ATLANTIC LEGAL FOUNDATION

2014 ANNUAL REPORT

The Year in Review

Atlantic Legal Foundation in 2014 continued its productive efforts in courts and before administrative agencies across the country, vigorously pursuing its mission of advancing the rule of law by advocating limited and efficient government, free enterprise, individual liberty, school choice and sound science.

The Foundation maintained its status as the nation's preeminent public interest law firm advocating application of clear and sound rules for the admissibility of medical and other expert testimony in toxic tort, product liability and other litigation, by filing briefs on behalf of distinguished scientists in asbestos-causation cases, as well as in cases focusing on the trial judge's "gatekeeping" responsibility in admitting or excluding expert testimony.

Constitutional issues remained a focus as well, in several briefs in the Supreme Court of the United States. There, we addressed the critical need to modify the "jurisdictional determination" procedures employed by the U.S. Army Corps of Engineers in enforcing the Clean Water Act, which effectively cripple any resistance by the property owner to government objection to the development of private property.

Atlantic Legal continued its opposition to class-action abuse by challenging in the Supreme Court the Sixth Circuit's certification of two massive classes of plaintiffs in an antitrust case involving potentially $9 billion in combined damages. Abuse of the class action device is important because, as some courts have recognized, certification of huge classes puts immense pressure on defendants to settle litigations that are without merit, because they threaten irrational verdicts, with potentially ruinous consequences.

Other Supreme Court filings included an important challenge to the expansion of the "disparate impact" doctrine in housing, a challenge to the Internal Revenue Service's overly-aggressive application of the "sham transaction" doctrine and an assertion of First Amendment rights on behalf of public television and radio broadcasters.

In state courts, the Foundation came to the support of parents in a California school district who wanted their elementary school children to be able to take yoga as part of a physical education program…a position challenged by parents who believe that yoga is inherently religious and that Christian children cannot practice yoga without jeopardizing their core religious beliefs.

Before regulatory agencies, the Foundation filed extensive comments critiquing the proposed rule "'Waters of the United States' Under the Clean Water Act", promulgated by the Environmental Protection Agency. The rule, if adopted, will significantly expand federal jurisdiction over private property, greatly increasing, as the Supreme Court itself has recognized, the cost and time of developing land, even for a single family home.

In November we were privileged to present the Foundation's twenty-seventh Annual Award to H. Lawrence Culp, Jr., the recently - retired President and Chief Executive Officer of Danaher Corporation. His remarks, "Reflections on Being a CEO", are reproduced in this report.

Atlantic Legal's board and advisory council remain convinced that our legal system needs the kind of responsible, objective and vigorous advocacy the Foundation has provided for the past 38 years. We are grateful for the loyal support of our contributors, leadership and staff, enabling the Foundation to continue its important work.

Bill Slattery
President

Dan Fisk
Chairman

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In The Courts

The Foundation participates in appeals raising questions of broad public importance. Here is a sample of recent filings; other cases are discussed at the Foundation's website, www.atlanticlegal.org.

Constitutional and Procedural Issues

Jurisdictional Determinations under the Clean Water Act: *Kent Recycling v. U.S. Army Corps of Engineers*
United States Supreme Court

Under the Clean Water Act (CWA), the Army Corps of Engineers may issue a site-specific Jurisdictional Determination (JD) delineating "waters of the United States" subject to federal regulation on private land. A JD effectively prohibits the land owner from using the regulated portion of his land without a federal permit. In apparent conflict with the Supreme Court's unanimous decision in *Sackett v. EPA*, the Ninth and the Fifth Circuits refused to review such determinations under the Administrative Procedure Act holding they create no legal consequences and are not "final agency action." According to these Circuits, a landowner may bring a challenge to such a determination in court only after making a prohibitively costly and time-consuming application for a permit, which the Corps will then issue, issue with conditions and limitations, or deny. The application would be unnecessary, and outside the agency's power to issue or deny, if the JD incorrectly asserts federal jurisdiction, as petitioner contends in this case. In conflict with other Circuits, the Fifth Circuit held that a due process challenge to a JD is also subject to this onerous permit requirement to establish "final agency action" under the APA. Here the Army Corps of Engineers made a JD that a portion of a parcel of property of which petitioner is the contract vendee is subject to CWA regulation and cannot be developed without a permit. Obtaining a permit is onerous: in *Rapanos v. United States*, 547 U.S. 715 (2006), in which Atlantic Legal also filed an *amicus* brief, the Supreme Court noted that the "average applicant for an individual permit spends 788 days and $271,596 in completing the process."

Atlantic Legal's *amicus* brief, filed in support of a petition for *certiorari* before the Supreme Court, was on behalf of a couple who bought property in Weston, Connecticut several years ago. The brief highlights and "puts a human face on" the barriers and frustrations faced by landowners whose property is deemed to include "jurisdictional wetlands". This couple paid slightly over $210,000 for 14 acres of undeveloped land in a suburban community, intending to build a $300,000 house. They spent approximately four years and $200,000 to obtain local building department and conservation commission approvals. Then, when they started repairing a pre-existing gravel driveway leading from the public street to the site of their house, they received a "cease and desist" letter from the Army Corps of Engineers, asserting probable Clean Water Act jurisdiction and threatening fines of $37,500 per day and possible imprisonment if they did not immediately stop work. Four years later, after they exhausted all administrative appeals, the Corps of Engineers' commanding regional officer affirmed the district engineer's "Jurisdictional Determination" that the property contains or is connected to "waters of the United States" and is therefore subject to federal jurisdiction. The decision affirming the district office decision, and the underlying regulations, state that the decision is the final administrative finding of jurisdiction. There are no more administrative appeals available.

The Foundation argues that, as with the compliance order in *Sackett*, the JD in this case has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific property and is legally binding on the agency and the landowner, thereby fixing a legal relationship, the *sine qua non* of "final agency action," and thus is appealable to an Article III court. The Government argues that the JD, by itself, imposes no affirmative legal obligation on the landowner.

Limiting Class Action Abuse: *In re Polyurethane Antitrust Litigation* — United States Supreme Court

Atlantic Legal maintained its work to limit the abuse sometimes involved in massive class action lawsuits. In the latest class action effort, Atlantic Legal filed a brief in the Supreme Court of the United States in *Carpenter Co., et al. v. Ace Foam, Inc.*, et al., in support of a petition for certiorari filed by defendants. The case, also known as In re *Polyurethane Antitrust Litigation*, is class action by two classes, direct and indirect purchasers of polyurethane, used mainly as filler for such products as furniture and furnishings. The Sixth Circuit certified two massive classes, which assert combined damages of over $9 billion. Petitions characterize this as "gargantuan"—they are likely the largest ever certified and upheld by a federal court of appeals—that "sweeps together dissimilar purchasers of a vast number of distinct products" sold by disparate groups of defendants, and covers a "kaleidoscope" of different purchasers and products, ranging from furniture manufacturers purchasing seat padding, to individuals buying foam pillows.

The thrust of the petition for *certiorari* is that the two classes contain many purchasers who did not suffer any injury, and certification of those classes violates the requirement of Article III of the U.S. Constitution that *all* class members have standing. As a separate ground for review, petitioners argue that individual damages calculations overwhelm common issues, in violation of the Supreme Court's decision in *Comcast Corp v. Behrend*. Petitioners also argue that the district court used an aggregate approach to measuring damages improperly obscuring the differences among class members, resulting in windfalls for some while potentially undercompensating others, and stripping class action defendants of their right to present "defenses to individual claims," in violation of the Rules Enabling Act, due process, and the Court's decision in *Wal-Mart Stores, Inc., v. Dukes.*

Atlantic Legal's brief, which was joined by the International Association of Defense Counsel, focuses on whether certifying a class under Rule 23(b)(3) is improper when individualized damages issues predominate, and when plaintiffs rely exclusively on aggregate damages models that calculate damages purportedly incurred by the class as a whole, rather than by individual class members.

First Amendment Challenge: *Minority Television Project Inc. v. FCC* — United States Supreme Court

Atlantic Legal filed a brief in *Minority Television Project Inc. v. FCC*, which involved an important First Amendment question relating to outdated restrictions on political speech in broadcast media.

The Ninth Circuit issued an *en banc* ruling that greatly limited the rights of public TV and radio broadcasters nationwide, relying on a 45-year old ruling in *Red Lion Broadcasting v. FCC* (1969).

The Ninth Circuit upheld a federal law prohibiting corporate and campaign advertising on public radio and television and ruled that the government has a substantial interest in imposing advertising restrictions to "preserve the essence of public broadcast programming" and that "Congress recognized that advertising would change the character of public broadcast programming and undermine the intended distinction between commercial and noncommercial broadcasting."

Minority Television Project Inc., a California nonprofit group that operates a public television station in Palo Alto, California, many of whose broadcasts and announcements are in Asian languages, sued the Federal Communications Commission after it was fined $10,000 by the FCC for allegedly broadcasting ads.

Federal law bans broadcasters from airing paid ads for political candidates, issue advocacy and corporations on public radio and TV. The law allows programming suppliers such as National Public Radio to broadcast messages by corporate sponsors, however. The station claimed the ban on "ads" violates its right to free speech.

The Ninth Circuit *en banc* majority rejected arguments that broadcast speech should receive the same deference that the U.S. Supreme Court gave to speech related to elections in its 2010 *Citizens United* ruling that allowed corporations and unions to spend unlimited sums on political campaigns. *Citizens United* "was not about broadcast regulation; it was about the validity of a statute banning political speech by corporations."

The thrust of Atlantic Legal's brief, filed with several other non-profits, primarily addressed the issue whether, in light of the Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), courts should apply strict scrutiny to bans on paid political messages that are "broadcast," rather than "rational basis review," or intermediate scrutiny, as in *FCC v. League of Women Voters*, 468 U.S. 363 (1984). Unfortunately, the Court denied review at the end of its term in June, 2014.

Disparate Impact and the Fair Housing Act: *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* — United States Supreme Court

The issue before the Supreme Court of the United States in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project* is whether the Fair Housing Act allows for liability based on disparate impact, as distinct from discriminatory acts or motives.

Disparate impact has metastasized at the federal level. Increasingly, entities which are government contractors or subcontractors, or which receive federal funding, must make race-conscious decisions to avoid disparate impact in housing, employment, education, grant programs, government contracting, *etc.*

The Supreme Court's decision in *Ricci* highlights the conflict between disparate impact doctrine and the constitutional guarantees of equal protection because requiring employers and others to avoid disparate impact liability could lead to a *de facto* quota system. As explained in Justice Scalia's concurrence, a disparate impact theory of liability may violate the Equal Protec-

tion Clause because subjecting defendants to disparate impact claims leads them to engage in unconstitutional race-conscious decision-making to avoid liability for such claims and leads to substantially adverse results. See *Ricci v. DeStefano*, 557 U.S. 557, 582, 594 (2009).

Atlantic Legal joined in an *amicus* brief Pacific Legal Foundation filed on behalf of a number of public interest legal foundations and advocacy groups in support of petitioner on the merits. The brief argues that (1) the text of the Fair Housing Act does not support a cognizable disparate impact claim, (2) there is a conflict between the disparate impact theory of liability and Equal Protection, and (3) the extension of the disparate impact doctrine to the Fair Housing Act leads to adverse results.

Public Pension Fund Disclosure: *Empire Center v. New York State Teachers' Pension System* — New York Court of Appeals

The Foundation filed a friend of the court brief in the New York Court of Appeals on behalf of the Citizens Budget Commission and the Citizens Union of New York City in support of a freedom of information request by the Empire Center for Public Policy in two related cases, *Empire Center v. New York State Teachers' Pension System and Empire Center v. Teachers' Retirement System of the City of New York*. The Citizens Budget Commission and the Citizens Union of New York City are two of the oldest and most-respected non-partisan, good government organizations in New York.

The cases arose out of requests for information by Empire Center, pursuant to New York's Freedom of Information Law (FOIL), for information about retired members of the two immense public employee retirement systems: their names, last employers, cumulative years of service at retirement, gross retirement benefits, retirement dates, and membership dates. Both retirement systems refused to provide the names of their retirees, invoking Section 89(7) of the FOIL, which provides that nothing in the law shall require "the disclosure of the home address. . . of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system," arguing that a "retiree" is also a "beneficiary."

The lower courts held that they were constrained by an earlier decision of the Court of Appeals to find for the retirement systems.

Atlantic Legal argued that Section 89(7) is an exception to the broad disclosure mandate of FOIL, and should be narrowly construed to promote the overarching purpose of FOIL—public access to government records and transparency—and the holdings of the lower courts are manifestly contrary to the purposes of FOIL and particularly troubling given taxpayers' justified concerns over the fiscal issues facing state and local government; and that principles of statutory construction, especially the principle that a law should not be construed to render legislative language superfluous when it is practicable to give to each a distinct and separate meaning should be recognized.

The legal issue is significant because many observers believe that the financial burden of government pensions threatens to adversely affect the economic viability of the State and City of New York and the welfare of New York citizens and taxpayers.

In a landmark 6-0 ruling, the New York Court of Appeals (the state's highest court) decided in May in favor of Empire Center, holding that the names of state and local government retirees receiving pensions are subject to public disclosure under the state Freedom of Information Law.

The Establishment Clause and Yoga: *Sedlock v. Baird* — California Court of Appeal

The Foundation filed an *amicus* brief in support of intervenor parents who favor inclusion of a yoga option in the curriculum of elementary schools in their local school district.

The plaintiffs, parents of some elementary school children, sued local school officials in San Diego County, California. They allege that yoga taught as part of the physical education program is closely tied to the Hindu religion, and thus constitutes an impermissible "establishment" of religion in violation of the First Amendment to the U.S. Constitution.

A foundation that has ties to a religious variety of yoga made a half-million dollar grant to the school district to implement an experimental yoga-based physical education curriculum. After a pilot program had been tried in one school the district made substantial changes to the yoga exercises being taught—in part in response to parents' comments—and all references to Hindu religion were removed from the curriculum and the names of the various yoga positions have been given common English names.

Plaintiffs allege that, notwithstanding these changes, yoga is inherently religious and that there is no "secular variety" appropriate for public schools. Their objection is grounded in their belief that yoga and its practices involve the worship of idols in violation of the Ten Commandments and that Christian children cannot practice yoga without jeopardizing their core religious beliefs. They claim that the school district is attempting to indoctrinate naive elementary school children in a "deviant" religion. Ironically, a significant percentage of adults in the Encinitas community use yoga as part of their health and fitness regime.

The central issues in the case are whether the yoga taught in the schools is "religious" and, if it is, whether the introduction of an optional yoga exercise class from which references to the Hindu religion have been removed amounts to an "entanglement" of the state with religion under the leading case *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

In an *amicus* brief the Foundation argued that, while yoga may have religious roots, as commonly practiced in the United States it has become a secular activity. In addition, many sports—including many of the Olympic track and field sports, wrestling, judo, jiu jitsu, karate, and lacrosse—have religious origins, but have no religious overtones as performed in schools and professionally. A deconstruction of *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979), the case on which the plaintiffs primarily rely, shows the case supports the position of the school district and defendants.

Admissibility of Expert Evidence

In 2014 Atlantic Legal continued its vigorous advocacy on behalf of the application of clear and sound rules for the admissibility of medical and other expert testimony involving diverse litigation settings.

Asbestos Causation: *Rost v. Ford Motor Company* — Supreme Court of Pennsylvania

This is an appeal from a decision of the Pennsylvania Superior Court, the intermediate appellate court in Pennsylvania, which held that the opinion of plaintiffs' expert on medical causation was admissible, despite the fact that the expert's opinion does not satisfy the legal standard articulated by the Pennsylvania Supreme Court in a line of cases, starting with *Gregg v. V-J Auto Parts Co.*, 596 Pa. 274, 943 A.2d 216 (2007) (rejecting the "fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation"), and continuing with *Betz v. Pneumo Abex, LLC*, 615 Pa. 504, 552, 44 A.3d 27, 48 (2012) (the "every exposure" theory is "fundamentally inconsistent with both science and the governing standard for legal causation"), and Howard v. A.W. Chesterton Co., 78 A.3d 605, 608 (2013) ("in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions").

The issue Atlantic Legal addressed was whether—contrary to *Howard, Betz, and Gregg*— a plaintiff in an asbestos action may satisfy the burden of establishing substantial-factor causation by an expert's "cumulative-exposure" theory that the expert concedes is simply an "any-exposure" theory by a different name, a theory that the Pennsylvania Supreme Court has repeatedly rejected.

Mr. Rost was diagnosed with mesothelioma. His claim against Ford arose because he alleged he was exposed to asbestos while working at the dealership more than 60 years earlier. Mechanics at the Ford dealership did, among other work, brakes repairs and replacement and clutch repairs and replacements which contained asbestos. But Mr. Rost was not a mechanic. Mr. Rost's job included sweeping up dirt and debris in the dealership's service area. Significantly, Mr. Rost was exposed to substantial amounts of asbestos in subsequent long-term jobs at a manufacturer of electric parts and at a electric utility for 34 years.

The plaintiffs' experts asserted that there is no safe level of asbestos exposure, based on a "cumulative exposures" theory, which they conceded was the same as the "every exposure" opinion advanced in prior asbestos cases.

The trial court instructed the jury that if they found that the Ford products in question contained asbestos and that plaintiff was exposed to them on a regular, frequent, and proximate basis, and this exposure contributed to the plaintiff's mesothelioma, then there must be a finding of liability. The jury found in favor of plaintiffs awarding them $1,000,000 in damages. The Superior Court affirmed the jury verdict.

The Foundation's *amicus* brief argued that, in *Gregg*, the Pennsylvania Supreme Court had ruled that a plaintiff in an asbestos case must present "reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm" and that the Court noted further that the "fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures" is not "reasonably developed scientific reasoning." Further, in *Betz*, the Supreme Court was critical of expert opinions which find no individual differences in the potency of the fiber, the concentration or intensity of the fibers, or the duration of exposure to a particular product. The plaintiff's expert's testimony in *Betz* that "each and every exposure to asbestos—no matter how small—contributes substantially to the development of asbestos-related diseases" is essentially no different from the testimony of Mr. Rost's experts.

We also argued that the clear and emphatic opinion of the Pennsylvania Supreme Court in *Howard* should have made clear that, in cases involving dose-responsive diseases, expert witnesses may not ignore or refuse to consider dose as a factor in their opinions; bare proof of some *de minimis* exposure to a defendant's product is insufficient to establish substantial-factor causation for dose-responsive diseases.

In short, the Foundation argued that the *Betz* and *Howard* decisions should have closed the door to the "every breath" or "single fiber" theory, but in *Rost* the lower courts sought to avoid the Pennsylvania Supreme Court's holdings in the *Betz*, *Gregg* and *Howard* trilogy, by permitting plaintiffs' experts to engage in a purely semantic change of the rejected "every breath" or "each fiber" theory to a "cumulative exposure" theory according to which "each and every breath" "contributes" "substantially" to causing mesothelioma.

Asbestos Causation II: *Izell v. Union Carbide Corporation* — California Supreme Court

Plaintiff Bobbie Izell worked as a cement contractor in the 1950s and as a general contractor building small houses in the Los Angeles area until he retired in 1994. He was diagnosed with mesothelioma in 2011, when he was 85 years old.

Izell acknowledged that he didn't work with asbestos directly, but he argued that he was exposed to asbestos dust while inspecting the homes his construction crews worked on. Because his exposure to asbestos was relatively low, it took longer for the cancer to develop, he argued.

A Los Angeles Superior Court jury initially awarded $30 million in compensatory damages against five defendants—including Union Carbide, which was assessed 65 percent of the fault—to Bobbie Izell and his wife, and awarded the $18 million in punitive damages against Union Carbide alone. The plaintiffs accepted a reduction of the compensatory damages to $6 million.

Union Carbide argued that the verdict should be overturned as to both liability and damages. There was insufficient evidence linking Izell's illness to a Union Carbide product, they argued, and the damages were excessive.

The California Court of Appeal held that an asbestos plaintiff can establish causation and hold a defendant liable for damages merely by showing that he inhaled some amount of asbestos from a defendant's product—no matter how small the amount. The causal link between Izell's exposure to the Union Carbide product and his illness, the Court of Appeal held, was established by the plaintiff's testimony that he saw his workers apply joint compound containing Union Carbide asbestos material in its wet form and then sand the dried product, creating dust when it became airborne and which Mr. Izell inhaled.

The $18 million in punitive damages was not excessive, the Court of Appeal ruled, because Union Carbide "acted with a reprehensible indifference to the health and safety of others," including plaintiff Izell, when it concealed internal studies establishing that even brief exposure to asbestos caused cancer.

The Foundation filed an *amicus* letter brief in support of Union Carbide's petition for review by the California Supreme Court because the decision of the Court of Appeal is inconsistent with the already lax legal standard articulated by the California Supreme Court in *Rutherford v. Owens, Illinois, Inc.*, 16 Cal.4th 953 (1997) and because the opinion of plaintiffs' expert on medical causation does not satisfy that standard. The Court of Appeal, by holding that plaintiffs met their burden merely by presenting expert testimony that every exposure to the defendant's respirable asbestos fibers contributes to the plaintiffs total exposure and therefore any exposure, no matter the quantity or fiber type, should be deemed a substantial factor contributing to the plaintiff's risk of developing mesothelioma, misconstrued *Rutherford*.

Judge's Gatekeeping Duty: *Accenture LLP v. Wellogix, Inc.* — United States Supreme Court

In April, Atlantic Legal filed an amicus brief on its own behalf and on behalf of the Federation of Defense & Corporate Counsel (which has an international membership of 1,400 defense and corporate counsel) and the International Association of Defense Counsel, an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits, in *Accenture LLP v. Wellogix, Inc.*, an important case involving the admissibility of expert evidence. Because of "Atlantic Legal Foundation's significant role" in important "causation" cases, we were asked by a prominent Supreme Court practitioner to file an amicus brief in support of a petition for *certiorari*.

The *Accenture* case involved allegations of theft of trade secrets—computer code—from an oil-industry services start-up by a very large consulting firm, for use by a major international oil company. The key witness for the plaintiff was a computer programming expert who testified that he had "forensic evidence" that Accenture had copied computer code created by Wellogix in software that would computerize heretofore handwritten purchase and service orders for complex oil and gas drilling projects.

Federal Rule of Evidence 702 provides that a witness "who is qualified as an expert" may testify only if "the testimony is based on sufficient facts or data" and "the expert has reliably applied the principles and methods to the facts of the case." The question presented in this case was whether Rule 702 required a court, and not the jury, to decide whether expert testimony is "based on sufficient facts or data" and "reliably applie[s] . . . principles and methods to the facts of the case," and to set aside a jury verdict that rests on expert testimony that fails to meet these fundamental requirements.

The Supreme Court in its landmark *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) decision recognized that "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it" and case outcomes often turn on expert evidence. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). Thus, the Federal Rules of Evidence and the Supreme Court's cases demand that expert testimony be carefully scrutinized by the court before it reaches the jury. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592-97.

Frequently, however, courts are abdicating this essential "gatekeeping" duty by passing questions that the court must resolve at the admissibility stage to the jury to weigh as a part of the merits determination, on the theory that (as in pre-*Daubert* jurisprudence) "vigorous cross-examination" will adequately protect the record. This case is a paradigmatic example. Plaintiff's suit for misappropriation of trade secrets hinged entirely on a software expert whose testimony was decisive, but in key aspects inadmissible because his testimony went far beyond an analysis of software, and included legal conclusions as to what information was a trade secret, whether the defendant had misappropriated those trade secrets, and the economic impact of that alleged misappropriation on the plaintiff's business secrets, despite the fact that the expert had no firsthand knowledge of the underlying facts, no expertise in the oil and gas industry, and no background in appraising businesses or assessing damages, and no factual basis for his opinion.

Unfortunately, in the *Accenture* case, the district court and court of appeals "punted" on the key admissibility issue and left it to the jury to decide whether the computer expert's testimony was reliable. According to those courts, cross-examination is the proper check on wayward experts, and any defects in an expert's testimony can be sorted out by the jury. These decisions are part of a growing trend in which many courts are turning a blind eye to Rule 702's requirements, and faulty expert testimony is reaching jurors under the rationale that its deficiencies go to the weight of the testimony, not its admissibility.

The thrust of Atlantic Legal's brief was that the *Daubert* trilogy and amended Rule 702 represent a shift away from judicial "deference" to experts' conclusory opinions toward a "pedagogical model" for evaluating expert testimony, which requires the trial judge to understand the facts underlying and the reasoning behind the

expert's conclusions. Likewise, if the expert's testimony goes before a jury, the jury needs to be able to apply the expert's methodology to the facts before them. In this case, the trial judge admitted that he found it "very hard. . .to follow" the testimony of Wellogix's expert, notwithstanding that the trial judge had already presided over an arbitration involving similar issues arising out of the same transactions, but different parties, and had already heard evidence about Wellogix's computer code. It was illogical for the district court to believe that a lay jury would be able to sort out that testimony and reach an informed judgment.

Judge's Gatekeeping Duty II: *City of Pomona v. SQM North America Corp.* — United States Supreme Court

The Foundation filed an *amicus* brief in support of a petition for *certiorari* seeking U. S. Supreme Court review of the Ninth Circuit's decision in *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036 (9th Cir. 2014). The issue is a prototypical *"Daubert"* question: Did the Ninth Circuit correctly reverse the trial court's exercise of its "gatekeeper" role in excluding unreliable scientific expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702.

This case arose out of findings that the City of Pomona's water supply contains perchlorate above the limit established by California regulatory authorities. Perchlorate has been alleged to affect iodine uptake by the thyroid. Synthetic perchlorate is widely used by the military and by its aerospace industry contractors as an oxidizer in solid rocket fuel, and it is also used in numerous commercial products, including explosives and airbags. The federal government and government contractors have incurred substantial liability for perchlorate contamination. Perchlorate is also found naturally in soil, groundwater, and seawater worldwide.

The principal issue in this case is whether the city's identification of the source of the perchlorate in its water supply as the Atacama Desert of Chile is science-based. SQM North America's parent company is a principal producer of perchlorate from the Atacama Desert and SQM North America sells Chilean perchlorate in the United States, although it ceased selling it in California decades ago. Pomona attributes the perchlorate in its water supply to local use of Chilean fertilizers containing natural perchlorate during the first half of the twentieth century. SQM began distributing Chilean fertilizer in the U.S. in 1927, but there is no direct evidence that its products were ever used in Pomona.

Pomona's case rested on the testimony of an expert who testified that he had developed and applied a complex, multi-step form of "stable isotope analysis" to identify Chilean perchlorate as the dominant source of perchlorate in Pomona's groundwater. The expert admitted that no other laboratory employs his approach, and a Department of Defense Guidance Manual, co-authored by the expert and only issued on the eve of trial, acknowledges that the expert's method remains under development and has not been verified through independent testing by other laboratories.

After a *Daubert* hearing, the district court, in a very brief decision, excluded the city's expert's evidence. The Ninth Circuit reversed.

In our *amicus* brief in support of the petition for *certiorari*, the Foundation argued that the Ninth Circuit panel decision ignores the Supreme Court's ruling in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) that the question was not only reliability of an expert's methodology in general, but rather also whether the expert reliably applied the theory to the specific facts of the case, and that in *Kumho* "there [was] no indication in the record that other experts in the industry use [the expert's] approach. . ." (526 U.S. at 154) and in *General Electric v. Joiner*, 522 U.S. 136 (1997) the Court held that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." (522 U.S. 136, 146). The 2000 amendment to Rule 702 requires the trial court to determine that the expert's testimony "is the product of reliable principles and methods," and that the testimony "is based on sufficient facts or data" and that "the expert has reliably applied the principles and methods to the facts of the case." We argued further that the Ninth Circuit's holding rests on a rigid distinction between

an expert's "methodology" and "conclusions," a distinction which the Supreme Court rejected in *General Elec. Co. v. Joiner*, ("conclusions and methodology are not entirely distinct from one another") and *Kumho Tire Co. v. Carmichael* (trial court must determine reliability where expert "testimony's factual basis, data, principles, methods, or their application are called sufficiently into question"). To protect the truth-seeking function of the judicial system, trial courts should exclude expert testimony where "any step" in the expert's application of his or her chosen methodology is unreliable and, thus, renders the analysis itself unreliable.

Other Notable Cases

Challenging the IRS: *WFC Holdings Corp. v. United States* — United States Supreme Court; *American International Group v. United States* — Second Circuit Court of Appeals

In two cases, one a petition for *certiorari* to the Supreme Court of the United States and the other an appeal to the Second Circuit Court of Appeals, the Foundation supported taxpayers challenging the aggressive and arbitrary application by the Internal Revenue Service of the "Sham Transaction" doctrine (sometimes also referred to as the "Economic Substance Doctrine"). This common-law doctrine allows the IRS to disregard a transaction that complies with the Internal Revenue Code only if it is a "pure paper shuffle" that does not change the taxpayer's economic position apart from taxes.

In the case that was the subject of the Supreme Court petition, the IRS challenged as a sham transaction the transfer by Wells Fargo Holdings of under-performing lease obligations from a bank to a banking affiliate that generated tens of millions of dollars of profits (far in excess of transaction costs). In support of Wells Fargo the Foundation argued that a taxpayer is permitted, under the Sham Transaction Doctrine, to structure an objectively profitable transaction so as to achieve tax benefits provided for in the trade, even if each step is not independently profitable. Unfortunately, the Supreme Court denied review in June, 2014.

In the Second Circuit case, the Foundation's amicus brief supported American International Group in its challenge to the Internal Revenue Service's application of the "Economic Substance Doctrine" in a case involving foreign tax credits. The Internal Revenue Code allows U.S. taxpayers who have already paid taxes on income in a foreign country to claim a "foreign tax credit" for the taxes paid, so as to avoid "double taxation". The IRS asserted that the transactions in question lacked economic substance, because they did not have a purpose or utility apart from their anticipated tax consequences, and thus can be disregarded for tax purposes. The taxpayer, AIG, argued that the transactions at issue were legitimate examples of banking activities and had economic substance because they were expected to generate a pre-tax profit over the life of the transactions in the tens of millions of dollars.

The Foundation's brief supporting AIG's appeal argued that taxpayers need to minimize uncertainty in planning transactions, and that uncertain application of the tax law makes it impossible for taxpayers to plan for the future and they are generally entitled to make business plans in reliance on the tax laws as written, without being second-guessed because of their desire to structure the transaction in a way that minimizes their tax obligations.

Limiting the "Non-Delegable Duty" Doctrine: *KAM WAY Transportation, Inc. v. Superior Court (Chavez)* — California Supreme Court

The expansion of vicarious liability is of particular interest because it threatens the viability of small and medium sized firms that act as intermediaries and which promote efficiency in a vital industry, the transportation of goods by truck, and could diminish competition.

The case arose out of a truck accident in which the owner-driver of a tractor-trailer truck carrying a cargo of fruit on an interstate delivery from Washington to Arizona caused an accident in which a passenger in the cab of the truck was injured. The passenger, Chavez, was being trained as a truck driver by the owner-operator and was assisting the owner-operator on this trip. Chavez sought to recover for his injuries from the driver (Singh), the motor carrier (HSD) and KAM-WAY Transportation (the truck "broker").

KAM-WAY Transportation is a freight or truck broker, which acted as an intermediary between the owner of the cargo and the motor carrier. KAM-WAY exercised no ownership or operational control over the tractor-trailer or the cargo.

Under California law, employers are generally not liable for injuries to third parties due to the negligent acts of an independent contractor. An exception is the "non-delegable duty" doctrine, under which one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. This type of vicarious liability applied only to certain specific groups, including motor carriers.

Unlike motor carriers, trucking (or "freight") brokers are businesses that do not actually transport goods, but simply match various companies which need goods shipped with independent motor carriers. Prior to this case, California's non-delegable duty doctrine had never been applied to truck brokers. Multiple other jurisdictions have clearly held that truck brokers should not be held vicariously liable for the acts of truck operators/drivers with whom they contract.

In the trial court KAM-WAY moved for summary judgment, arguing that KAM-WAY acted only as a truck broker, not a motor carrier, and that since Singh was acting as an independent contractor, KAM-WAY was not liable for Singh's actions. The trial court denied KAM-WAY's motion for summary judgment solely because it found a triable issue of fact as to whether KAM-WAY had breached a "non-delegable duty of care" to Chavez. The trial court acknowledged that the "nondelegable duty doctrine had only been applied to carriers, but determined for the first time that "The articulated [non-delegable duty] rule that applies to carriers, should apply to brokers . . . as a matter of public policy."

KAM-WAY sought a writ of mandate directing the trial court to grant the summary judgment motion, arguing that the writ is necessary because if the trial proceeds against it based on a novel application of law, it will be "irresistibly pressured to settle based solely on the magnitude of the potential financial exposure." The Court of Appeal summarily denied KAM-WAY's motion. KAM-WAY filed a petition for review in the California Supreme Court.

In an "amicus letter brief" to the California Supreme Court Atlantic Legal urged that court to grant review. We argued that a trial court should not decide a novel application of law and that only the California Supreme Court should make this judicial policy determination. We pointed out that the California appellate courts had never before held that a freight or truck broker can be held vicariously liable for the acts of an independent contractor motor carrier under the nondelegable duty doctrine and that the case relied upon by the trial court held only that carriers have a nondelegable duty. We also pointed out that the Superior Court's policy determination is likely to have an enormous impact on the economy. According to the U. S. Department of Transportation, of all the goods shipped in the United States in calendar year 2012, 70% of total tons was shipped by truck.

Extending the nondelegable duty doctrine to brokers will increase the costs of truck transportation, because at the very least brokers will have to insure against vicarious liability (assuming such insurance is available) and that cost will be passed on to shippers and consumers. If such insurance is not available, or available only at prohibitive cost, many small and medium-sized brokers will likely be driven out of business, reducing competition and diminishing the availability of a useful, and in many cases, vital, service.

Charter School Advocacy

ATLANTIC LEGAL FOUNDATION

BULLETIN
AUGUST 2014

Federal or State Jurisdiction Over New York Charter School Employees – A Conversation

In 2005, Atlantic Legal Foundation published the first of its "Leveling the Playing Field" books, for New York charter school operators, administrators and board members, introducing them to state public employee relations law affecting labor relations at these schools, and best practices to operate freely and effectively in the face of these laws. This book was followed by similar books for New Jersey, Massachusetts, Michigan and California [www.defendcharterschools.org]. Each of these books contained a similar message: that with sound employee relations, charter schools could operate in an innovative, flexible and education-driven environment, always keeping the interests of students and their achievement uppermost, without the need for union representation.

These books were co-authored by Roger Kaplan, Thomas Walsh and other members of the Jackson Lewis law firm. Mr. Kaplan also is a member of Atlantic Legal Foundation's Advisory Council.

In 2012, however, the National Labor Relations Board, the federal agency charged with administering labor relations law applicable to private sector employers and employees, changed the landscape. It held in *Chicago Mathematics & Science Charter Academy*, 359 NLRB No. 41 (Dec. 14, 2012), that an Illinois charter school was not a "political subdivision" of the state, and therefore was not exempt from the coverage of the National Labor Relations Act (NLRA). The Board based its decision on its finding that despite receiving a large proportion of its funding from state sources and being subject to state education mandates, the school was not created by the state, so as to constitute a department or administration area of the government, or administrated by individuals either who are responsible to public officials or to the general electorate. Instead, the Board found the school was created by charter applicants and run by a board of directors that operated independently of public officials. *Chicago Mathematics* was followed by another decision in *Pennsylvania Cyber Charter School*, NLRB Case No. 06-RC-119003, 2014 WL 1390806 (2014) (not reported in official bound volumes), reaching a similar result, likening the school in that case to a government contractor[1]. Still, more recently, an NLRB Regional Director in Brooklyn, relying on these cases, concluded that a New York charter school also was subject to the National Labor Relations Act and NLRB jurisdiction, despite arguments from a teachers union seeking to represent the school's employees, that the state's Charter School Act and Public Employees Relations Act (Taylor Law) constituted the school a public employer and that its representation petition should be considered by the State's Public Employees Relations Board. *Hyde Leadership Charter School Brooklyn*, NLRB Case No. 29-RM-12644 (May 28, 2014) (request for review pending). The charter school in *Hyde Leadership* was represented by Jackson Lewis' Tom Walsh.

Charter school operators in New York and elsewhere understandably may be uncertain as to the significance or consequences of state labor law and labor relations board (PERB) jurisdiction, or federal labor law and labor board (NLRB) jurisdiction. Recently, Mr. Kaplan sat down with Mr. Walsh to ask him how jurisdiction over charter schools by the state or the federal government could affect the rights and obligations of the schools and their employees. Here is their conversation:

Q. Mr. Kaplan: In your experience, Tom, why might a New York charter school faced with union organizing among its staff and a union demand for recognition as their representative prefer to have the NLRB assert jurisdiction in the case, rather than PERB?

A. Mr. Walsh: The principal reason – and its importance cannot be overstated – is that, under the NLRA, an employer may insist on having the NLRB conduct a secret ballot election among an appropriate unit of employees, so that employees can freely choose whether they want union representation or not, absent, in relatively few cases, an NLRB order based on authorization cards signed by a majority of bargaining unit em-

[1] On June 26, 2014, the Supreme Court in NLRB v. Noel Canning Company, 572 U.S. __, 2014 WL 2882090 (Docket No. 12-1281), concluded that two of the four Board members who decided Chicago Mathematics, Richard Griffin III and Janet Block, had been unconstitutionally recess-appointed, thus putting the authority of that decision in question. The Board panel that later decided Pennsylvania Cyber, however, was confirmed by the Senate, so it appears that the rationale of Chicago Mathematics remains viable despite the change of Board personnel.

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During 2014, Atlantic Legal Foundation continued to assist charter schools and their advocates in a variety of settings and responded to requests for legal assistance and guidance. The most visible project involved a federal jurisdictional issue: does the National Labor Relations Act apply to charter schools or are they exempt from coverage as political subdivisions? The Foundation published a bulletin (available at www.atlanticlegal.org) alerting New York charters to the issue, explaining that NLRA jurisdiction would require unions to submit to secret ballot elections in their efforts to organize charter school employees. To date, most unions have taken advantage of card check procedures (often abused by unions) permitted under state law.

Before the Agencies

EPA Wetlands Rule Comments

The issue of federal wetlands jurisdiction is controversial because it enables two federal agencies, EPA and the Corps to extensively and intensively regulate land use down to individual lots, and, in effect, to override local zoning and land use regulation and to use their permitting process to micro-manage development on private land throughout the country, even in areas that are not, at least in the common-sense meaning, "wetlands."

The Foundation filed extensive comments critiquing the Environmental Protection Agency's proposed rule "'Waters of the United States' Under the Clean Water Act," 79 Fed. Reg. 22188, et seq. (April 21, 2014) ("Proposed Rule"). The stated purpose for promulgating the new rule is to further clarify the scope of the term "waters of the United States" as defined in 33 C.F.R. 328.3, and as applied by the two federal agencies that have jurisdiction to enforce the Clean Water Act (CWA) -- the EPA and the U.S. Army Corps of Engineers ("Corps") -- and to reduce the number of case-specific rulings. The proposed rule purports to follow Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), using a broad "significant nexus" test, while also expanding the scope of the term "adjacent" in order to increase the scope of automatic jurisdiction.

Under the Commerce Clause, the jurisdictional scope of the CWA is limited to "navigable waters" of the United States. This is defined in section 502(7) of the statute as "waters of the United States, including the territorial seas." According to EPA and the Corps, this definition has generally not been limited to traditional navigable waters.

The key issue is whether "adjacent" water bodies to traditional "waters of the United States" are also within federal jurisdiction. The Supreme Court in *Rapanos* left the lower courts with conflicted guidance on how broadly to define the term "waters of the United States." The Court split 4-4-1, with Justice Kennedy concurring. The four-justice plurality, in an opinion by Justice Scalia, held that "waters of the United States" included "only relatively permanent, standing, or continuously flowing bodies of water" connecting to traditionally navigable waters. Moreover, only wetlands with a "continuous surface connection" to a traditional "water of the U.S." would be considered 'adjacent' to such waters under the CWA. Justice Kennedy's nebulous concurring opinion said that the term WOTUS should encompass wetlands that possess a "significant nexus" to waters that (1) are or were navigable in fact or (2) that could reasonably be so made. "Significant nexus" could be found if "the wetlands 'either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable,'" if this relationship is more than "speculative or insubstantial."

The four dissenters, in an opinion by Justice Stevens, joined by Breyer, Souter and Ginsburg, would have deferred to the agency's broad interpretation.

Since there was no majority opinion, it is unclear which *Rapanos* opinion is persuasive. The Seventh, Ninth, and Eleventh Circuits have ruled that Kennedy's concurring opinion is controlling; the First and Eighth Circuits have held that either Kennedy's concurrence or the plurality holding may control; and, one district court has held the plurality holding alone is determinative.

The Foundation's comments criticized the proposed rule for defining "Waters of the United States" too broadly, thereby unnecessarily expanding federal jurisdiction over, and interference with, state and local land use regulation. The proposed rule, while presented as a modest clarification or modification of the current definition of "jurisdictional" waters under the Clean Water Act, could result in a substantial extension of federal jurisdiction.

The Foundation's comments on the Proposed Rule assert that EPA's proposed rule is unreasonably broad, rendering virtually all water bodies, with few exceptions, subject to the jurisdiction of the Corps and the EPA and that it conflicts with the more concrete and limited plurality test in *Rapanos*.

The Foundation has been involved in numerous cases involving federal Clean Water Act regulation, such as *Sackett v. EPA*, 132 S. Ct. 1367 (2012) and *Rapanos v. U.S.* (2006), and the more recent *Kent Recycling*, described above.

While it does not appear that the proposed rule would facially expand on the "significant nexus" test in Justice Kennedy's concurrence in *Rapanos*, since it purports to be written in the spirit of the concurrence (the rule summary makes repeated references to it), it would almost certainly not meet the criteria in the Scalia plurality opinion. Moreover, even if the proposed rule were adopted, it might well be applied in a manner inconsistent with the intent of Kennedy's concurrence, especially Kennedy's statement that the impact of the subject wetlands on navigable waters must be more than "speculative or insubstantial."

The proposed rule will also increase the types of water bodies that fall within the jurisdiction of both the EPA and Corps by expanding the term "adjacent wetlands," giving both agencies increased discretion. Under the proposed rule subsurface hydrologic connections may now fulfill the adjacency requirement, clearly disregarding the *Rapanos* plurality holding. For any waters that do not fall within the requirements for per se jurisdiction, the proposed rule allows the courts to engage in case-specific analysis for whether there is a significant nexus and to defer to agency "expertise."

2014 Annual Award Presented to H. Lawrence Culp, Jr.

In November the Foundation presented its twenty-seventh Annual Award to H. Lawrence Culp, Jr., recently-retired President and Chief Executive Officer of Danaher Corporation.

Larry Culp stepped down in September, 2014 as Danaher Corporation's President and Chief Executive Officer to become a Senior Advisor following a nearly 14-year run during which revenues and market capitalization increased approximately five-fold to nearly $20 billion and $50 billion, respectively, while at the same time driving shareholder returns five times that of the S&P 500 Index. He also played a key role in the evolution of the Danaher Business System, the common operating philosophy and model deployed across Danaher.

During Mr. Culp's tenure, international sales expanded from approximately 40% of total revenues to almost 60% today and the company deployed approximately $25 billion for strategic acquisitions. Mr. Culp drove the establishment and growth of Danaher's health care platforms in clinical diagnostics, life sciences and dental.

He joined Danaher in 1990 from Veeder-Root, a Danaher subsidiary, where he became President in April 1993. In 1995, he was appointed Group Executive and Corporate Officer, with responsibility for Danaher's Environmental and Electronic Test and Measurement platforms. Mr. Culp also served as President of Fluke and Fluke Networks. He became an Executive Vice President of Danaher in 1999, Chief Operating Officer in 2000, and President and CEO in May 2001.

Mr. Culp is chair of the Board of Trustees for Potomac School and Vice Chair of the Board of Visitors and Governors of Washington College. He served as a Non-Executive Director at GlaxoSmithKline PLC. Mr. Culp holds a B.A. from Washington College and MBA from Harvard Business School.

Larry Culp's Remarks: "Reflections on Being a CEO"

I'm really quite humbled to be here this evening, particularly in light of the previous recipients of this award; [former Marine Corps Commandant] General [P.X.] Kelley, certainly first amongst them. So I'd like to thank the Atlantic Legal Foundation, the directors, the officers, of course, Bill Slattery and Dan Fisk, for recognizing, really not me because as, I think, Jon's [Jonathan Graham, Danaher General Counsel] introduction suggests, the success we've enjoyed at Danaher over a long period of time has really been a function of those nearly 70,000 people on our payroll, many of whom are in attendance tonight. So I think all of us are humbled and thankful for this honor.

I also want to take a moment to thank the many friends of Danaher who are here this evening, a number of law firms, accountants and consultants who I know are here. It's great to see you. We certainly appreciate your support of the foundation and all that you've done over nearly a quarter of a century to help us be the company that we are today. Let's not stop. There's still a lot of value to be created. There's still a lot of Danaher to be built in the years to come.

I also want to thank Jon. Jon remembers those days up in Montgomery County quite well. Unlike a number of general counsels of Fortune 200 companies, Jon did not come to Danaher to replace anyone. Jon came to forge a legal function and forge a legal function he did. Jon did that with an eye toward not finding opportunities to say no, but helping us find ways to smartly say yes always with keeping the integrity bar very high in a thoughtful, but uncompromising way. And that, I think, is really an important part of the culture that we've been able to build.

And, as Jon teased a little bit, he's done that in a Danaher like cost efficient way. He'll tell you over cocktails he's never heard me say that publicly. That, too, is true, but, Jon, thanks for taking a business school grad and helping him understand what a general counsel and a legal function can really do for a great company. It's been a great ride.

As a business leader I think I have some perspective on the work—the important work that the Atlantic Legal Foundation does. Business does not enjoy a stellar reputation in our country today. Business is under attack in a whole host of different ways—some deserved, some not so—but I think the foundation's emphasis on free enterprise and efficient and limited government is work that's incredibly important and I just want to, I think, on behalf, not only of Danaher, but really the entire corporate community thank the lawyers at the foundation for the incredibly important work, good work, that you do.

They really are those principles of free enterprise and limited and efficient government that have, I think, created, not only an economy, but a society, warts and all, which is the envy of the world. And we ought not to forget that. I think, moreover, the importance Bill [Bill Slattery, Atlantic Legal President] highlighted of real facts, science, and the consideration for the economics for all stakeholders as we move our country and our economy forward are critical. And I think the foundation lends a strong voice to that activity and, again, I think the corporate community is in your debt for that good work.

Jon highlighted, I think, very well a quick overview of Danaher. I thought before we get started in some of the remarks that Jon asked me to share with you tonight on how we built the company, I'd give you a little bit of context. Jon covered a fair bit of this already..., we're very proud of the fact that we're nearly $20 billion in size and pushing nearly $60 billion in market capitalization.

But I think, more importantly, we really take pride in the fact that the way that we have transformed the company. We were a hand tool company, an OEM manufacturing company with a lot of small factories in the East and in the Midwest. Today we've got an incredible global footprint, really serving as a science and technology company, the most important markets in the world today. Think about what we do in the environment. Think about what we do in healthcare, both from a clinical and from a research perspective. And what we're able to do in a whole host of important markets, not only creates great value for our shareholders, because these are growth markets around the world, but, just as importantly, we're helping scientists; we're helping researchers solve the most pressing challenges that our country and the world faces over the next 10 or 20 years.

So it's good business; it's important work to do. And the financial characteristics of the markets and the companies that are part of Danaher drive the numbers that you see here, a 50 percent gross margin; very high indication of the sort of value that we create for our customers. The fact that a quarter of our revenues today come from the high growth markets under pressure, for sure today, but have really been a great growth driver for us and certainly over the next 20 years will change the competitive nature of all the markets that we serve. So we want to be there. We want to be there in a way that allows us to win so that we can continue to be that leading science and technology company that you heard about in the video.

Jon also talked about our shareholder returns. And I'm glad I brought a slide. I'm glad—this is the only other slide I'll use tonight. I'm glad I was able to do this to really paint the picture of the returns that we've enjoyed over a one, ten and twenty year period relative to the S&P. The chart captures that 20-year run and it's just tremendous, sustained outperformance. As you can imagine, we're exceptionally proud of that track record at Danaher. I happen to preside over that as CEO for nearly 14 years, but it certainly wasn't my work alone. It was the work of those 70,000 people on the payroll and many of you here in the audience who have had a hand in creating this sort of track record.

What I thought we could do is take you through much more detail about the work that we do, the markets that we serve and some of the financial characteristics of the company. Thirty, maybe thirty-five pages of PowerPoint would have been exceptionally boring for you so we decided not to do that. But as Jon and I were preparing for this evening we talked—kicked around some of the topics that might be of interest - I shared with Jon that a lot of people have asked, since April when we announced the transition, what have you learned as the CEO about leadership. Now I'm really going to get out there a little bit on this because with General Kelley in the audience I feel like I have a lot to learn about leadership, one of the great leaders in American history. But as a CEO there's certain things that I thought I knew, but—that I know much better now having been in that chair. And I thought I would share some of those lessons with you.

The first amongst them..., is we fervently believe at Danaher the best team wins. That's our number one core value and talent is what it's all about. If you've got the right people on your team the sky's the limit, but if you don't it probably won't be your opportunity.

There's a lot that we do to operationalize that at Danaher. There's a fair bit of process that we've built in over time to make sure that we're recruiting, developing, retaining, and promoting the best people for our businesses. And that's not strictly a matter of pedigree and IQ. We really look for fit; we look for competence; we look for runway for the work that's to be done. And that'll be different in different functions. It'll be different in different businesses and certainly different in different geographies. But by deliberately being aggressive about everybody that we bring in and everybody we promote, we think we've been able to build some of the better teams in our markets and, in turn, that's allowed us to win.

Early in my tenure as CEO I challenged the board to keep track of a lot of numbers, but to make sure we kept track of what we call internal fill, the rate at which we fill our senior positions with our own people. We successfully doubled that number to nearly 75 percent today and we did that while we were quintupling the size of the business. So a lot of that process yielded results. It allowed us to build our own leadership cadre who are good at what they do, but, more importantly, are cut from the Danaher block. And I think that's really been a differentiator for us.

One of the keys that I learned along the way was the power in making sure that I interviewed every one of our 50 operating company presidents or presidential candidates. You might think that's micromanagement in a company as large as Danaher there are lots of levers to pull, but I learned early that in a decentralized structure those presidents really held our future in their hands; who we hired, who we promoted, who we fired were really the critical lever points for me as a CEO. So every time we had an opening I wanted to be part of that conversation. I wanted to see those candidates, and not in a cursory way, but in an in depth way so that we made sure we were building the best leadership team we possibly could.

Similarly, I became a big believer in what we call one over one. And that's simply a mechanism where Jon and Dan Comas, our CFO who's here tonight, and all of our senior team who reported directly to me allowed me to interview the folks they were bringing onto their team so we could have an opportunity to make sure we were clear that we were bringing in the best talent. Served for folks like Jon as an opportunity to calibrate on what looks good, and I'll come back to that, but it also made sure that those that were involved in searches for talent

didn't fall to what we call search fatigue where you get a little tired and you drop the bar. Somebody comes in, search is done. They do OK, but they don't do great and it's not a big deal the first year, but down the road you feel that.

So those were just some of the things that were important to us as we were really making sure that we were living that value of the best team wins. Not always easy because we were all really in a growth company keen to make sure that we were building out the team. It was easy to fall prey to search fatigue, but I don't think we did very often. And as a result, I think we enjoy a team today that's the envy of many of the industries in which we participate.

One of the other things I learned along the way was the importance of doing the right things well. If you know Danaher, particularly if you have a history with Danaher, you probably know that we're steeped in the Toyota manufacturing system. We get a lot of credit, some of it, frankly, not probably deserved, as one of the expert U.S. companies with respect to lean manufacturing. We do OK on our factory floors, but when we go see a Toyota factory we're always reminded about how much more we have to go.

So the perception out there with many is that we're an outstanding execution company. Early in our growth that's what we were, but we weren't always doing well on those things that mattered most. So over time I think I developed an appreciation, as the senior team did, that we needed to continue to improve our ability to execute, but we had to choose wisely. We had to choose well those things we did so that we pointed, if you will, those arrows in the right direction and just as deliberately, and sometimes almost as maniacally, we needed to be clear with the organization that which we were not going to do.

And then day in day out once we'd agreed that vision, we agreed that strategy make sure that we didn't stray. And that's hard. It was particularly hard as the company was growing and becoming more global; lots of good people doing good work, thinking they were doing the right things and even when they were doing them well they weren't always the right things. So we instituted a lot of process and capability to make sure that once we huddled and agreed to that road map that it was hard to stray. And along the way we were not only doing the right things, but we were bringing a lot of the DBS tools and capabilities that you heard about to bear to make sure that we were doing them well in a sustainable way; not trying to muscle out a quarter, but to do it in a way whether it was improving the development of a new technology, whether it was driving productivity in a manufacturing operation in a way that was sustainable, predictable and repeatable. We got a lot of things wrong. By no means do I want to leave you with the impression that we executed flawlessly. We certainly didn't, but I think over time we were able to build that aerobic capacity in the organization so that we knew that we were doing the right things well.

One of the things I got a taste of as a young operating executive, but really only as CEO did I fully appreciate, is the power CEO's and business leaders have, the tremendous leverage and impact you get from your ability to define winning, to define what good looks like. So many organizations, particularly large organizations like ours, end up being trapped by internal conversations which turn into negotiations about how much will the budget be for next year, what will the sales target be for the next quarter, all of that. Many of us have been there, right. And unfortunately it's human nature for those negotiations to be very inwardly focused and in many cases for folks to want to find a safe target to sign up to, to attach their names to.

I think what we tried to do at Danaher was to make sure that our leaders understood that their leverage with an eye toward building the sorts of results you saw on the slides really began on a day-to-day basis with how they defined what was acceptable. Walk past a piece of trash on the shop floor, that's not acceptable. Fall prey to hiring somebody who's almost on spec the bar comes down. Conversely folks that really wanted to be outstanding, who wanted to compete and win, to build and to grow found that at Danaher we could have a conversation. We weren't necessarily negotiating with each other; we were sharing dreams. And in the process we could take a little bit of a leap of faith, certainly sign up to hard targets, a year's budget, profit plans and the like, but always have the opportunity after the fact to see, not only how well we did against those absolute targets, but to look at our performance on a relative basis.

We would much prefer to have a company sign up for an audacious goal and fall short than have someone cleverly negotiate a target that's safe, deliver it, maybe beat it a little bit. Because in the long run all winning is relative and those companies that were able to stretch themselves did really well, and do really well for Danaher.

I think a business leader's role, certainly my role as CEO, was to make sure that we avoided those internal negotiations, that we set those bars high, but also made it safe for folks to fall short. None of us, right, ever want to lose. None of us want to fall short, none of us want to disappoint. That, too, is human nature. But that said lots of companies make it difficult for folks to dream and to reach, to win, but to somehow fall short of a target. So we always try to make sure that we had a view of that subjective element so that the folks, who were really stretching and building, even if they were falling short from time to time, were properly rewarded and supported, be it as a business team or were individuals.

In turn, that leads me to my fourth lesson and that is the importance of how leaders deal with failure and surprises. You think from some of those numbers that failure and surprises didn't come our way very often; they did. A one-time Washingtonian, Mike Tyson, once famously said, "Everyone's got a plan until they're punched in the mouth." That happened to us on more than one occasion.

And I think business leaders, and certainly myself as a young business leader, think that folks rally around the wins and the celebrations. That's important, but I think leaders really make their mark and they build followership or not when bad things happen, when surprises are encountered.

And we love to compete with companies that where a lot of yelling and screaming goes on when things go wrong. We love to compete with companies that don't have a systematic problem solving process like the Danaher Business System, but rather will focus on a person or people as opposed to the problem themselves. So we built up a lot of capability in our organization to make sure that when bad things happen, when we fell short, when we lost market share, when a new program was late that we really got to root cause and dug in deeply to make sure we understood why that happened so that we could do better next time. So we take those lessons and implement corrective actions. That's part of making failure safe, but it also, in our experience, has helped us build a leadership cadre that understands that folks will follow you or not often because of the way things go.

This hit me in a very personal way early in my tenure. Every December we go to New York to offer up a year in review analysis for Wall Street as well as give them a look ahead for the earnings guidance for the company. It's typically an afternoon. I tended to take the stage at 4:00, once the market closes, to give the wrap up and in the market moving information. I remember vividly sitting at my seat in the front row one year. We started about 1:00. I think it was about—it wasn't even 2:00 yet. I got a note to come to the back of the room. Went to the back room and heard that we had our website hacked. Our wrap up presentation, our guidance had been released inadvertently, probably criminally.

It didn't take us very long to huddle and agree that we were simply going to acknowledge that that had happened and we were going to effectively give the wrap up presentation midstream and hope that everybody stayed for the rest of the presentations. I let the presenter wrap up; I took the stage, gave the presentation, not a lot of surprises given. Most of them had been pounding their Blackberries during the course of the presentation. They had the numbers. And I just humbly pleaded with them to stick around for the next couple of hours. We still had some good presentations that would really help them understand what our company's all about rather than just the earnings guidance. The Blackberries continued to be pounded. No one left and we had a successful day.

It was only afterwards that I think I appreciated the impact of that session. I just thought we were doing what we normally do, but Pat Allender, our long time CFO, came up to me afterwards and said that was great. Pat, our website was hacked; what can be great about that? He said you're a relatively new CEO. The street doesn't really know you yet. You're doing fine in all the prepared remarks and the like, but they got to see you in the way they rarely see CEO's dealing with a crisis, a modest crisis, but nevertheless a surprise and you handled it pretty well.

And I had never fully appreciated the importance of dealing with surprises. I think from then on and certainly we talk about this with our business leaders that rush of blood that we all feel when something bad happens or something comes along we weren't expecting. Try to check that; just check it for a moment, take a breath and make sure that what you do is something that is thoughtfully done. All your people are going to remember that far more than they remember anything else.

And if I was to offer a final lesson, and Jon suggested that I not include any lawyer jokes in this presentation, which I have adhered to. I want a reputation as being good company, but I did worry about this last one and that is listen; listen a lot. And I worry about that because I know many of you have been trained to speak in 15-minute increments.

You're in good company. CEO's are taught something similar. CEO's are taught to be in send mode all the time. CEO's are taught to have a vision and talk about it endlessly. And to remember that only when you begin to be sick of the sound of your own voice is your message likely to be getting through. So we're all in good company, but we all need to listen. And I would say CEO's need to listen a lot more than they do because CEO's and other business leaders, I think, have a unique responsibility. They sit in a single chair in the org chart. They've got a unique perspective. They've got to figure out the pieces of the puzzle. They need to stitch together the mosaic, to make the right decisions, the strategic calls, the organizational calls to set a business up for future success. And there's no way anyone ever brings that to you on a platter. I think business leaders really have to stitch all of that together with their teams, but sometimes alone. And there's no way you get the pieces that matter most if you're talking, if you're in send mode. And what we try to do at Danaher with our leaders, and certainly something I learned, was the importance of having lots of touch points, formal and informal, across the organization, inside the company and out in the market, so that those pieces of information, those scraps, those rumors and the like all came in and we sifted through them to make the best possible decisions we could. And that often requires trust, particularly as you're cutting through layers in an organizational chart, cutting through the hierarchy; really important to make sure that folks know that not only are you—that you're listening, but you'll share—you'll use what they share with you judiciously and not put them in harm's way.

I'm sure a lot of what I've just shared with you is common sense. We believe it's common sense, but one of the things that really differentiates Danaher is our, I think, our acknowledgment that what we call a Danaher Business System, this operating model and this culture, is really nothing more than common sense vigorously applied.

This video's a tough one to watch having been out of the chair for nine and a half weeks because we really did have, and do have, a wonderful team. I want to thank again many of them for being here this evening and certainly, again, appreciate the recognition for Danaher that the foundation has given us this evening. Thank you.

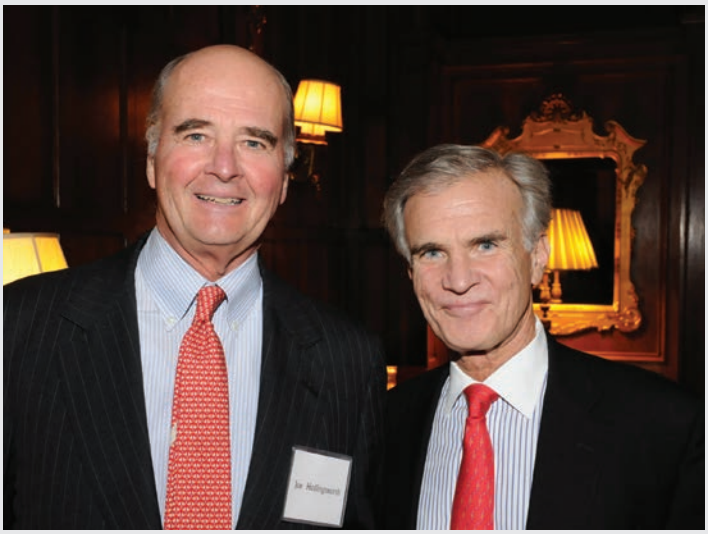
Photographs from the Annual Award Dinner

Bill Slattery, General P. X. Kelley, Dan Fisk

Doug Foster, Richard Wilson

Colin Ryan, Maura Blaul, Mary Clark, Bob Long

Tim Gillis, Jonathan Graham



Joe Hollingsworth, Tom Birsic

Sandy Smith, Roger Kaplan

David Wood, Dan Fisk, Bobby Burchfield

Gregg Vicinanza, Joan Stafslien, Bob Haig, Jeff Sherman

Peter Robinson, Attila Bodi, Ag Samoc

Bob Lutz, Mary Britton, Gina Jung

Frank Leone, Catherine Baumer, Bill Slattery

Jim Sullivan, Desmond Ellis

Phil Busman, Buffy Mims, Matt Malinowski, Robert Johnston

Don Fowler, Frank Leone, Dan Steen

Jon Graham, Larry Culp, Dan Fisk

Joe Warin, Julie Lansaw Warin, Barry Nigro, Jonathan Graham

Tim Peckinpaugh, Ken Ward

Larry Culp, Jeff Sherman

Steve Harmelin, General P. X. Kelley, Hon. Patrick Meehan, James Wholey

Jon Graham introducing Larry Culp

Larry Culp

Larry Culp

Dan Fisk presenting Larry Culp with Tiffany Sterling Silver Tray

Jay Stephens, Larry Culp

Dan Fisk, Larry Culp

General P. X. Kelley, Sandy Smith, Larry Culp

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Chairman, CEO and President
NCR Corporation

2012

William H. Swanson
Chairman and CEO
Raytheon Company

2011

Edward J. Ludwig
Chairman of the Board
BD

2010

W. James McNerney, Jr.
Chairman, President and CEO
The Boeing Company

2009

Chad Holliday
Chairman of the Board
DuPont

2008

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Johnson & Johnson

2007

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Former Counsel to President Ronald Reagan

2006

Thomas J. Donohue
President and CEO
U.S. Chamber of Commerce

2005

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Chairman and CEO
Tyco International Ltd.

2004

Hon. George J. Mitchell
Former United States Senator
Chairman, The Walt Disney Company
Partner, Piper Rudnick LLP

2003

Maurice R. Greenberg
Chairman and CEO
American International Group, Inc.

2002

Henry A. McKinnell, Jr., Ph.D.
Chairman and CEO
Pfizer Inc

2001

Hon. William S. Cohen
Former Secretary of Defense
and United States Senator

2000

Norman R. Augustine
Retired Chairman and CEO
Lockheed Martin Corporation

1999

General P. X. Kelley
Former Commandant of
the Marine Corps

1998

Hon. Rudolph Giuliani
Mayor of New York City

1997

Hon. Donald Rumsfeld
Former Secretary of Defense

1996

Bruce Atwater
Retired Chairman and CEO
General Mills, Inc.

1995

Alfred C. DeCrane, Jr.
Chairman and CEO
Texaco Inc.

1994

Malcolm S. Forbes, Jr.
President and CEO
Forbes, Inc.

1993

Amb. Carla Anderson Hills
United States Trade Representative

1992

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Retired Chairman and CEO
Sprint Corporation

1991

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Retired Chairman and CEO
Citicorp

1990

Irving S. Shapiro
Retired Chairman and CEO
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1989

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Chairman and CEO
Pfizer Inc

1988

Hon. William E. Simon
Former Secretary of Treasury

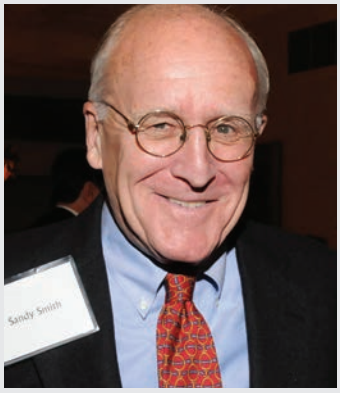
Board Speaker

At the Foundation's June 2014 dinner meeting, Rosemary Stewart, partner in Hollingsworth LLP, Washington, D.C., addressed "The Fate of Chevron in Ecuador", a discussion of Chevron's long-running defense of toxic tort litigation in Ecuador.

Rosemary Stewart

Briscoe R. Smith Retires

Briscoe R. "Sandy" Smith retired from the Foundation's staff on December 31, 2014. Sandy has contributed over 28 years of service to Atlantic Legal. He joined the Advisory Council in February, 1986, and became Senior Vice President and Counsel in May, 2000. His service has been invaluable and he has been a wonderful colleague.

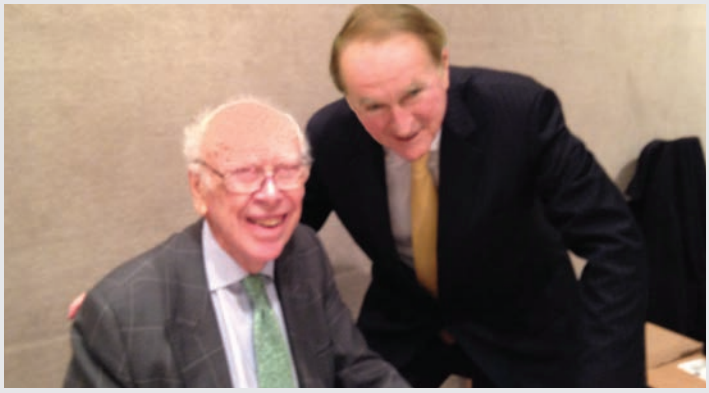


Briscoe R. Smith

Fortunately for us, we will continue to benefit from Sandy's advice and counsel, as he has agreed to rejoin the Advisory Council.

Dr. James D. Watson, Nobel Laureate

In December Atlantic Legal President Bill Slattery caught up with Dr. James D. Watson at a book signing in New York of Dr. Watson's latest book, "Father to Son: Truth, Reason and Decency", a family history. Dr. Watson is an American scientist and one of the co-discoverers of the structure of DNA in 1953. Dr. Watson, Francis Crick and Maurice Wilkins were awarded the 1962 Nobel Prize in Physiology or Medicine "for their discoveries concerning the molecular structure of nucleic acids and its significance for information transfer in living material." Dr. Watson also wrote *The Double Helix* (1968) about the DNA structure discovery.



Dr. James D. Watson, Nobel Laureate, with Atlantic Legal President Bill Slattery

Atlantic Legal has been privileged to represent Dr. Watson on multiple occasions in cases involving the intersection of science and the law.

The December book signing took place at Christie's in New York City and was held in connection with the sale by Dr. Watson of his Nobel Prize gold medal. Dr. Watson had decided to auction off the medal and to use part of the funds raised by the sale to support scientific research. The medal sold at auction at Christie's in December 2014 for US$4.8 million.

Interestingly, it was reported that the medal was subsequently returned to Dr. Watson by the purchaser, Russian business magnate Alisher Usmanov, who stated that Dr. Watson deserved the medal, as it recognized his scientific accomplishments, and that it was "unacceptable" that he should have to sell it.

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Atlantic Legal Foundation

2039 Palmer Ave. Suite 104
Larchmont, NY 10538
(914) 834-3322
Facsimile (914) 833-1022

New York City Office
330 Madison Ave. 6th Floor
New York, NY 10017
(212) 867-3322
Facsimile (212) 867-1022

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Atlantic Legal Foundation

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