

## Minnesota Estate Tax Relief

by Nancy M. Kiskis

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## Uncertainty for Financial Institutions in the State-Legalized Marijuana Industry

by Margaret H. Garborg

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## Consumer Attorneys Target Filers of Mechanics Liens: How to Avoid Getting Sued

by Sarah E. Doerr

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## Minnesota Estate Tax Relief

By Nancy M. Kiskis | 612-877-5385 | [Nancy.Kiskis@lawmoss.com](mailto:Nancy.Kiskis@lawmoss.com)

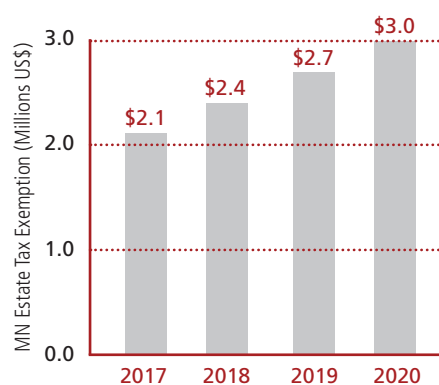
The recent Minnesota legislative session ended with new laws that benefit persons who die as residents of Minnesota or with property subject to Minnesota estate tax.

### Residency Determination.

The Minnesota Department of Revenue and the courts have a list of factors that they consider in determining where a person resides for tax purposes. They include the number of days spent in Minnesota in a year, where one owns or leases a home, where one votes, etc. These factors used to include such things as where the person's advisors were located and the location of charities to which the person donates.

These last factors came under significant criticism as one may have lived and worked in Minnesota their entire life, been well established with their advisors, donated to

favorite Minnesota charities, and then moved to a southern state in retirement to get away from Minnesota winters. In moving to a warmer climate, the person had no intention of changing his or her trusted advisors or to discontinue donating to favorite Minnesota charities.



Effective on January 1, 2017, Minnesota law was changed to provide that in determining

residency the Minnesota Department of Revenue and the courts can no longer consider:

1. Location of the person's attorney, certified public accountant, or financial advisor.
2. The financial institution where the person maintains accounts or applies for credit.
3. Charitable contributions made within or without the State of Minnesota.

### Minnesota Estate Tax Exemption.

Minnesota has increased the estate tax exemption available to persons dying either as a resident of Minnesota or with property subject to Minnesota estate tax. Effective for persons dying in 2017, the exemption has increased by \$300,000 to \$2.1 million, and will increase by \$300,000 per year to \$2.4 million in 2018, \$2.7 million in 2019, and

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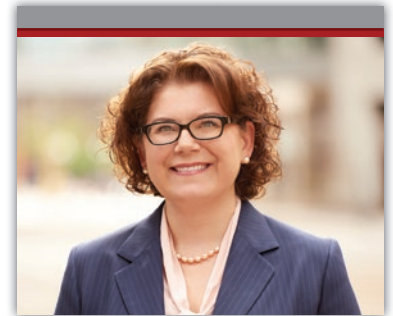
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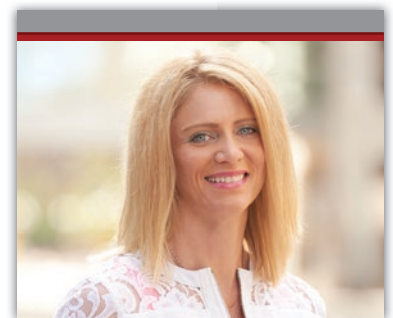
## Two New Attorneys Have Joined Our Team

**Shannon M. Heim** joined the firm's regulated industries and communications law teams. Shannon focuses her practice on the needs of companies doing business in the telecommunications and energy industries. She has advised telecom and energy companies on a full range of regulatory issues and has represented her clients before both state and federal regulatory bodies and courts. Shannon also advises and represents companies, cooperatives, and trade associations on commercial contracts involving complex and contentious issues of business and law. Shannon was appointed by Governor Mark Dayton to his Task Force on Broadband on June 1, 2015. The Task Force develops policies to promote the expansion of broadband access throughout Minnesota. Shannon received her J.D., *cum laude*, from The Catholic University of America Columbus School of Law and her M.A. and B.A. from the University of Iowa.



Shannon Heim

**Jodi L. Johnson** has joined the firm's business law, employment law, and real estate teams. Having worked for many years as corporate counsel, Jodi recognizes the importance of integrating legal advice with a client's overall business objectives. Jodi's employment law experience includes advising clients and litigating in the areas of discrimination, wrongful termination, wage and hour disputes, non-compete/solicitation agreements, drug testing agreements, harassment, workplace violence, and executive compensation. In her real estate practice, Jodi counsels clients on acquisitions and dispositions, development, condominium conversions, leasing, financing, and dispute resolution. She has done substantial lease work and has advised on several significant acquisitions and dispositions on behalf of owners and developers. Jodi received her J.D., *magna cum laude*, from William Mitchell College of Law and her B.S. from St. Cloud State University.



Jodi Johnson

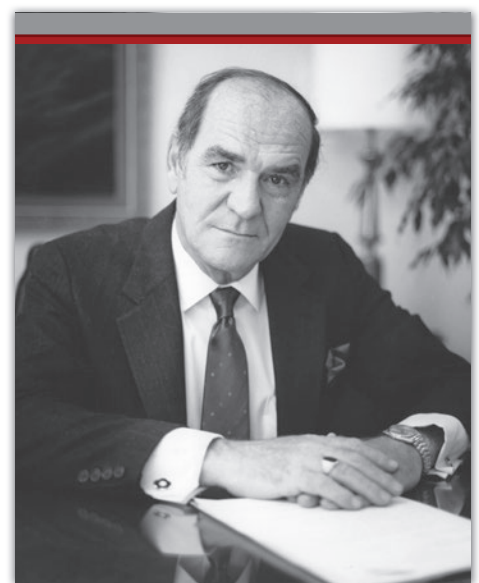
## Moss & Barnett Remembers Scott Herzog

Our friend and colleague, **W. Scott Herzog**, passed away on May 23, 2017, at the age of 83. Scott was a leading partner in the law firm of Barnett, Ratelle, Hennessy, Vander Vort, Stasel & Herzog which merged with the law firm of Moss, Flaherty, Clarkson & Fletcher to form the law firm of Moss & Barnett in 1983. He served as a director of both firms and chaired both firms' litigation departments.

Scott was a highly respected and skilled trial attorney. He handled a variety of complex litigation subjects, including products liability claims, professional negligence, insurance law, and catastrophic casualty losses for both plaintiffs and defendants. He was co-counsel for the plaintiff on the highest medical malpractice jury verdict in Minnesota history,

and he argued and briefed many leading decisions before the Minnesota Supreme Court on auto insurance coverage law. Scott received his J.D. from the University of Minnesota Law School and his B.A. from the University of Minnesota. He was a member of the American, Minnesota State, and Hennepin County Bar Associations.

Scott was beloved and deeply respected by all who knew and worked with him both on the bench, in the trial bar, and at Moss & Barnett. He mentored and trained a generation of young attorneys who went on to achieve great success in their own careers. Scott will be deeply missed by those who knew him as their trusted lawyer, colleague, and friend.



Scott Herzog

## Uncertainty for Financial Institutions in the State-Legalized Marijuana Industry

By Margaret (Maggie) H. Garborg | 612-877-5250 | [Maggie.Garborg@lawmoss.com](mailto:Maggie.Garborg@lawmoss.com)

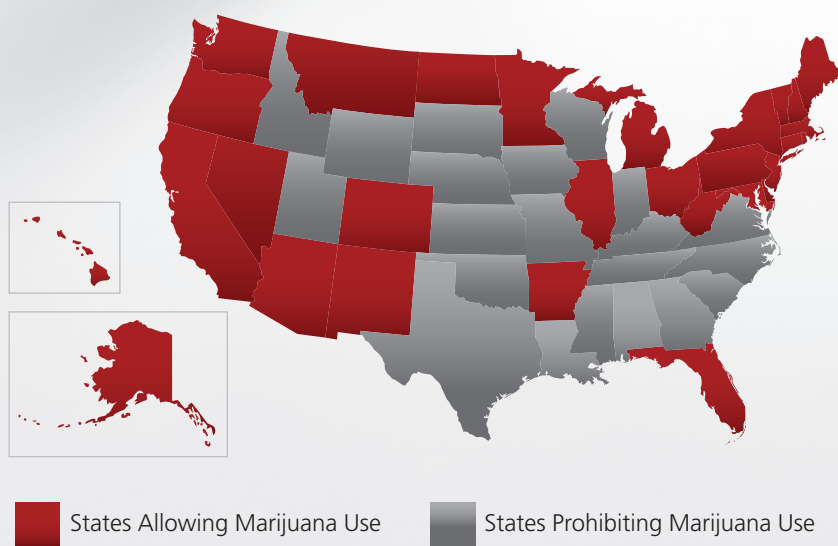
Twenty-nine states and the District of Columbia permit marijuana use for medicinal purposes. Eight of those states and the District of Columbia also permit marijuana use for recreational purposes. Despite those numbers, the banking industry has been reluctant to enter the market due to the risk of prosecution under federal drug and anti-money laundering statutes and penalties under federal banking regulations. Recent federal guidance attempted to clarify federal marijuana enforcement priorities, but did little to dispel legal and regulatory uncertainty. The fact remains that legal prohibitions and regulatory hurdles continue to create significant risks and costs for financial institutions that wish to serve the marijuana industry.

Marijuana has been listed as a Schedule I controlled substance under the federal Controlled Substances Act (CSA) since 1970. The CSA criminalizes not only manufacturing, distributing, and dispensing marijuana and possession with intent to manufacture, distribute, or dispense, but also aiding and abetting in, conspiring to commit, and acting as an accessory after the fact with respect to such activities. In *Gonzales v. Raich*, the Supreme Court of the United States affirmed the federal government's authority to criminalize marijuana, notwithstanding contrary state law. Thus, financial institutions that assist marijuana-related businesses operating under state law risk prosecution under the CSA.

Because the provision of banking services to marijuana-related businesses is unlawful under the CSA, such action likewise constitutes a violation of federal anti-money laundering statutes. The Money Laundering Control Act prohibits certain financial transactions involving the proceeds of "specified unlawful activity," which includes the manufacture, importation, sale, or distribution of a controlled substance as defined in the CSA. The Illegal Money Transmitters Act prohibits involvement in a

the Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of Treasury, for customer transactions suspected to involve funds derived from illegal activity.

By virtue of their participation in the federal banking system, financial institutions are subject to regulations that also punish relationships with marijuana-related businesses. Federal deposit insurance and membership in the Federal Reserve system both require compliance with



business that transmits funds that are known to be derived from a criminal offense or are intended to be used to promote or support unlawful activity. Together, the Bank Secrecy Act ("BSA") and the USA PATRIOT Act require that financial institutions undertake sufficient due diligence to verify the identity of customers and assess the risk associated with each customer. They must also file "suspicious activity reports" (SARs) with

federal banking regulations, which, in turn, require compliance with federal money laundering statutes. Both the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve monitor institutions for compliance with the BSA. Almost all state and nationally chartered institutions are legally required to purchase federal insurance and are thus subject to FDIC regulation. The Federal Reserve's oversight extends to

## Consumer Attorneys Target Filers of Mechanics Liens: How to Avoid Getting Sued

By Sarah E. Doerr | 612-877-5297 | Sarah.Doerr@lawmoss.com

Most construction and trade creditors do not consider themselves to be in the business of debt collection. And, most of the time, they are not. The Minnesota Court of Appeals recently issued an opinion of interest to the construction and trade industries, and to all parties who serve mechanic's lien statements on consumers. The court cautioned such parties to ensure that their communications with consumers comply not only with the applicable mechanic's lien statute, but also, in certain circumstances, with federal consumer protection laws.

### What does this mean for construction and other trade creditors who regularly serve and record mechanic's lien statements?

First, a primer on how mechanic's liens work: In Minnesota, when a person has contributed to the improvement of another's land, that person (or company) has a lien against the property, so long as the lien statement is recorded and the landowner is served with a copy of the lien statement within 120 days of the completion of the work, and pre-lien notice requirements have been met. The right to a lien serves as security for payment to a company or contractor that supplies goods and services on credit to the owner of the improved land.

The Fair Debt Collection Practices Act, or "FDCPA," in turn, is a broad, federal consumer protection statute that protects consumers from abusive, unfair, and deceptive collection practices. Among other things, the FDCPA governs what can and cannot be included in communications with consumers in connection with the collection of a debt. Under the FDCPA, "consumers"

are natural persons (but not business or corporate entities) who have incurred debts for personal, family, or household purposes. Violations can lead to the imposition of damages, penalties, and an award of the consumer's attorney fees for enforcing the violation.

In the recent Minnesota Court of Appeals decision, *Randall, et al. v. Paul* (filed June 19, 2017), the Court held that if a party's *primary goal* in serving the mechanic's lien statement on a consumer is to collect its debt, then that party must comply with the FDCPA's requirements for communications with consumers. Notably, the attorney who served the mechanic's lien statement in *Randall* failed to include what is often called a "Mini-Miranda" disclosure of consumer rights. He also failed to send the creditor the "validation notice" required by the FDCPA.

### How can a creditor be sure it is complying with the FDCPA when serving a mechanic's lien notice?

Before causing a mechanic's lien statement to be served, a creditor should answer the following questions:

#### 1. Is the creditor contacting the consumer directly or through a third party, e.g., an attorney or collection agency?

The FDCPA only applies to third-party "debt collectors," not to creditors collecting debts in their own name. If the mechanic's lien statement is prepared and sent out by the creditor itself, or one of its employees, the FDCPA does not apply. If outside counsel or another vendor prepares and serves the notice on behalf of the creditor, however, the FDCPA may apply.

#### 2. Is the customer a consumer for purposes of the FDCPA?

Next, a creditor should determine whether they are dealing with a "consumer" for purposes of triggering the FDCPA. Is the customer an individual, rather than a business? What was the nature of the work performed? Was it for a personal or household project, e.g., homebuilding or landscaping? If so, the FDCPA may apply.

#### 3. What is the purpose of serving the mechanic's lien statement?

Creditors are entitled to be paid what they are owed for their supplies, labor, and services. The mechanic's lien laws allow them to attach a lien to a customer's property if they are not paid. On the one hand, a party serving a mechanic's lien statement may say that it was doing so simply because that is what the law requires in order for the creditor to perfect its lien. But the *Randall* court adopted an "animating purpose test" for determining whether a communication with a consumer is in connection with the collection of a debt. There need not be an explicit demand for payment in order for a mechanic's lien statement to trigger the FDCPA. That is, if the statement is served on a consumer in an attempt to induce payment, the FDCPA may apply.

A party who determines that it may need to comply with the FDCPA should seek the advice of counsel for guidance on what should and should not be included in consumer communications. For example, any initial communication with a consumer for the purpose of collecting a debt should include a "Mini-Miranda" disclosure, which informs the consumer that the debt

## Consumer Attorneys Target Filers of Mechanics Liens: How to Avoid Getting Sued - Continued from Page 4

collector is attempting to collect a debt and that any information obtained will be used for that purpose. Second, within five days of any initial communication with a consumer, including, in some instances,

service of a mechanic's lien statement, a debt collector must send the debtor a "validation notice" that informs the consumer of the amount owed, the name of the creditor, and the applicable timeframe for disputing

the debt. Finally, counsel can assist in drafting communications that effectively communicate with consumers while avoiding potential exposure under the FDCPA and other consumer protection laws.



**Sarah Doerr** practices in the areas of bankruptcy and creditors' remedies. She has experience in both individual and commercial bankruptcy matters and regularly represents secured and unsecured creditors. She also counsels clients in matters related to bankruptcy, insolvency, and restructuring. In her creditors' remedies practice, Sarah defends and counsels debt buyers and debt collection agencies in connection with issues arising under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act, and related consumer-protection statutes and regulations.

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## Minnesota Estate Tax Relief - Continued from Page 1

\$3.0 million in 2020. This increase in the estate tax exemption could mean Minnesota estate tax savings of as much as \$48,000 per \$300,000 increase in the exemption. The savings will depend on the size of one's taxable estate.

Individuals with taxable estates of less than the new increased exemption amount will not be required to file an estate tax return with the State of Minnesota.

Governor Dayton has, however, made it well known that he wants to "pull back" some of the \$650 million in tax cuts that were passed, and one of those cuts includes this increase in the Minnesota estate tax exemption. At least for now, the new increase in the estate tax exemption remains the law in Minnesota.

***Please contact your Moss & Barnett attorney for more information.***



**Nancy Kiskis** is a member of our wealth preservation and estate planning team. She counsels clients in planning for death and incapacity, tax planning (specifically income, gift, and estate taxes), and charitable giving, as well as succession planning. She has personal and professional experience in working with families affected by Alzheimer's disease and dementia.

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state-chartered member banks and all bank holding companies, which, in the United States, control some 80% of banks and approximately 99% of all insured commercial bank assets.

In August 2013, the Department of Justice issued a memorandum outlining eight enforcement priorities under the CSA in light of ongoing state-level marijuana legalization, including preventing distribution of marijuana to minors, routing of revenue from marijuana sales to criminal enterprises, and diversion of marijuana from states where it is legal to states where it is illegal. In February 2014, the DOJ issued a second memo stating these priorities would apply to the prosecution of marijuana-related conduct in the context of financial crimes, particularly the federal anti-money laundering statutes. Both memos indicate that the primary inquiry in all cases is whether the conduct in question implicates one of the eight enforcement priorities. The memos also state that conduct in compliance with an effective state regulatory system is unlikely to do so.

In tandem with the February 2014 DOJ memo, FinCEN issued guidance clarifying BSA compliance expectations for financial institutions providing services to marijuana-related businesses. The guidance requires institutions to review the licensing application and any information about the business available from the state licensing authority, to become familiar with the normal business practices of its marijuana-related business customers, and to monitor public sources of information about customers.

Institutions also must monitor for suspicious activity, including certain red flags that indicate the activity implicates a DOJ enforcement priority. With respect to reporting requirements, the guidance confirms that institutions must file an SAR for most activity involving a marijuana-related business operating under state law.

The DOJ memos and FinCEN guidance have proven ineffective in persuading financial institutions to serve the marijuana industry, evidenced by the fact that very few banks have formed relationships with marijuana-related businesses and the fact that the marijuana industry continues to report difficulty accessing banking services. In terms of criminal liability, the controlling United States Supreme Court case holds that state legalization of marijuana is not a defense to enforcement of federal criminal law. Furthermore, although the 2013 and 2014 memos imply that banks will not face criminal prosecution, the memos clearly state that the DOJ retains authority to enforce federal law and that the memos do not provide a legal defense to enforcement. Thus, federal prosecution remains a very real risk. Punishment for a conviction under the CSA or federal anti-money laundering statutes can include potentially steep civil or criminal money penalties and imprisonment. In addition, institutions risk loss of deposit monies and collateral under the asset forfeiture provisions of the CSA and anti-money laundering statutes.

In terms of regulatory liability, the Federal Reserve, the FDIC, and FinCEN all have the

authority to impose civil money fines for violations of the BSA. FinCEN's fines have been known to reach into the millions. The FDIC also has the authority to revoke deposit insurance altogether, which would effectively force the closure of an institution required to carry federal insurance. In terms of regulatory cost, FinCEN's 2014 guidance stated that it expected the new BSA compliance requirements to "enhance the availability of financial services for marijuana-related businesses." However, the guidance contemplates a level of due diligence far exceeding that required in typical banking relationships. There is cost associated with the additional filing requirements, and there is cost associated with determining whether customer activity implicates a DOJ enforcement priority. Taken together with the potential criminal liability and risk of fines and loss of access to the federal banking system, the costs and uncertainty associated with heightened due diligence requirements will continue to be barriers for financial institutions that wish to serve the marijuana industry.



**Maggie Garborg** is a member of our multifamily and commercial real estate finance and real estate teams, focusing her practice on real estate financing transactions. Maggie primarily advises lenders regarding financing and refinancing of multifamily housing projects and sale of loans to secondary market investors such as the Federal Home Loan Mortgage Corporation.

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# GREAT TEAMS ACHIEVE GREAT RESULTS

## Moss & Barnett Congratulates its *Super Lawyers* and *Rising Stars*!

Moss & Barnett is pleased to congratulate its attorneys who are listed in *Super Lawyers* and *Rising Stars* for 2017.

### Minnesota *Super Lawyers* 2017

- **Cindy J. Ackerman** – Estate & Probate
- **Kevin M. Busch** – Banking
- **Jana Aune Deach** – Family Law
- **Aaron A. Dean** – Construction Litigation
- **Charles E. Jones** – Professional Liability: Defense
- **Susan C. Rhode\*** – Family Law
- **Dave F. Senger** – Business/Corporate
- **Thomas J. Shroyer** – Professional Liability: Defense
- **James J. Vedder\*** – Family Law

*Super Lawyers* is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Peer nominations and evaluations are combined with third-party research, and selections are made on an annual, state-by-state basis. Designation as a *Super Lawyer* is awarded annually to only 5% of the licensed, active lawyers in Minnesota.

### Minnesota *Rising Stars* 2017

- **Sarah E. Doerr** – Business Litigation
- **Susan (Susie) A. King** – Estate & Probate
- **Taylor D. Sztainer** – Business Litigation

In 1998, *Super Lawyers* launched *Rising Stars* in Minnesota to recognize the top up-and-coming attorneys in the state — those who are 40 years old or younger, or who have been practicing for ten years or less. Designation as a *Rising Star* is awarded annually to no more than 2.5% of licensed, active lawyers.

\* **Moss & Barnett is especially pleased to congratulate Susan C. Rhode, who ranked in the Minnesota Top 10, Top 50 Women, and Top 100 *Super Lawyers* lists for 2017, and to James J. Vedder, who ranked in the Top 100 *Super Lawyers* list for 2017.**



**Cindy J. Ackerman**



**Kevin M. Busch**



**Jana Aune Deach**



**Aaron A. Dean**



**Charles E. Jones**



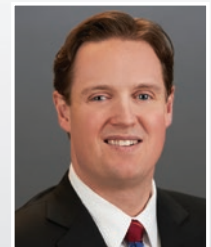
**Susan C. Rhode**



**Dave F. Senger**



**Thomas J. Shroyer**



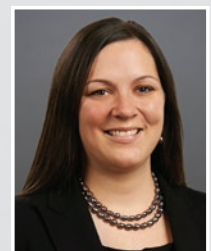
**James J. Vedder**



**Sarah E. Doerr**



**Susan (Susie) A. King**



**Taylor D. Sztainer**

**To learn more about Moss & Barnett, our attorneys, and our various practice areas, please visit our website at [LawMoss.com](http://LawMoss.com).**

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

## Moss & Barnett Launches “M&B Cares”

Moss & Barnett employees have participated in a wide range of civic, charitable, and other community service organizations for many years. To encourage and recognize volunteerism, the firm will be organizing quarterly initiatives. Employees will be encouraged to submit nominations for organizations and activities for service by this initiative, which will be called M&B Cares. The committee members are attorney **Jana Aune Deach**, paralegal **Joe Avechuco**, paralegal **Shelly Doerr**, accounting clerk **Nick Tautges**, and attorney **Jeff Waldron**.

“We are very grateful for our employees who endeavor to improve the quality of life in our communities and are thankful to our firm for assisting with those efforts by providing its support and recognition to them,” said Jana Aune Deach, who will serve as the chair of M&B Cares and is also a director of Moss & Barnett.

Our first M&B Cares initiative took place on June 4, 2017, when Moss & Barnett employees, family members, and friends participated in the Feed My Starving Children’s mobile packing event,

LOVE SOMALIA, at the St. Paul River Centre. The group filled 46 boxes of food that will provide 9,936 meals (the event produced a total of 645,568 total meals).



**Pictured from left to right:** Michael, Bruce, and Sue Rivers with friend Anna Blankinship; Mark and Trina Nolen, friends of/with Shary Potter; Cindy and Jay Littlejohn; Misty Gozola and her son, Jonathan; Phil Rush and friend, Peggy Foster; Karen Berg; Deb LaTerza; Carrie Diaz and her son, Charlie; Teresa Burshek and her daughter, Katie; Jeff Waldron; Julie and Chuck Donaldson. Not pictured: Shelly Doerr and Andrea Szondy