

THE HIGH COST OF A CASE GONE BAD

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A New Jersey biotechnology company is accusing a leading product-liability and toxic-tort lawyer, James Tyrrell Jr., of giving fraudulent and negligent advice that cost the client more than \$10 million.

In the late 1990s, Tyrrell and his firm, Latham & Watkins in Newark, convinced Artegraft Inc. of North Brunswick to pursue Johnson & Johnson in a contract dispute using a patent theory that Tyrrell manufactured without legal foundation, a suit filed in Middlesex County alleges.

As it turned out, Artegraft expended roughly \$5 million in legal fees for an arbitration it had no chance of winning, the suit says. After the loss, it had to pay J&J \$5 million to settle.

Latham & Watkins counters that Artegraft was a savvy client that knew the risks of the strategy and decided on it after Tyrrell made directors aware of the pitfalls. Indeed, he obtained the less costly goal the client wanted, but the company decided to press for more, and the extra costs couldn't have been anticipated. Now, motivated by "avarice," the company is trying to recoup its losses and avoid an additional \$1.6 million in unpaid bills, the defendants say in a partial dismissal motion.

The litigation comes just as Tyrrell is leading a 30-lawyer defection to Washington, D.C.'s 450-lawyer Patton & Boggs after nine years at 1,600-lawyer, Los Angeles-based Latham & Watkins. Last Monday, Patton & Boggs announced Tyrrell would head its new offices in Manhattan and Newark and serve as national chairman of a product liability and toxic tort practice.

Firm chairman Thomas Hale Boggs Jr. said Tyrrell and his colleagues had handled some of the most complex toxic tort and environmental matters in the nation, and that "their skills and reputations will add to our already substantial national litigation capabilities."

The malpractice suit, *Artegraft v. Latham & Watkins*, MSX-L-8937-05, was filed by Adubato Nesi & Studwell in Cranford, N.J., and Michael Ambrosio, a Seton Hall University School of Law professor.

The parties and lawyers decline to comment on the substance of the suit, but their positions and the facts are stated in court papers.

Privately held Artegraft markets arterial grafts of organic material for cardiac and vascular patients. In 1992, it made a deal with Ethicon Inc., a J&J subsidiary, to buy a line of bovine blood vessel graft products for use in surgery.

Under the contract, Artegraft paid \$1 million at closing and agreed to pay \$1.1 million more over five years, plus royalties on sales. A noncompete clause said J&J would stay out of "the business in particular and the vascular graft business in general," if Artegraft made payments as agreed.

Unknown to Artegraft, J&J was developing a product that would reduce demand for bovine-artery substitutes. It was the Palmaz stent, one of the great medical inventions of the 20th century, which keeps arteries open and helps heal them. Julio Palmaz developed it in the 1980s from work he started in a San Antonio garage and it has become a staple of the \$5 billion cardiac and vascular treatment market.

The defense brief says Artegraft learned in 1993 of the advent of stents and asked J&J to desist from that business, saying it violated the noncompete clause. Artegraft also began paying less than it was required to under the contract.

J&J struck back. It refused to halt the stent business and sued Artegraft in Morris County for breach of promise, asked for \$1.3 million in damages and sought to evict Artegraft from premises leased under the contract.

Artegraft hired Tyrrell, then a partner at Florham Park's Pitney, Hardin, Kipp & Szuch. Tyrrell had come to the firm 10 years earlier and his client roster included Monsanto Co., Lucent Technology Corp., Rubbermaid Inc., Burlington Industries and SmithKlineBeecham.

Artegraft told Tyrrell the goal was to walk away with forgiveness of the debt left on the note and outstanding rent and pursue its business free and clear of the deal with J&J. That would presumably be an easy price for the giant pharmaceutical company to pay to remove impediments to its stent business. For Artegraft it would be considered a home run, executives said.

But Tyrrell talked about another idea that could be more lucrative to the company, or at least secure the most favorable possible settlement.

According to the malpractice suit, Tyrrell advised that if Artegraft could establish that Ethicon had breached the noncompete clause by marketing the Palmaz stent, Artegraft could recover millions of dollars in damages.

Under a so-called gatekeeper theory, the noncompete clause would have the same effect as a blocking patent.

Tyrrell, who had moved to Latham & Watkins with Artegraft and other clients in tow in 1997, explained in an October 1998 memo, "In effect we contend that Claimants sold us their property right to engage in the vascular graft business. It is our contention that this property right is equivalent to owning a blocking patent. Hence, we claim that Artegraft is entitled to a royalty just as a patent holder would be entitled to a royalty."

Unfortunately, according to the suit, "at no time did Tyrrell or any other defendants advise plaintiff that there in fact existed controlling case law in New Jersey to indicate that patent-type damages are not recoverable for a breach of contract claim," the suit says.

A meeting with J&J lawyers left the impression Artegraft could get out of the litigation with an amicable settlement. But as the case headed for arbitration required by the contract, Tyrrell pursued the gatekeeper strategy. And because the case now required huge amounts of discovery, the legal bills started mounting.

The suit says Tyrrell originally planned to use former Pitney Hardin litigators at \$100 an hour. But he instead used Latham & Watkins reviewers who billed at \$200 and \$300 an

hour, costing Artegraft hundreds of thousands of dollars more, according to the pleadings.

In 1998, Latham & Watkins estimated the total cost of the litigation, through the arbitration, would be \$1.1 million. But by October 1999, with the arbitration still not finished, the firm had collected \$1.6 million and estimated the complete case would cost \$3.65 million, the suit says.

Tyrrell, pressed for his opinion on likely outcomes, told Artegraft in an October 1999 memo there was an 80 percent chance the arbitrators would cancel its debt, a 60 percent chance for debt cancellation plus an award of up to \$3 million and a 25 percent chance of an award of more than \$5 million.

He also said there was a 40 percent chance that the arbitrators, if asked, would enjoin J&J from selling the stent and stent products, which would result in a multimillion-dollar negotiated settlement.

In the end, J&J hit the home run. In January 2002, the arbitrators found Artegraft liable for the balance of the note, rejected its fraud and contract counterclaims and concluded that its nonpayment under the contract discharged Ethicon from its obligations under the noncompete clause, the suit says.

Tyrrell estimated that in the damages phase Ethicon would win an award of \$8 million to \$10 million with an 80 percent likelihood of also getting fees billed by its firms, Patterson Belknap Webb & Tyler in New York and Porzio, Bromberg & Newman in Morristown, N.J.

Tyrrell said he would be willing to file papers to continue the case, without charging for it, but the firm called in Gregory Haworth of Duane Morris & Hecksher's Newark office, and the case settled with a \$5 million payment to J&J. Artegraft had paid \$5 million in fees and is still waiting for \$1.7 million more, according to the pleadings.

Latham & Watkins takes many of the same facts and tells a far different story.

"This case is the product of plaintiffs' avarice and failure to accept responsibility for decisions and judgments that it alone made," the firm says in a motion by Roseland's Connell Foley for dismissal of the fraud claim and any claims for fees paid prior to November 2000.

Tyrrell actually could have obtained the forgiveness the company sought but Artegraft, a sophisticated client, "eschewed this 'home run' result in favor of a potential windfall recovery from Ethicon/J&J," the defense says.

Documents in the case describe a vigorous debate by company directors that fell into "shark" and "minnow" groups and show that the sharks won and decided on the aggressive strategy. "Artegraft was continuously apprised of the risks it faced, but again and again decided to enter the fight," the motion says.

Superior Court Judge Alexander Waugh has scheduled a May 16 hearing to decide whether to throw out part of the fee recovery claim and the fraud count for failure to state a claim.

The suit says Tyrrell's advancement of the gatekeeper theory, allegedly without a precedent, was part of an attempt to prolong the litigation and make the fees go higher. But the defense says that notion isn't supported by the claim because Tyrrell was merely expressing opinions and estimates and giving options. Artegraft can't make a showing that it relied on his statements to its detriment.

Legal issues aside, the case serves as another example of how a bad outcome and high fees are essential ingredients for a malpractice suit. And it demonstrates the pressures on lawyers to collect their fees.

In July 1999, with unpaid bills then at \$1.2 million, Latham & Watkins partner Christopher DiMuro wrote to an Artegraft executive, "As you know, prompt collection of accounts receivable is one of the criteria used to evaluate partnership performance so Jim will be particularly appreciative of your efforts to remit full payment within the next 15 days." Artegraft didn't.