THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Winter 2010

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Important Announcements

Mark your calendars now for the

Annual Crab Feast

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5:30 p.m.

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Implications Of Praxair V. ATMI

By Cameron K. Weiffenbach

In August 2008, the U.S. Court of Appeals for the Federal Circuit decided *Star Scientific Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357 (*Fed. Cir.* 2008), and reversed a finding of inequitable conduct because R.J. Reynolds Tobacco Company (R.J. Reynolds) had failed to provide adequate evidence to support thresholds of materiality and intent found by the U.S. District Court for the District of Maryland.

According to the Federal Circuit, "[t]he need to strictly enforce the burden of proof and elevated standard of proof in the inequitable context is paramount because the penalty for inequitable conduct is so severe, the loss of the entire patent even where every claim clearly meets every requirement of patentability."

Star Scientific, 537 F.3d at 1365. In reversing the decision of the district court, the Federal Circuit found that the affirmative evidence relied upon to support inferences drawn by the district court on the threshold of intent was not adequate to satisfy the clear and convincing standard. The Federal Circuit further stated that "materiality does not presume intent ..." *Id.* at 1366.

The district court found that a letter by Professor Harold Burton to the patent applicant's prosecuting attorney was material and not cumulative of prior art before the U.S. Patent and Trademark Office (PTO) during prosecution of the patent in suit.

It appears that the Federal Circuit combed the evidence before the district court and found that the prior art information contained in the Burton letter was cumulative in view of a response by R.J. Reynolds in the litigation. The response has been submitted to PTO during the prosecution of the patent in suit.

A month after deciding *Star Scientific*, the Federal Circuit rendered an opinion in *Praxair Inc. v. ATMI Inc.*, 543 F.3d 1306 (Fed. Cir. 2008), in which the Federal Circuit made a finding of inequitable conduct with respect to U.S. Patent No. 6,045,115 (the '115 patent).

Praxair Inc. (Praxair) brought suit against ATMI Inc. (ATMI) for infringement of three patents. Two of the patents were found to be unenforceable by the U.S. District Court for the District of Delaware for inequitable conduct.

The Federal Circuit affirmed the finding of inequitable conduct for only one patent, the '115 patent. Praxair asserted infringement of claims 18 and 20 of the patent.

The claimed subject matter in the '115 patent is directed to an apparatus (a valve system) for controlling the liquid phase discharge of pressurized fluids from a pressurized tank.

The apparatus recited in claim 18 comprises (i) a pressurized container, (ii) a gas flow path having an outlet port and a conduit defining an inlet, and (iii) a restrictor in the gas flow path. Claim 20 was dependent on claim 18 and further limited the conduit to a tube having an internal diameter that does not exceed 0.2 mm.

The district court found that restriction flow orifice (RFO) prior art was "highly material" to the examination of the patent application that led to the '115 patent.

Because the district court found the prior art was "highly material" and because the district court also found that all of the individuals accused of inequitable conduct had knowledge of the RFO prior art, the district court inferred an intent to deceive. *Praxair Inc. v. ATMI Inc.*, 445 F.Supp.2d 473, 479–81 (D.Del 2006).

It would appear from the district court decisions that the material prior art was "RFO's protected by

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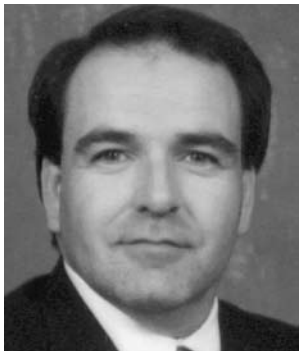
President's Message

Cleaning Up Our Side of the Street — A Call to Arms

A few years ago, I enjoyed an MDC presentation from Mr. Mel Hirshman, and was pleased, although not surprised, to learn that civil defense lawyers were only infrequently the subject of legitimate grievances and disciplinary sanctions. While I hope and pray this is still the case, and certainly the large majority of defense lawyers practice at the highest level of ethical professionalism, I have witnessed more atrocious conduct from our side of the practice in the last few years than I had in the two decades which preceded them.



Edward J. "Bud" Brown, Esquire

Law Office of Edward J. Brown, LLC

Somehow, somewhere, the idea that it was okay to cheat to win is no longer being treated as poison by a handful of litigators on our side of the bar. Indeed, even very ethical lawyers I know and respect have turned a blind eye to conduct committed by defense lawyers, even though the same conduct would have been decried if committed by our opponents on the other side of the street. Perhaps even worse, I have seen the bench allow itself to be lied to — not in shades of grey, but in documented black and white — and not only fail to sanction the wrongdoer, but fail to even conduct hearings, perform in camera reviews, or utilize the power it possesses under the crime/fraud exception to the attorney-client privilege to determine whether the lawyer is participating in or facilitating the conduct.

Cases on point:

A Maryland defense lawyer, we'll call "Mr. "Underhanded", allowed, and perhaps assisted, his client to change his story after discovering the sole witness who could contradict this tale had passed away. This occurred after Mr. Underhanded had represented exactly the opposite in verbal conversations. Multiple verifiable false representations were also made to the court, even though they were unequivocally countered by the written record, and thus were brought to the judge's attention for remedial action. The result — no hearings, no sanctions, and due to the case's ongoing status, no disciplinary action yet undertaken — indeed, this lawyer is still practicing as a member of our bar.

Even worse, an out of State defense lawyer from the Virginia office of one of Maryland's prominent defense firms, who is *pro hac vice'd* in as the reputable "Dr. Jekyll", but is discovered to be "Mr. Hyde", is informed by his client's expert of a 300% increase in the presence of a known carcinogen in the home of the Plaintiffs and their children. Not only does Mr. Hyde fail to immediately disclose same, but several months later files an expert designation indicating that the air quality in the family residence had **"substantially improved"**! Indeed, it is not until six months after the testing that the increase is discovered due to the test results being found in a different expert's file at a deposition. Different deception — same result: no sanctions, no outcry from the bench, and pending the appeal, Mr. Hyde continues to practice without disciplinary action or penalty. (Amazingly, even an affidavit from another Maryland attorney concerning Mr. Hyde's dishonest conduct in another Maryland case in which he enjoyed pro hac vice admission did not lead the court to require any additional supervision by the sponsoring Maryland counsel (who one can only hope played no role in the suppression and/or misrepresentation of the information).

I never thought I would have to attach a fax confirmation sheet as an appendix to a Court of Special Appeals Brief to disprove the misrepresentation of non-receipt by one of our defense counsel , subpoena a carrier's bill auditing records to prove a conversation occurred, nor have a defense attorney seek my consent to a change of venue of an arbitration for alleged convenience purposes , when in reality switch was a subterfuge to change the deadline in order to allow her to file a counter claim (why she simply didn't ask straight up for an extension remains a mystery, although I've been told that the serially sneaky actually believe everyone else thinks and acts just like they do.)

And, I never, ever dreamed, even in my worst nightmares, that a member of our defense bar would have his secretary call and leave me a message rejecting my request for a short extension to oppose a dispositive motion after I disclosed that the reason for the request was that my mother-in-law had just passed away (while I was in a jury trial, of all things) and needed a little extra time .

His explanation (and I quote): "I was just following

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orders." "I WAS JUST FOLLOWING ORDERS"!?!

Maybe I was just lucky to be mentored by the Philip Goldsboroughs, (Honorable) Robert Cadigans and John Bolgianos of the world, who would no more tolerate a "cheat to win" mentality and/or such lack of professionalism than they would high treason. However, as much a mentoring is still a much needed component of our practice, the offenses I see and hear about it are not, primarily, committed by the newer members of our bar. Indeed, the serial offenders are often more likely to be experienced members of known firms, who seem willing to trade on their partners' or firms' good reputations.

Maybe "what goes around" simply doesn't "come around" anymore (this is particularly a problem with *pro hac vice* counsel, as the "one and done" setting seems to provide some sense of insulation or lack of accountability). But maybe we should take a harder look at ourselves to figure out why there seems, at least sometimes, to be no consequence at all for this type of conduct, and what we can do about it.

Although all attorneys must police the profession, the defense bar is in the unique position to clean up police our side of the street — stated bluntly, although it is never okay for any lawyer to cheat to win, we have long stood in the analogous position of the thin blue line when it comes to preventing fraud and other abuses of the civil justice system — thus, there is something inherently evil about one of our own resorting to lying or cheating, especially when our forces are often backed by the resources of a major corporation or insurer . To mix metaphors and (poorly) paraphrase Mark Twain, the presence of bad cops on our force can not simply become like the weather, "Something everyone talks about, but nobody does anything about". Thus, if any good can come from this post, this message should really be viewed as a call to arms — a plea to everyone of our members to actively police our side of the street and refuse to turn a blind eye to the sins of the few, but apparently growing number of, bad apples who have lost sight of the Code of Professional Responsibility, and also the unwritten code of the defense lawyer: HONOR ABOVE ALL!

But how?

ONE: Zero tolerance. Chances are the reader of this article has never even considered committing the cheating, misrepresentations nor acts of general sneakiness outlined above. There's a fair chance, however, that such conduct has been witnessed being committed by a co-defendant's counsel, or at least suspected. Was it brought to the court's

Continued on page 4

EDITOR'S CORNER

The Editors are proud to publish this latest edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article from Cameron K. Weiffenbach, Of Counsel at Miles & Stockbridge P.C., presents an article discussing the implications of *Praxair v. ATMI*. Wendy Karpel, who is the co-chair of The Maryland Defense Counsel's Programs and Membership Committee, discusses Maryland's standard for determining an appealable workers' compensation order. In addition to these articles, Jennifer Schwartzott, an associate in the Litigation Department at Miles & Stockbridge LLP, highlights a recent Circuit Court of Montgomery County decision in which the court excluded expert testimony from the infamous mold expert, Dr. Ritchie Shoemaker.

The Maryland Defense counsel has had a number of successful events since the Winter 2009 edition of *The Defense Line*, including the always popular Past Presidents Reception. Mark your calendars now for Maryland Defense Counsel's Annual Meeting and Crab Feast, which will take place on June 3, 2010 at 5:30 at Bo Brooks in Canton! The Editors encourage our readers to visit the Maryland Defense Counsel website (www.mddefensecounsel.org/events) for full information on the organization's upcoming events.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this issue of *The Defense Line*. In that regard, if you have any comments or suggestions or would like to submit an article or case spotlight for a future edition of *The Defense Line*, please feel free to contact the members of the Editorial Staff.

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or the grievance commission's attention, or did it fall off the radar screen at about the same time that the case was closed?

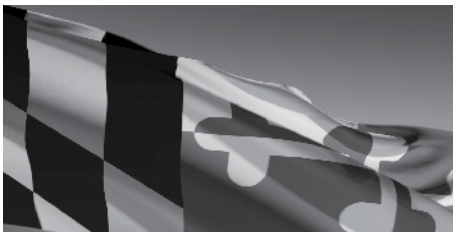
TWO: Seek the MDC's help. Dwight Stone and I are working, and seeking volunteers to assist us, to establish a task force within the MDC to combat this problem—possible cures range from informal and confidential review of such acts and offenses, creating an alter ego type system (so that a "reach-out" to the offender's firm or partners might be initiated), and working with the bench and bar to evaluate the possible tighter restrictions on *pro hac vice* admissions and requiring greater Maryland counsel supervision, oversight and accountability.

THREE: The crime/fraud exception. Recent appellate opinions, including Judge Battaglia's excellent analysis of the crime/fraud exception in to the attorney-client privilege in *Newman v. State*, 384 Md. 285, 863 A.2d 321 (2004), have emphasized that the privilege is not intended to, and indeed does not, protect fraud—either by the party or the defense lawyer. A well chronicled history of counsel's conduct, including other acts of wrongdoing or questionable conduct, may well justify, at a minimum, *in camera* review of matters ordinarily protected by the privilege or considered to be work product. In Mr. Underhander's case, it was ultimately discovered that the substituted defense which arose after the key witness' death was, curiously, never disclosed to any of the defendant's experts until after the witness died, even though each had been working on the file long before the witness passed away. Application of the crime/fraud exception may have provided, and may ultimately provide, the whole story, but at a minimum may serve as discouragement for those who believe the privilege protects such conduct.

FOUR: Give karma a boost. It is, of course, a tough task to report a fellow defense counsel, particularly when the case is still ongoing, as the spectre of a counter charge of seeking tactical advantage is always lurking nearby in the shadows. And, of course, not every incorrect representation is a lie—indeed, the unwritten code of conduct would at least require, if possible, providing the opportunity for the offending party to correct the record. However, when this fails, a motion to strike the filing containing the falsehood, a request for the appointment of a special discovery master who may have the time and resources to conduct an *in camera* review, and/or even providing your own affidavit, may help force the issue and obtain court intervention while the matter is still ripe. I am convinced that those who serially engage in this conduct do so not only because they are rarely sanctioned or caught, but also because the culprits are not even called-out on a regular basis. Even if your crime/fraud motion is denied, the court will hopefully remember the attorney who is at issue—and perhaps the next motion will be granted or grounds for seeking disciplinary action bolstered. And, please, please share your information with your colleagues—how many times have you been deceived by a Mr. Underhanded or Mr. Hyde, only to later discover another attorney in our group has experienced similar problems?

Recently, I was asked to give some real life examples of outstanding ethical conduct, and the instances which first came to mind all involved actions from our cohorts on the other side of the street. I'd like to think this is because conduct above and beyond the ethical requirements is simply so commonplace in the defense bar that it isn't remarkable nor noteworthy, just the norm. I fear, as do several ethical and prominent plaintiffs' counsel who spoke with me candidly, that offenses such as those mentioned above are not as rare as I had hoped. Indeed, several respected defense attorneys have confided that they lately have had more problems with co-defendant's lawyers than with plaintiff's counsel—although the universal consensus is that a small number of malfeasors are ruining it for the rest of the defense bar.

The answer is simple—the only small number which is acceptable is ZERO, and thus I call out to each and every member of our organization to use our resources, bring these matters to the MDC, the bench and/or the grievance commission, and remain ever vigilant to ensure that, sooner or later, it does "come around".



Expert Information Inquiries

The next time you receive an e-mail from our Executive Director, Kathleen Shemer, containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mary.dimaio@aig.com). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

Hospitals are Not the Insurer of Last Resort

By John T. Sly, Esq.

One of the most vexing issues facing hospitals is the question of whether they are vicariously liable for the actions of independent health care providers practicing in their facilities. In this article I argue that hospitals are not the insurer of last resort, and only stand as vicarious principals for independent health care providers in limited circumstances.

The Relevant Law

The law of Maryland is that a party is not liable for the negligence of another unless the tortfeasor is that party's agent and the agent acts within the scope of his authority and to further the interest of the principal. See, e.g., *Hollander v. Pan Am World Airways, Inc.*, 332 F. Supp. 96 (1973). Thus, to find a hospital liable for the actions of an independent health care provider, he/she would first have to be found to have been the hospital's agent for purposes of the plaintiff's care. *Hetrick v. Weimer*, 67 Md. App. 522, 508 A.2d 522 (1986), *reversed on other grounds*, 309 Md. 536, 525 A.2d 643 (1987). The facts of most cases involving care rendered by an independent health care provider lead unequivocally to the conclusion that they are not agents of the hospital so that the hospital is entitled to summary judgment on this issue.

Maryland courts have distinguished between a situation where a patient enters an emergency department and is treated there by personnel he/she believes to be employees of the hospital and where a private physician cares for a patient in the hospital. In *Mehlman v. Powell*, 281 Md. 269, 378 A.2d 1121 (1977), Judge Eldridge of the Maryland Court of Appeals noted that "all appearances suggest and all ordinary expectations would be that the Hospital emergency room, physically part of the Hospital, was in fact an integral part of the institution." *Mehlman*, 281 Md. at 274. Thus, the Court of Appeals concluded that "the staff of the [Hospital] emergency room were its employees, thereby causing the decedent to rely on the skill of the emergency room staff, and that the Hospital is consequently liable to the decedent as if the emergency room staff were its employees." *Id.* at 275. Recently, the Court of Appeals confirmed that care rendered in the emergency department is presumptively performed by agents of the hospital. *See Debas v. Nelson*, 389 Md. 364, 885 A.2d 802 (2005).

Mehlman is predicated on the health care provider being a member of the emergency department's staff and caring for the patient in the emergency department. In this limited circumstance, Maryland law assumes that a patient would expect the health care provider to be an employee of the hospital and therefore imposes vicarious liability on the hospital for that health care provider's negligence. In reality, this is a legal fiction imposed due to public policy concerns. In other words, while we recognize that the emergency physicians are legally independent, the law will not permit a hospital to disavow a principal/agency relationship.

However, where a provider is not a member of the emergency department and does not care for the patient in the emergency department, vicarious liability has not been imposed on the hospital. To do otherwise would be to place the hospital in the position of the insurer for all actions taken by all health care providers in the hospital. To avoid this outcome, Maryland courts have been careful not to extend the Mehlman exception to the general law governing the liability of principals for the actions of independent contractor health care providers to such a degree as to swallow the general principal-agent rule.

In *Hetrick*, the Court of Special Appeals addressed a situation where a pregnant woman, Jody Ann Hetrick ("Ms. Hetrick") presented to Anne Arundel Medical Center suffering from nausea, vomiting, abdominal pain, and several other symptoms. *Hetrick*, 67 Md. App. at 527. She was in approximately her thirty-first week of pregnancy. Id. She came under the care of her obstetrician and his associate. *Id.* Surgery was performed that revealed Ms. Hetrick was suffering from severe preeclampsia which had allegedly been undiagnosed by her obstetrician for over one week. Id.

Ms. Hetrick agreed to undergo a caesarean section even though she knew the baby would be born prematurely. Id. Immediately before the surgical delivery, Ms. Hetrick met a pediatrician and neonatologist for the

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first time. She testified that the pediatrician introduced himself and said, "I'm here for the baby." Id. She further testified that she did not know that the pediatrician had been called in by her own doctors and, indeed, stated that she assumed he was from the hospital. *Id.* at 527 & 529. The child was born in very poor condition and eventually died.

Plaintiff in Hetrick alleged, inter alia, that the pediatrician was the apparent agent of the hospital. However, the Court of Special Appeals rejected Plaintiffs' contention. *Id.* at 534. The Court noted that, "The principal-agent relationship is created, therefore, only if a third party has been misled by and relies upon the apparent authority of the supposed agent." *Id.* at 522–33, quoting *Klein v. Weiss*, 284 Md. 36, 61, 395 A.2d 126 (1978). The *Hetrick* Court further pointed out that, "'Apparent authority results from certain acts or manifestations by the alleged principal to a third party leading the third party to believe that an agent had authority to act.'" *Id.* at 533 (emphasis in original). To have been held liable for the acts of the pediatrician, the hospital would have had to have said or done something to cause Ms. Hetrick to believe that the pediatrician was its agent. *Id.* at 533. Ms. Hetrick's subjective assumption that the pediatrician was affiliated with the hospital was not enough to impose liability on the hospital. *Id.* at 534.

Maryland law on this issue is in accord with other leading jurisdictions, though there is a minority of states that disagree. For example, in *King v. Mitchell*, 31 A.D.3d 958, 819 N.Y.S.2d 169 (2006), a New York appellate court held that a hospital may not be held vicariously liable under apparent agency principles for the alleged malpractice of an independent anesthesiologist who participated in a surgery that was performed by a physician chosen by the patient. The evidence indicated that the anesthesiologist introduced himself to the patient shortly before the surgery and was employed by an independent group that had contracted to work at the hospital. The patient argued that the hospital had held the anesthesiologist out as its agent by providing consent forms and a questionnaire that related to anesthesia and (a) contained the hospital's logo; and (b) did not explain that the anesthesiologist was not a hospital employee. *King*, 31 A.D.3d at 959–60.

The trial court denied the hospital's motion for summary judgment on the grounds of apparent agency. The appellate court reversed and held that the apparent agency claim failed as a matter of law. In so doing, the court explained that, in order to maintain an apparent agency claim against a hospital, a patient must show that the hospital held the physician out as its agent and that the patient reasonably relied upon the appearance of agency in accepting the physician's services. The court then concluded that although it would be "preferable" for hospitals to disclose the status of physicians working on their premises, a failure to make such disclosure, by itself, does not rise to the level of a representation of agency. *King*, 31 A.D.3d at 960. The court also reasoned that the patient had not relied on the purported appearance of agency in selecting the hospital. Finally the court cited the patient's admission that the anesthesiologist's employment status had not affected her decision to accept his services. *King*, 31 A.D.3d at 960–61. The *King* court, like the Hetrick court, distinguished cases where hospitals have been held vicariously liable under apparent agency principles for the malpractice of an independent emergency room physician, pointing out that a patient who seeks emergency room care looks to the hospital — rather than to a particular doctor — for treatment.[1] *King*, 31 A.D.3d at 960.

Helpful strategies

Hospitals should be concerned when they are brought into a case involving a plaintiff whose damages allegedly extend beyond an independent physician's personal policy limits. The unmistakable conclusion is that plaintiff is setting the hospital up to be the insurer of last resort. The result is unappealing to both a private practitioner —who will likely see a demand for his policy limits — and the hospital.

In many instances, a private physician initially sees a plaintiff in a private office and then provides care at the hospital. Therefore, no affirmative representations are made by the hospital to support a theory of apparent agency and, because the doctor never saw the patient in the emergency room, the indicia of agency assumed by *Mehlman* is not present.

As discussed in this article, vicarious liability should not be assumed for the acts of independent health care providers. In my experience, plaintiff attorneys are often willing to voluntarily dismiss a hospital defendant who aggressively argues that it is not the vicarious principal for the health care provider. If voluntary dismissal is not forthcoming, an appropriate motion for summary judgment should be filed. This usually assists both the hospital and the private practitioner.

Mr. Sly is a trial attorney and partner at Waranch & Brown, LLC.

[1] *Another New York court recently refused to extend the apparent agency doctrine beyond the emergency room setting in* Rizzo v. Staten Island University Hospital, *29 A.D.3d 668, 815 N.Y.S.2d 162 (2006).*

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The Infamous Mold "Expert," Dr. Shoemaker, Finally Excluded in Maryland

In August 2007, former tenants (two parents and six children) of a luxury residence in Potomac, Maryland, brought a mold-related personal injury and property damage lawsuit against their former landlords and owners of the home in the Circuit Court for Montgomery County. *Nordlander, et al. v. James and Jean Ku*, Case No. 286296-V. The Plaintiffs sought $55 million for their alleged injuries under theories of breach of contract, fraud, and negligence. The Defendants responded with a counter-claim against the Plaintiffs for breaching the lease (i.e., terminating the lease early without just cause).

To advance their personal injury claims, the Plaintiffs identified Ritchie C. Shoemaker, MD to serve as their medical expert. Prior to this case, Dr. Shoemaker had testified in dozens of mold-related cases in the State of Maryland and beyond. The Plaintiffs first sought Dr. Shoemaker's consultation five months after moving out of the subject residence. At that time, Dr. Shoemaker recorded Mrs. Nordlander as experiencing the following symptoms: fatigue; weakness; aching; cramps; unusual pains; sharp stabbing pains; light sensitivity; red eyes; blurred vision; shortness of breath; inability to take a deep breath; sinus congestion; abdominal pain; "non-secretory" diarrhea; joint pain; impairment of recent memory; difficulty concentrating; "word finding" problems; confusion; disorientation; mood swings; anger; appetite swings; excessive sweating; difficulty controlling body temperature; always feeling hot; excessive thirst; frequent urination; increased susceptibility to static electric shocks; numbness and tingling in arms; vertigo; metallic taste; sensation of ants crawling on body; and tremors. Dr. Shoemaker initially diagnosed Mrs. Nordlander with "sick building syndrome," but later modified his diagnosis to "mold illness," which he admits to "coining himself" and describes as "an acute or chronic illness acquired following exposure to the interior environment of a water-damaged building with resident microbial contaminants."

To arrive at his diagnosis, Dr. Shoemaker employed a two-tiered protocol, which he has developed and modified over the years. At his deposition in October 2008, Dr. Shoemaker testified that Tier One of his protocol consists solely of an interview in which he attempts to do the following: (1) identify whether or not the person has potentially been exposed to a water-damaged building; (2) confirm the presence of a "distinctive group of symptoms" in various "body systems;" and (3) verify the absence of any confounding diagnoses and exposures (i.e., other potential causes of the patient's symptoms). If, based on his interview, Dr. Shoemaker believes that a person meets his Tier One criteria, he performs six biochemical tests as his Tier Two analysis. Dr. Shoemaker believes that "mold illness" is confirmed if three of the following six tests are "positive:" (1) Visual Contrast Sensitivity; (2) reduced levels of alpha-melanocyte stimulating hormone; (3) elevated levels of matrix metallopeptidase 9; (4) the presence of a certain version of the HLA gene; (5) Antidiuretic hormone/osmolality dysregulation; and (6) ACTH/cortisol dysregulation. Dr. Shoemaker admitted that his protocol did not include an inspection of the subject's indoor environment or the opinion of an environmental professional to confirm the presence or absence of water-damage or mold growth.

Dr. Shoemaker testified that he was satisfied that Mrs. Nordlander met his Tier One criteria after his first consultation with her, and recommended Tier Two testing the same day. According to Dr. Shoemaker, the Tier Two tests revealed that Mrs. Nordlander had a HLA genotype that renders her especially susceptible to "mold illness;" had a reduced level of MSH; and had a visual contrast deficiency. Dr. Shoemaker then prescribed Mrs. Nordlander with a cholesterol-lowering medication, Cholestryramine, supposedly to remove "putative biotoxins," including mold, from her digestive tract.

Dr. Shoemaker attributed Mrs. Nordlander's alleged injuries to her exposure to the "interior environment" of the subject residence. He admitted basing his conclusion on some photographs that Mrs. Nordlander showed him of the interior of the house; "limited" environmental testing; and the "presence of musty smells." Dr. Shoemaker did not inspect the house or conduct any independent investigation to confirm what, if anything, Mrs. Nordlander was exposed to in the residence, and could not identify anything specific that she was exposed to that allegedly caused her injuries. He further conceded that his knowledge about the subject property was based on the representations made and information provided by Plaintiffs' counsel.

Based on the precedent set in *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314 (2007) which discussed Dr. Shoemaker's diagnostic methods at length, Defendants filed a Motion to Strike Dr. Shoemaker's expert testimony, and requested the Court hold a *Frye-Reed* evidentiary hearing in advance of trial to determine the issue. Persuaded by the Court of Appeals directive in *Chesson* that a *Frye-Reed* hearing was appropriate, the Circuit Court (The Honorable Michael J. Algeo) held a two-day evidentiary on March 24 and 25, 2009 at which Dr. Shoemaker and the Defendants' expert, Hung K. Cheung, M.D., M.P.H. testified. *See Chesson*, 399 Md. at 328 (holding that Dr. Shoemaker's "theories regarding causation and the tests he employed to diagnose [the plaintiffs] are subject to a *Frye-Reed* analysis.").

On April 22, 2009, the Court issued a 16-page opinion striking Dr. Shoemaker's expert testimony. The Court held that "Dr. Shoemaker's theories are simply unproven hypotheses and cannot be accepted as reliable," and that "Dr. Shoemaker applied a methodology that is not generally accepted in either medical or scientific communities." Slip Opinion at 11, 14. The Court went on to say that Dr. Shoemaker failed to consider other possible causes of Mrs. Nordlander's ailments, and did not "account for [the] significant gap in time from the alleged exposure to his diagnosis." *Id.* at 13. The Court also took issue with Dr. Shoemaker's conclusion that one can acquire "mold illness" without ever being exposed to mold. *Id.*

Not surprisingly, the exclusion of the Plaintiffs' only medical expert substantially undercut their case. The Plaintiffs were left only with their property damages. The case settled on Day Two of trial where both the Plaintiffs and Defendants received a nominal amount for their injuries.

For more information about this case or for copies of the Court's Opinion striking Dr. Shoemaker, please feel free to contact Jennifer M. Schwartzott, Bradford S. Bernstein and/or Michael J. Halaiko at Miles & Stockbridge P.C.

SPOTLIGHTS

Manuel Gonzalez v. CertainTeed Corporation November 2009 Mesothelioma Trial Group 24x08000011

On December 7, 2009, after a three-week trial, a Baltimore City Circuit Court jury returned a defense verdict in a mesothelioma claim in favor of CertainTeed Corporation. CertainTeed was represented by Todd Suddleson of DeHay & Elliston, LLP, and Douglas Pfeiffer and Laura Cellucci of Miles & Stockbridge P.C. Plaintiff, Manuel Gonzalez, represented by the Law Offices of Peter G. Angelos P.C., claimed exposure to CertainTeed asbestos-cement water and sewer pipe while working as a cement finisher at various construction sites in Maryland and the District of Columbia from 1977 to 1979. Plaintiff requested an award in excess of $30 million. Although conceding that Mr. Gonzalez had asbestos- related mesothelioma, CertainTeed contested that the disease was due to exposure from CertainTeed's water and sewer pipe, and further argued that its warnings were adequate. CertainTeed's investigation and proof at trial refuted Mr. Gonzalez's claim that he worked in proximity to the installation and cutting of the water and sewer pipe. CertainTeed also introduced evidence that it began distributing warnings to users of the pipe in 1977. Plaintiffs called experts Murray Finkelstein, M.D., Dr. Robert Gordon, Dr. Barry Castleman, Dr. Jerome Paige (economist) and Mr. Jerry Lauderdale. Defendants called experts John Craighead, M.D., Mr. Robert Spence, Mr. Allan Burt (construction practices and sequencing) Dr. Patrick Gaughan (economist), and Dr. Charles Weaver.

Mary Malloy Dimaio of the Law Offices of Maher & Associates obtained a defense verdict in the Circuit Court for Baltimore County on October 17, 2009 in the case of *Granruth v. Weaver Marine Service, Inc.* Plaintiff claimed injury to her eyes as a result of alleged fiberglass exposure in April 2007. Plaintiff was a customer of a local marina. She kept her boat stored at the marina over the winter of 2006–2007, and wanted it ready to use for the weekend on Friday, April 27, 2007. Defendant complied and left the boat ready for her in her slip. She claimed that she picked it up on Sunday, April 29, 2007, and when she throttled up to her first destination, her face, eyes, and upper arms began to itch. The eye irritation continued, and she sought emergency treatment that Sunday. Some substance was removed from her eyes at that time and over the course of the next several weeks. Over the years since, she has complained of light sensitivity and dry eyes. Her contention was that the substance was fiberglass from the defendant's premises, allegedly drifting from a workshop into the ambient air and settling on the surface of her boat, which was 20 feet high on land and over 100 feet away from the workshop. The defense centered on the fact that the plaintiff picked up the boat on Friday and did not report to the emergency room until Sunday; that there was no proof at all that the substance in her eyes was fiberglass; that her business was demolishing and renovating homes in Baltimore City, which could have been the source of some irritant; and that her theory of causation was improbable as such an event had never occurred at defendant's premises in over 60 years of business.

Goodell Devries Win High Profile Med Mal Case in Federal Court

On September 3, 2009 **Susan Preston**, along with **Danielle Dinsmore** and **Derek Stikeleather** of Goodell DeVries Leech & Dann LLP, obtained dismissal of all claims in a medical malpractice suit by former CBS morning news personality Mark McEwen in the United States District Court for the District of Maryland. Mr. McEwen alleged the client doctor and hospital failed to diagnose his stroke in 2005 and caused him to suffer a stroke two days later. Defendants successfully challenged the reliability of the expert testimony of both of plaintiff's causation witnesses under Daubert. The Court granted the Daubert motion, finding both experts' testimony inadmissible, and entered summary judgment for all defendants. It found the opinion that medications to treat stroke probably would have prevented plaintiff's stroke within 48 hours was inadmissible ipse dixit in the face of uncontroverted epidemiological studies that repeatedly show the short-term efficacy of such drugs is less than fifty per cent.

Peggy Fonshell Ward, of Moore & Jackson, LLC, recently successfully defended her corporate client in a breach of contract case in Sarasota, Florida. The Plaintiff, a major national supplier of steel construction materials, asserted that the defendant, a nationwide business specializing in sale and leasing of shoring equipment, had entered an oral contract to purchase steel sheet piles to construct a permanent sea wall. The defendant contended that it had merely obtained a quote, but had not orally greed to make the purchase and had not issued a purchase order, as was the business practice for many years between the two companies. In a bench trial, the court found for the defendant on several bases, including that the alleged oral contract violated the statute of frauds, that there was insufficient evidence of an oral acceptance and, in a question apparently not yet addressed by any Florida appellate opinions, that "course of dealing" could be used to decide whether there was a contract at all, not just to interpret the terms of a contract.

SPOTLIGHTS CONTINUED

Mark Willard v. Bauer Corporation

United States District Court for the District of MD, Southern Division, Case No.: 8:06-167

VERDICT: Defense verdict on 5/15/09
JUDGE: Alexander Williams, Jr., United States District Court

ATTORNEYS:
Plaintiff — William E. Hewitt, Karen M. Cooke (Coggins, Harman & Hewitt)

Defendant — **John T. Sly, Christina N. Billiet** (Waranch & Brown, LLC)

Plaintiff, Mark Willard, sustained a left rotator cuff injury when he fell from an 8 ft. ladder manufactured by Defendant Bauer Corporation. Plaintiff had purchased the ladder the day before, and had climbed it to evaluate the lights in his warehouse. Plaintiff alleged that the fall was as a result of a manufacturing defect in the ladder, i.e. cracked rivets.

Defendant denied liability and disputed that the rivets were cracked or that the ladder was defective in any way. Defendant argued that Plaintiff lost his balance while working on the lighting and fell to the ground.

After a four day trial, the federal jury deliberated for approximately 2.5 hours before rejecting Plaintiffs claim.

Andrew Lake, et. al. v. Annapolis Radiology Assoc., et. al.

Circuit Court for Anne Arundel County, Case No.: 02-C07-122215

VERDICT: Defense verdict on 7/23/09
JUDGE: Hon. Paul G. Goetzke

ATTORNEYS:

Plaintiff — Paul A. Turkheimer (Meyers, Rodbell & Rosenbaum, PA)

Defendant — **John T. Sly, Lisa Russell** (Waranch & Brown, LLC)

Plaintiff, Andrew Lake, underwent abdominal surgery to repair a hernia. Plaintiffs alleged that the surgeon perforated the bowel during the performance of the procedure. The surgeon had previously settled the matter. The case proceeded against the radiologist who allegedly failed to identify the perforation. Plaintiff later experienced septic shock and required treatment at a tertiary trauma center and was rendered permanently disabled.

Defendant argued that the radiology was appropriately interpreted and that the surgeon was aware of the possibility of perforation but discharged Plaintiff to home.

After a two and a half week trial, the jury returned a defense verdict.

Goodell, DeVries Obtains Defense Verdict in Five Week Trial of Equitable Indemnification Claim Brought by Former Arnold & Porter Partner

Following a 5-week trial, a jury in Washington, D.C. returned a defense verdict on October 20, 2009 in favor of George Washington University Hospital in a suit brought by a former partner at the D.C. law firm of Arnold & Porter. The Plaintiff/Assignee claimed that the health care provider defendants should indemnify the wheelchair manufacturer which had already paid a $14 million settlement of a product liability claim after the Plaintiff was thrown to the ground by his malfunctioning wheelchair. The Plaintiff argued that two episodes of alleged hypoxia during a 5-week ICU stay caused brain damage which cut short his legal career at age 42. The hospital, which was defended by GDLD attorneys **Thomas V. Monahan, Jr.** and **Aaron L. Moore**, demonstrated that nurses who cared for the Plaintiff were not negligent.

Circuit Court for Anne Arundel County News

New Judicial Assignments Effective June 1, 2009

Approval Authority for all Case Removal or Transfer . . . . . Judge Davis-Loomis
Criminal Coordinating & DCM Judge . . . . . Judge Hackner
Back-up. . . . . .Judge Mulford
Criminal, Pre-Trial Chambers Matters . . . . . Judge Hackner
Criminal, Post-Trial Chambers Matters . . . . . .Judge Mulford
Civil Coordinating & DCM Judge (Non-Family Law) . . . . . Judge Jaklitsch
Back-ups . . . . . Judges North & Silkworth
ASTAR/Business & Tech Coordinating & DCM Judge . . . . . .Judge Silkworth
Back-ups . . . . . Judges Caroom, Hackner & Mulford
Drug Court, Adult Coordinating Judge . . . . . .Judge Mulford
Back-ups . . . . . .Judges Wachs & Loney
Drug Court, Juvenile Coordinating Judge . . . . . .Judge North
Back-up. . . . . Judge Jaklitsch
Family Division Coordinating & DCM Judge . . . . . .Judge Wachs
Back-ups . . . . . .Judges Loney, Davis-Loomis & Caroom
Juvenile Coordinating Judge . . . . . .Judge Caroom
Back-ups . . . . . Judges Davis-Loomis, Mulford, Wachs & Harris
Jury Judge . . . . . .Judge Goetzke
Exemplification Judge . . . . . Judge Harris
Estates, Trusts & Guardianships Judge . . . . . .Judge Harris
Backup . . . . . .Judge Silkworth
Orphans Court Contact Judge . . . . . .Judge Silkworth
Backup . . . . . Judge Goetzke
Discovery Sanctions Judge . . . . . Judge Harris
Backup . . . . . Judge Goetzke
Special Assignments for All Cases . . . . . Judge Davis-Loomis
Waiver of Filing Fees Criminal Cases. . . . . Judge Hackner
Waiver of Filing Fees Civil . . . . . Judge Davis-Loomis

Criminal Docket Judges . . . . . .Judges Mulford & Hackner and rotation of entire Circuit Court bench as needed.
Civil Non-Family Law Division Judges . . . . . Judges Jaklitsch, North, Silkworth, Goetzke & Hackner.
Family Division Judges . . . . . Judges Wachs, Loney, Davis-Loomis, Harris & Caroom.

Office of Case Management Restructuring

In this era of doing more with less, the Court has consolidated the family law and civil non-family law offices into one Office of Case Management. The Office of Case Management is now under the direction of Nancy Faulkner. Staff members Laurie Soistman, Jim Kafchinski and Michele Houston have all been cross-trained to handle case management issues regardless of case type. Anne Morrison, who many know from her work in the Circuit Court Law Library is now the court's ADR Coordinator located in the Office of Case Management. There are still two phone lines to call (Family Law, 410-222-1153) and (Non-Family Law, 410-222-1215).

Who To Call? Important Numbers to Remember

1. Status of a Civil Case . . . . . Civil Clerk's Office, 410-222-1431
2. Copies from a Civil Case File . . . . . Civil File Room, 410-222-1239
3. Postponements . . . . . Postponement Coordinator Nancy Baker, 410-222-1350
4. CourtCall Telephonic Appearances . . . . . Postponement Coordinator Nancy Baker, 410-222-1350
5. Interpreter requests. . . . . .Assignment Office, 410-222-1422
6. Family Law Services 410-222-1113
   Includes: Family Law Orientation Workshop, Kids Count, Teens Count, Family Law Substance Abuse Assessments, Custody Evaluations, Mediation Fee Waivers.

Maryland Judiciary Case Search Online . . . . . **http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp**
A great deal of case information is now available online through Maryland Judiciary Case Search (MDJCS). No special login is needed. Some people have reporting trouble getting to the search data. Click the box agreeing to the terms on the front page of the MDJCS site and hit continue to proceed to the search criteria page. You can also find a link to this page from the Circuit Court for Anne Arundel County website located at **www.circuitcourt.org**.

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  - Interactive Realtime Court Reporting
  - Remote Realtime Court Reporting
  - Exhibit Scanning and Linking
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- Legal Videography
  - Videotaped Depositions
  - Complimentary Video-to-Text Transcript
  - Live Video Streaming
  - Video Editing and Clip-making
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800-292-4789 or mdc@ladreporting.com

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Standard for Determining an Appealable Workers' Compensation Order:

Montgomery County v. Willis, No. 3081 *(Ct. of Spec. App. Aug. 28, 2009)*

By Wendy B. Karpel

The Court of Special Appeals in the case of *Montgomery County v. Willis, No. 3081 (Ct. of Spec. App. Aug. 28, 2009)* held that the refusal of the Maryland Workers' Compensation Commission to refer a matter to the Insurance Fraud Division under the authority of §9-310.2 of the Labor and Employment Article of the Maryland Annotated Code is an appealable order. This decision reversed the Montgomery County's circuit ruling that a finding of no fraud by the Commission is not an appealable order. The Circuit Court reasoned that since no benefit accrued to the Claimant as a result of a finding of no fraud, the Employer/Insurer could not appeal the order. In rejecting the Circuit Court's reasoning, the Court of Special Appeals held that there is no necessity that a benefit be denied or granted in order to have an appealable workers' compensation order. Rather, the legislature's intent in drafting Md. Code Ann., Lab. & Emp. §9-310.2 was to allow for an appeal from a Commission decision that denied a referral to the Insurance Fraud Division of the Maryland Insurance Administration.

Facts

On July 20, 2001, Valerie Willis, a former Montgomery County police officer, injured her left knee at work. At that time, the Claimant missed no time from work. In fact, a first report of injury was not filed until January 26, 2002. Unbeknownst to the County, the Claimant had surgery to the knee a few days after this first report injury was filed. Unbeknownst to the County, the Claimant had injured her knee on December 31, 2001, in a non-work-related event. The only records that the County had secured were medicals from June 2002 forward.

On September 26, 2005, the Claimant had a second surgery to her knee. Claimant still had not alerted the County to the December 31, 2001 intervening event. Additionally, the Claimant had not provided any medical records from December 31, 2001 through June 2002. The County had no records regarding the first surgery in January 2002. Lacking any knowledge of the intervening event on December 31, 2001, the County paid for the 2005 surgery. The County had never paid for the 2002 surgery.

In April 2006, the Claimant filed issues for temporary total disability ("ttd") benefits dating back to the January 30, 2002 knee surgery. Having no medical records, the County refused to pay ttd benefits for that time period. While investigating the 2002 ttd claim, the County obtained the pre-June 2002 medical records. These records revealed the intervening non-work related event of December 31, 2001.

On November 20, 2006, the County filed the "Request for A. Hearing For Referral To Maryland Insurance Fraud Division" form with the Commission. A hearing was held. On May 1, 2007, the Commission issued an order finding that no fraud was proven. On May 17, 2007, the County noted an appeal of this decision to the Circuit Court in Montgomery County, Maryland.

On December 21, 2007, the Claimant filed a motion for summary judgment/dismiss alleging that the Commission order finding no fraud was not appealable because no benefit was granted or denied by this order. The Circuit Court agreed. The County appealed this decision.

The Argument

The County appealed the decision of the Circuit Court on the grounds that the Commission's finding of no fraud was an appealable order. Since the case law required that in order for a Commission award to be appealable that the order needed to deny or grant a benefit, the County argued that a finding of no fraud denied the Employer/Insurer the ability to recoup any fraudulent payments made.

While L.E. § 9-310.2 does not contain a monetary benefit to the County, L.E. §9-310.1 does provide an economic benefit. If there is a finding of fraud under L.E. § 9-310.2, L.E. § 9-310.1 is activated. It requires the Commission whenever there is an administrative finding of fraud by the Commission to order the person committing fraud to reimburse the employer/insure for the fraud. Based on this requirement in L.E. §9-310.1, the County argued that if there was a finding of fraud under L.E. § 9-310.2 than L.E. § 9-310.1 required the Commission to *sua sponte* award the reimbursement. The reimbursement constituted the required benefit so as to make the issue of fraud an appealable order.

In response, the Claimant argued that the County never raised issues under L.E. § 9-310.1. Therefore, the finding of no fraud did not deny the County the benefit of reimbursement. The County had to specifically raise the issue of reimbursement under L.E. § 9-310.1 in order to have an appeal right.

The Court rejected both of the County's and the Claimant's arguments. Instead, the Court of Special Appeals ruled that L.E. § 9-737 allows aggrieved parties to appeal a Commission's decision. There is no limitation in the legislation restricting the right to appeal cases that grant or deny benefits. The finding of no fraud fully and finally resolved the question of whether fraud occurred. Denying the employer access to judicial review of the question of whether fraud existed in this case would come close to vesting the Commission with unchecked power with respect to matters of fraud. If the legislature had intended to vest the Commission with such power, the legislature would have included language in L.E. § 9-310.2 that denied the employer/insure the right to judicial review under L.E. § 9-737. The legislature added no such provision to L.E. § 9-310.2. Accordingly, the County is entitled to a circuit court trial on the issues of whether Officer Willis committed fraud.

Continued on page 18

(WORKERS' COMPENSATION) *Continued from page 16*

What Comes Next

The practical affect of the Court of Special Appeal's decision in this case is to expand what is considered an appealable order. The test is no longer whether an order grants or denies a benefit. Rather, any order that fully and finally resolves the question before the Commission is appealable. It is the court's duty to hear the appeal and either affirm, modify, or reverse the Commission. To rule otherwise allows the Commission unfettered authority and disrupts the balance instituted by the legislature in providing that an aggrieved party is entitled to judicial review of a Commission's decision. The court imposed rule that there must be some denial or grant of a benefit does not exist in the plain language of L.E. § 9-737 and therefore is rejected. The only test for an order to be appealable is whether the order is a final one.

Wendy B. Karpel is an Associate County Attorney for Montgomery County. In that capacity, she heads the workers' compensation unit for the Montgomery County's Self-Insurance Fund, which is comprised of 17 self-insured municipal employers.

A Different Way of Doing Business

Maryland Commission Supports Limited Scope Representation

In the last decade a number of practitioners, bar associations and courts have been experimenting with models of legal practice that permit attorneys to provide *a la carte* services to clients who want or need to limit their expenditures, and are able to effectively handle the other aspects of their case on their own. The terms "unbundling," "discrete task representation," and "limited scope representation" have been used to describe these practice models.

Limited scope representation is an alternative mechanism for delivering high quality legal services to well-prepared clients. The client and the lawyer together decide which tasks would be most appropriate for the lawyer to perform, and which the client will handle. They enter into a carefully drafted retainer agreement through which the client engages the attorney to handle one or more discrete aspects of their case. The client may elect to engage the attorney to prepare court documents only; or the client may prefer to prepare their own pleadings using court forms, to engage the attorney to coach them prior to mediation or trial, or, where permitted, to make a limited appearance on their behalf at a court proceeding. Clients may choose limited scope representation for a variety of reasons. Some clients may be unable to afford full representation; others may simply be worried that they cannot evaluate the full cost of representation at the outset and want to limit the costs. Other clients may want to retain control over the process or may want direct access to the courts and the litigation process.

A recent paper published by the Maryland Access to Justice Commission urges the courts, bar associations and others to support limited scope representation in Maryland as a way to help lawyers provide their services to a broader range of clients. The white paper, entitled, *Limited Scope Representation in Maryland*, was included as an Appendix to the Commission's *Interim Report*, released in November, 2009. In it, the Commission suggests limited scope practice allows attorneys to take advantage of the "latent legal market" made up of those individuals who have a legal need, but are reluctant to seek help because of fiscal constraints or a desire to more directly control the process.

The Commission was created in 2008 by Court of Appeals Chief Judge Robert M. Bell to develop, coordinate and implement policy initiatives to expand access to the state's civil justice system. The Commission brings together a variety of leaders and stakeholders from the Maryland Judiciary and its justice system partners, including members of the legal services community, the Maryland State Bar Association, the Executive and Legislative branches, and the Governor's Office. The Commission is chaired by retired Judge Irma S. Raker of the Maryland Court of Appeals. Chief Judge Ben C. Clyburn of the District Court of Maryland serves as the Commission's vice-chair.

The Commission notes that, as in all professional relationships, limited scope representation works best when it is founded on clear and effective communication between the lawyer and the client. "An attorney who offers limited services to his or her clients, will need to clearly define the relationship in a limited scope retainer agreement, and will need to provide *a la carte* pricing so that the client can make effective decisions about when and how to engage the attorney." MARYLAND ACCESS TO JUSTICE COMMISSION, INTERIM REPORT & RECOMMENDATIONS (Fall 2009), 74 – 75.

The Commission concludes that there is a favorable Rules climate supporting limited scope practice in the State. Limited scope practice is clearly envisioned by the revisions made to Maryland Rule of Professional Responsibility 1.2 and the adoption of Rule 6.5. The Commission urges the State to consider other rule changes to further support and clarify the practice. These might include rules to permit limited court appearances, and to clarify issues related to the withdrawal or termination of limited representation, client communications and ghostwriting.

As the Commission notes, "Limited scope representation can provide an opportunity for lawyers to expand their practice and provide assistance to those who might otherwise never seek their aid." INTERIM REPORT, 83.

The Commission's report, including the white paper, may be found at www.mdcourts.gov/mdatjc.

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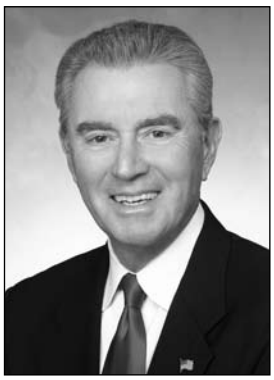

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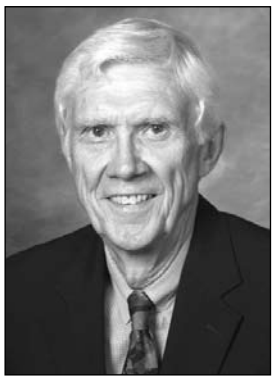

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(Praxair V. ATMI) *Continued from front cover*

sintered metal filters" and "conventional RFO's [having] standardized diameters as small as 0.1 mm." *Id.*; *Praxair Inc. v. ATMI Inc.*, 489 F.Supp.2d 387, 394 (D.Del. 2007).

The district court made a finding that "[t]here is no disclosure in the ... ['115 patent] of the RFO art nor of the use of flow restrictors." *Id.* at 393. However, in the Summary of the Invention at col. 3, lines 24 through 30 of the '115 patent, there is the following disclosure:

Any well known flow restriction device can serve as the flow restrictor. Suitable flow restriction devices can include, alone or in combination, packed conduits, membrane elements, or fine, porous screen or filter materials. A fine capillary tube can provide a preferred flow restriction where variations in both the length and diameter will allow adjustment of the maximum fluid discharge rate.

Neither the district court nor the Federal Circuit addressed this disclosure. The district court took notice of testimony of one of the inventors to support its conclusion of materiality.

When asked to describe a flow restrictor, the inventor testified that "[t]he simplest one is just a given orifice, a hole, very small hole, typically, or multiple holes." As specific examples, the inventor mentioned "packed columns" and filter materials such as stainless steel frets. *Praxair*, 543 F.3d at 1316.

It would appear that these examples are disclosed in the aforementioned disclosure in the '115 patent.

In addition, the Examiner searched class 251/subclass 118, which according to the class schedule, is specifically directed to valve and valve actuation device with a restrictor. USPTO Classification, title for class 251, subclass 118.

He also searched subclass 123, which further limits subclass 118 to "subject matter wherein the restrictor comprises a contracted portion of the flow line and the valve is located at the point of greatest constriction of the flow line." USPTO Manual of Classification, definition for class 251, subclass 123.

In making its finding of materiality, the district court relied on the testimony of the prosecuting attorney, who was one of the individuals accused of engaging in inequitable conduct.

When the attorney was asked to describe his knowledge of RFO prior art, he testified "[t]hat any time there's a change in the — in the diameter of something, in a valve or any flow control device, that could be ... a restricted orifice." *Praxair*, 543 F.3d at 1316.

This description appears to be consistent with the definition of subclass 123. It would appear, therefore, that the attorney's testimony did not provide any information not already known to the Examiner.

The district court noted four statements made by the prosecuting attorney before the PTO in the patent. The district court held that the following arguments were made to the Examiner:

> (1) The prior art did not teach the claimed "extreme limitation in flow" used "to provide a commercially practical container" that prevents "the catastrophic discharge" of toxic contents;
>
> (2) Existing safety measures were limited to "highly complex methods" and "elaborate systems;"
>
> (3) There was no indication in the prior art to use "severe flow restriction" to "overcome [ ] the problems of delivering highly toxic fluids from portable containers;" and
>
> (4) "[N]one of the prior art comes close to disclosing a restriction in the flow path from a pressurized container that has a diameter that does not exceed 0.2 mm." *Id.* at 1315.

It is not clear whether these arguments were made in the '115 patent or in one of the other two patents asserted by Praxair to have been infringed. In *Praxair*, 445 F.Supp.2d at 480 n.8, the district court referred to these arguments as having been made during the prosecution of the '115 patent. In *Praxair*, 489 F.Supp.2d at 393-94, the district court referred to these arguments as having been made during the prosecution of U.S. Patent No. 6,007,609, one of the other patents in suit.

In any event, the district court found that the prior art RFO devices contradicted these statements because "the prior art RFO devices provided a safety measure that appears neither 'highly complex' nor 'elaborate,'" allowed significant flow limitation, and "had standardized diameters as small as 0.1 mm." *Id.* at 394.

It is not clear from the evidence reported, however, how the district court reached these inferences.

For example, there is no testimony from the prosecuting attorney that, when he made the arguments to the PTO, he was aware of prior art with diameters less than 0.2 mm, how the evidence adduced at trial contradicts the statements represented to the PTO, and if the accused individuals were aware of the evidence at the time the representations were made.

The Federal Circuit noted the finding by the district court but indicated that the district court "did not explicitly find an affirmative misrepresentation." *Praxair*, 543 F.3d at 1315 n. 9.

The Federal Circuit, however, held that "*Praxair* offers no coherent argument as to why RFOs were not highly material in light of these four statements."

Judge Lourie dissented in *Praxair*, stating that "[n]o evidence was presented to show a threshold of intent." *Id.* at 1329.

Having been an expert witness on inequitable conduct cases, I would have to agree. I did not find evidence reported by the district court of an act or sequence of acts to show intent to deceive on the part of any individual having a duty to disclose.

Further, as noted above, despite the emphasis by the district court on four statements made during prosecution of the '115 patent, the Federal Circuit did not find any affirmative misrepresentation had been made to the PTO.

When *Star Scientific* was decided, it was thought the Federal Circuit in the future would more strictly enforce the burden of proof and elevated standard of proof for determining the threshold of materiality and intent by combing evidence adduced at trial to determine if the inferences reached by the district court were supported by clear and convincing evidence.

In light of the Praxair decision, however, that opinion was premature. The Federal Circuit will continue to decide inequitable conduct cases on a case-by-case basis, each decided on its own set of facts, with no clear predictability until the Federal Circuit addresses the issue en banc.

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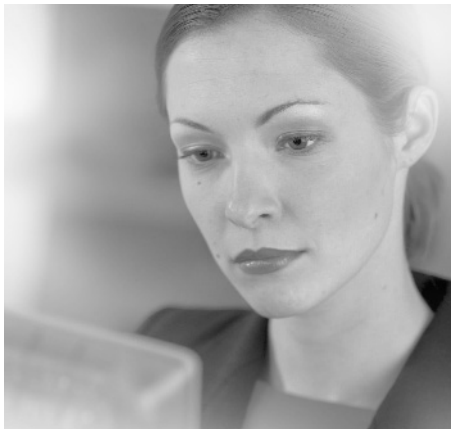


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