator for Herman is being able to help his clients.

His advice for junior attorneys:

Herman suggests that newer attorneys "jump into their work and take ownership of it."

"I think it's important for junior attorneys not to just do the work that's assigned to them, but to speak up and point out the important facts or law that the team has to pay attention to," he said.

"I think one thing we do well at Covington is we work well together and collaboratively," Herman added.

As part of his desire to collaborate, Herman enjoys mentoring newer attorneys. He was fortunate to have great mentorship at Covington when he first started practicing, and he likes to maintain the tradition.

"I try to make it so that junior attorneys don't feel like they need to be shy," he said.

Herman encourages newer team members "to be honest and brave about what they are seeing in the case law to make sure that we are all making the right decisions."

--As told to Elizabeth Daley

Law360's MVPs of the Year are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals, and complex global matters. A team of Law360 editors selected the 2023 MVP winners after reviewing more than 900 submissions.

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