



Bowles Rice McDavid Graff & Love PLLC

Views & Visions

A newsletter for clients and friends

Making Things Better with Good Chemistry

CHEMISTRY: Essential to Life

Michael D. Parker, President and CEO
The Dow Chemical Company

In February 2001, Dow became an official resident of West Virginia, after closing on our historic merger with Union Carbide. Since that time, we have been busy settling in, building relationships and forging roots in the community. We are pleased to be part of the Kanawha Valley and are working diligently to ensure our facilities there are truly world class and capable of competing on a global basis.

Everything we do at Dow is guided by our mission – *to constantly improve what is essential to human progress by mastering science and technology* – a lofty purpose, grounded firmly in reality. Few people – even people who work

in the chemical industry – truly recognize the sheer importance of chemistry to our modern standard of living.

The economic impact of the chemical industry is enormous. We are a \$1.7 trillion industry employing 10.5 million people globally. We enable virtually every other industry and contribute to people's lives in countless ways.

Our products are found in a variety of consumer markets ranging from food, water purification and health care, to transportation, electronics and personal care, providing solutions that make our lives safer, healthier and more convenient.

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Driving Home the Message of Good Chemistry

Fred Webber, President and CEO
American Chemistry Council

Wild, Wonderful West Virginia offers a variety of activities for tourists and locals alike. Chances are, whether you are whitewater rafting on the Gauley River, skiing at Snowshoe Mountain or golfing on one of West Virginia's many courses, the last thing on your mind is the business of chemistry – an industry that not only makes these activities possible, but also is a significant player in the state's economy.

In fact, in addition to manufacturing some of the essential parts of your titanium golf clubs and Gore-Tex® parkas, the chemical industry contributes 6.7% of West Virginia's gross state product – a higher percentage than in any other state. The industry directly employs 14,200 workers in West Virginia, which results in an additional 54,400 state jobs in other industries that support the business of chemistry. Those

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I nsights

F.T. Graff, Jr.



F.T. Graff, Jr.

Tom Graff has served as Chief Executive Officer of the firm since 1986. His practice of law focuses on business, commercial, banking and mineral law. Mr. Graff is a member of the Board of Directors of the West Virginia Roundtable, and serves as Chairman of the Finance Committee of the Chemical Alliance Zone (CAZ) and is a member of the CAZ Executive Committee.

I am especially proud to present to our readers this edition of *Views & Visions*, which is devoted to the chemical industry. Over the years, I have been personally involved with many members of the chemical industry in West Virginia, and as a member of the Executive Committee of Chemical Alliance Zone (CAZ) for the last two years, I am pleased to have played a small role in developing this important organization. Through the CAZ, it has been my good fortune to have had the opportunity to get to know many of the leaders of this industry on a personal basis. In doing so, I have developed a great respect for their abilities, work ethic and concerns for their employees, companies, industry and West Virginia.


The chemical industry has been a vital part of the West Virginia economy for more than a century, has served as a key link to industries throughout the world and has served us well. This industry is responsible for creating many thousands of good paying jobs for West Virginia residents and at the same time has enhanced our communities by importing outstanding, highly educated, hardworking and talented corporate leaders to our region. In addition, our chemical industry friends have always generously supported our communities and their projects. I am pleased to report that Dow Chemical is no exception to what we have become accustomed. It has come to West Virginia with impressive contributions to our community projects, sweeping changes to the company and exciting new ideas and ways to improve both the company and the economy of our state.

The role of the chemical industry today is more critical than ever to the development of our state and region. It offers jobs and business development through the competitive

production of chemical products for sale in the global economy. Our existing assets and human resources make our region attractive for chemical companies to locate here and become a part of our economy. And, importantly, we welcome them to our region and state.

The articles in this issue give us some insights into the opportunities available and what needs to be done to market West Virginia to the chemical industry. We are honored to feature lead articles written by Michael Parker and Peter Berner of Dow Chemical, Fred Webber of the American Chemistry Council, Hal Foss of Cytec Industries and Jon McKinney of Flexsys America, and to include information on the Chemical Alliance Zone courtesy of the CAZ Communications and Outreach Program and its Chairperson Aly Goodwin Gregg. We are also pleased to welcome Bob Baptista as the first Executive Director of CAZ, and to feature articles by several Bowles Rice attorneys who work with the chemical industry every day.

Bowles Rice has been proud to partner with members of the chemical industry over the years, and is especially excited to be a part of the regeneration of the industry in West Virginia today. We deeply appreciate the articles submitted by the prestigious group of authors, all of whom are outstanding and successful individuals who share a common commitment to make their industry and West Virginia grow and prosper.

We hope you enjoy this edition of *Views & Visions* and, through reading the articles, will gain a better understanding and appreciation of the chemical industry and its long relationship with, and great value to, West Virginia. 

Polymer Alliance Zone Leads the Way

*Robert E. Bowen, Chairman
Polymer Alliance Zone, Inc.*

The Ohio River Region of West Virginia is the home of one of the highest concentrations of polymer producers in the world and includes such major corporations as DuPont, M&G Polymers and GE Plastics. What this region does not have in large numbers are manufacturers who use the plastics produced by these companies to produce more value-added products.

Recognizing this opportunity, Governor Gaston Caperton signed Executive Order 1-96 on March 8, 1996, creating the Polymer Alliance Zone (PAZ) as a pilot to promote the growth of polymer and related industries in Jackson, Mason and Wood counties. This pilot was to be focused on economic development and would depend strongly on a partnership of industry, education, state and local government. The pilot has succeeded on many fronts during the past five years.

Partnering with the Development Directors in each county, PAZ has marketed the Zone with articles, editorials, industry trade shows, cold calls, a web site and networking activities. Since 1996, ten companies have either expanded their activities or located in the Zone and membership in the PAZ has grown from twenty companies to more than sixty. The annual budget has grown from \$100,000 to over \$4 million.

PAZ has worked to reduce barriers and provide incentives that would make the Zone more attractive to potential investors. Environmental permitting has been viewed as a deterrent to investing in West Virginia. A partnership of the State Department of Environmental Protection and PAZ has worked to improve the understanding of permitting issues and procedures with a permitting handbook which guides companies through the permitting process. Rules for permitting R&D projects have been developed.

Developing new training programs enhanced the employment skills of workers in the Zone. Through partnerships with West Virginia University – Parkersburg and representatives of the secondary education institutions in the counties, pre-employment and post-employment training programs have been developed and offered to our members.

In 1998, PAZ accepted a small contract, funded by the federal government through the efforts of Congressman Alan B. Mollohan, to provide marketing consultation for an electronics recycling. Now, the Polymer Alliance Zone is working under a multi-million dollar contract and is identified as an international leader in understanding electronics recycling – initially computers and accessory equipment. Representatives of PAZ have identified companies with the best practices for recycling end-of-life electronics. Currently, PAZ is planning the Mid-Atlantic Recycling Center for End-of-Life (EOL) Electronics (MARCEE). MARCEE creates the framework to attract a cluster of private sector companies to the Zone to Wood County, West Virginia.

The objective of this electronics-recycling project is to receive computers, monitors and printers for disassembly, separation/recycle, re-engineering and re-manufacturing. The recycled materials will be re-engineered into raw materials and products, with a distinct focus on recycling plastics. Recycling electronics is a significant benefit for the environment. Now, most electronic components end up in landfills. Working on the theme of environmental protection, a “MARCEE” business park is being planned as an “Eco-Park.” This offers a unique opportunity to incorporate the most advanced functional, quality of life, environmental, safety and occupational health attributes into the design.



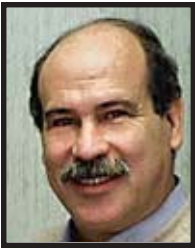
Robert E. Bowen

Robert Bowen has served as Chairman of the Polymer Alliance Zone's Board of Directors since its inception in 1996. Through his leadership, he has involved the PAZ in environmental permitting and identification of non-financial incentives for businesses to locate in the zone. Mr. Bowen is manager of the M&G Polymers USA, LLC plant (formerly Shell Chemical Co.) in Point Pleasant, West Virginia.

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Global Competitiveness: A Term Much Used But Little Understood

*Peter Berner, Vice President - WV Operations
Union Carbide Corporation - a Subsidiary of The Dow Chemical Company*



Peter Berner

Over the past few years, the terms global competitiveness and globalization have often been closely linked with layoffs or job reductions. And that has become the common perception. This perception needs to change if we are to move West Virginia forward to realize our economic, environmental and social potential.

First, let's look at globalization. It's not an option. Technology has forced every corporation that wants to survive in today's marketplace to think and act globally. Consider this: News travels the globe at the speed of light, markets in Hong Kong react to events in France immediately, trillions of dollars travel across the globe each day.

The obvious corollary then is the need to achieve global competitiveness. But, again, what does this term really mean? It is a thinly disguised veil that allows corporations to engage in mass dismissals and consequently exempt themselves from responsibility for the job loss. "The need to be globally competitive made us do it." This is totally unacceptable. If either of these are the driving forces, then I would propose to you that you have a poorly managed company, one that has latched on to this latest slogan as an excuse to hide its incompetence and absolve itself of responsibilities to its owners and employees. Sooner or later, this company will succumb under the weight of its own inept management.

To my mind, you can only be globally competitive if you have an undisputed technological leadership in the products and processes you are engaged in. You must be a world leader in all your businesses. Jack Welch, former CEO of General Electric, said it best: "... be number one or two in all of your businesses ... or exit."

Next, you must offer superior long-term value to your shareholders. But, at the same time, you must earn your right to exist each and every day by meeting the expectations of your customers and your communities. This is achieved by having superior environmental and safety performance; by internalizing and practicing a true social responsibility for improving the quality of life of communities where you have a presence; and, by having a talented and diverse work force second to none.

All of this will lead to a growth culture, whereby you will not only preserve your existing jobs, but will also have the right to aspire, grow and flourish in any economic environment.

There is some evidence that our state understands globalization and global competitiveness. Take a tour of the Eastern Panhandle or the new technology corridor near Fairmont. There's talk of a new technology corridor between Charleston and Huntington. The state legislature is taking a serious look at the cost of doing business here.

Other good news is that Senator Robert C. Byrd, Senator Jay Rockefeller, Governor Bob Wise and Congresswoman Shelley Moore Capito are all working tirelessly to move West Virginia ahead to compete in the global economy. There is also a multitude of economic development groups that have the same commitment.

What we must do is unite behind a vision and a strategy and by applying innovative thinking, we can move ahead. We don't need more studies. We need action. I have agreed to serve on the boards of several business organizations and I am very impressed with their commitment to change.

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Peter Berner joined Dow in 1968 as a research engineer in Freeport, Texas. He served in a process engineering assignment before moving to Guarujá, Brazil as a plant superintendent. Before moving to West Virginia to assume his now role, Mr. Berner was president and operations leader for Dow Latin America. Born in Budapest, Hungary, in 1945, Mr. Berner has a bachelor's degree in chemical engineering from the University of Pennsylvania and a master's degree in chemical engineering from Pennsylvania State.

Implications of Tax Reform “Lite” for Chemical Manufacturers

Michael E. Caryl, Esquire

Bowles Rice McDavid Graff & Love PLLC

The comprehensive reform of West Virginia’s state and local tax structure, proposed by former Governor Underwood’s Commission on Fair Taxation, appears to at least be on the back burner – if not in the deep freeze. In lieu of those sweeping reforms, designed in part to make more equitable the tax burden on all capital intensive industries, the Wise administration appears to be presently interested only in selected other elements of those changes.

Most notable is the coordinated effort of the Department of Tax and Revenue and the Development Office in conducting an in-depth review and analysis of the effectiveness of the myriad business tax credit incentives. While the report of the earlier Commission recommended the general, prospective elimination of most such credits, Governor Wise has called for the simplification or replacement of some, and the repeal of others for lack of use.

Specifically, under the administration’s plan, the Super Credit, which typically offsets at least 80% of a qualified taxpayer’s state tax liability for ten to thirteen years, would be replaced by a somewhat simpler Economic Opportunity Tax Credit. Unlike the Super Credit which requires the creation of 50 new jobs, the new credit would only require the creation of 15 new jobs if the investment is in one of West Virginia’s 27 economically distressed counties (or 30 new jobs in one of the others).

Under the new credit, an eligible taxpayer could take as much as 20% of its new qualified investment as a credit against up to 80% of its pre-credit liability for various state business taxes. If the median salary of the new jobs is higher than the average statewide wage, as much as 100% of the pre-credit liability could be offset. The legislation grandfathers Super Credit

earned if the qualified investment is contracted for by the end of 2002 and placed in service by the end of 2003.

Likewise, under the administration’s package of proposals, the little-used research and development credit would be replaced with a new Strategic Research and Development Tax Credit making the incentive for R&D expenditures attractive to a greater number of taxpayers.

In another bill, the older, less liberal industrial expansion and revitalization credit, regularly claimed by chemical manufacturers, would, for all manufacturers except electric power producers, be replaced with a Manufacturing Investment Tax Credit. Unlike the old credit, which allows a credit equal to 10% of qualified investment, the new credit would be limited to 5% of qualified investment. On the plus side, however, the new credit would be available to offset up to 50% of a taxpayer’s pre-credit liability for corporation net income tax which the old credit does not.

These changes are based on the view that, in practical effect, the industrial expansion and revitalization credit does little as an incentive for real capital growth. Instead, it is seen as serving mostly as an indirect form of ongoing franchise tax relief for existing industries which regularly make credit-qualified renovations to their plants.

By reducing the amount but refocusing the application of such investment credits, the administration would provide some relief from the relatively high income rates faced by chemical manufacturers and other larger companies in our state. At the same time, the reconfigured investment credit would reduce by half the maximum relief a taxpayer might otherwise receive from the business franchise tax.

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Michael E. Caryl

Mike Caryl is a member of the firm and is located in our Martinsburg Office. His primary area of practice is tax planning and tax litigation at federal, state and local levels. Mr. Caryl served as West Virginia State Tax Commissioner from February 1985 until December 1988. He has also served as chairman of the State Bar Committee on State and Federal Taxation and as President of the West Virginia Tax Institute, Inc. From 1997 to 1999, Mr. Caryl served as Vice-Chair of the Governor’s Commission on Fair Taxation.

(Parker . . . continued from page 1)

Let me share just a few examples from Dow's own product lineup:

- In cars, lightweight plastics make automobiles more fuel efficient and chemistry makes it possible for airbags to deploy in accidents. New innovations being developed in our labs will soon lead to widely available run flat tires, eliminating the need for spares.
- In the farmers' fields and in the supermarket, our products help ensure safe and plentiful supplies of food through more effective pesticides, biotechnology advances and better packaging.
- In our homes, schools and office buildings, high-performance foam insulation systems control temperature, conserve energy and protect buried cables. Heat transfer fluids keep building temperatures comfortable and protected from freezing. Advanced acoustical panels and carpeting dampen noise and vibration. And stronger, lighter structural reinforced composites and longer-lasting paints help protect buildings against the forces of nature.
- In doctors' offices and hospitals, our products make it possible for physicians to perform minimal and noninvasive surgical procedures. We help medical professionals and patients avoid infection with disposable facemasks, surgical drapes and gloves. We make diapers more absorbent and medical tablets easier to swallow.


The power of chemistry brings with it an awesome responsibility. We are responsible for delivering on the promise of chemistry to improve the standard of living the world over. At the same time, we must manage this power in a way that protects the health and safety of our employees, communities and customers and respects the environment. That is why we, at Dow, are fully committed to Sustainable Development. Sustainable Development is broadly defined as "meeting the needs of the

present without compromising the ability of future generations to succeed." At Dow, we have translated this into a Triple Bottom Line consisting of: Economic Prosperity, Environmental Stewardship and Corporate Social Responsibility.

Let me briefly address each element of the Triple Bottom Line. I've already mentioned the global economic impact of our industry, so let me focus on the economic impact at the local level. Our industry not only maintains a competitive work force, but also creates jobs and spin-offs. As we moved into West Virginia, we were mindful of the economic impact of our need to reduce the size of our work force. Therefore, we worked closely with Governor Bob Wise and CDI Engineering to develop an initiative that will see 400 to 500 jobs created and maintained in the area.

Our Environmental Stewardship is reflected in our commitment to the industry-wide principles of Responsible Care®, and our own voluntary Environmental, Health and Safety Goals for 2005. Our objective is to continuously work toward a vision of zero – no harm to the environment, our employees nor to any of the people that "we touch" in the value chain.

Our commitment to Corporate Social Responsibility is reflected in both our employee policies, which emphasize safety, diversity and inclusion and continuous learning, and our philanthropic efforts, which average about \$25 million a year globally. All around the world, we operate in small communities, a fact that has heightened our sense of accountability and has made us very conscious of what it takes to be a good neighbor.

As a neighbor in West Virginia, we will continue to responsibly manage the power of chemistry, providing valuable solutions that enhance life, while contributing positively to the places in which we do business. 

Michael D. Parker is president and chief executive officer of The Dow Chemical Company. He has served in a wide variety of assignments in research, manufacturing and the commercial area since he began his Dow career in 1968. Mr. Parker was named president of Dow North America in 1995 and executive vice president in 1996. He assumed his current position in November 2000. Mr. Parker received a bachelor's degree in chemical engineering from The University of Manchester (England) and an MBA from the Manchester Business School (England).

The Chemical Industry in West Virginia

*Jon McKinney, Plant Manager
Flexsys America, LP*

Wow!! Life never seems to slow down. The chemical industry in West Virginia is also an ever-changing place. During the seven years that I have been in the state so many names of the chemical companies have changed – starting with my own plant, Monsanto to Flexsys. Everyone has noticed Union Carbide's change to Dow, but before that we had Olin to Clearon, ARCO to Lyondell to Bayer, FMC-Nitro to Great Lakes, Rheox to Elementis, Shell to M&G Polymers, OSI Specialties to Crompton, with the latest change being discussed (Rhône-Poulenc) Aventis to Bayer. No wonder people cannot keep up with what is going on in the chemical industry; you need a score card to know who is who.

The chemical industry has been a vital part of West Virginia for more than 200 years. We trace our beginnings back to the discovery of salt in the Kanawha Valley. The availability of coal and the navigability of the Kanawha River led this area to becoming “the Chemical Valley.” What may not be known is that West Virginia is still the second most commercially dependent state on the chemical industry of any state in the Union. The chemical industry indirectly accounts for 22,500 jobs or nearly 20 percent of Kanawha Valley employment. Our local chemical industry supplies a wide range of products all over the world – products that go into toothpaste, candy bars, paints, animal feeds, skis, insecticides, automotive parts, swimming pools and so many more that the list would encompass many pages. Paraphrasing one of the national advertisers – the chemical industry does not make the end product; we just make it better.

Today's Economy and Our Changing World
Although the United States is the world's largest chemical producer, it is fair to expect

unparalleled change in the industry given the wake of a slowing economy and the events of September 11. In addition, monetary exchange rates with the rest of the world have changed by some 30-40% over the last several years making products made in the United States more expensive to the global customer. Consolidations are evidence of continued cost reduction efforts. Joint ventures, spin-offs, mergers and acquisitions have become a way of life.

With lightning speed communications, round-the-clock media coverage and globally interconnected audiences, these are exciting times for any industry. The chemical industry is acutely aware of the challenges created by operating across different cultures, geographic locations and media environments. In West Virginia alone there are 14 international investors with locations throughout the state.

Globalization has created one market – a market with fierce competition but also opportunities for new growth. Will West Virginia get its fair share of this growth? The answer is up to us.

Challenges

The chemical industry in West Virginia is at a crossroads. Critical choices must be made to face our reality head on and build for our future. We need to ask ourselves these questions: 1) Do we take advantage of the vast infrastructure of the chemical plants already located here or do we continue to decline? 2) Can the State and chemical companies work together to reverse the gradual loss of employment and influence businesses to invest in West Virginia? 3) Are we willing to face the challenges necessary to keep a healthy and growing chemical industry in our state?



Jon McKinney

Jon McKinney, Plant Manager of Flexsys, came to Nitro, West Virginia as the plant manager of Monsanto in September 1994. As a result of the joint venture between Monsanto and Flexsys, the Nitro plant became Flexsys in 1995. Mr. McKinney serves as Chairman of the Chemical Industry Committee of West Virginia and is on the Board of Directors for the Charleston Area Chamber of Commerce, the West Virginia Roundtable, Thomas Memorial Hospital and is a member of the Governor's Council.

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The Chemical Alliance Zone: Promoting West Virginia to the World

Aly Goodwin Gregg, Chair
Communications and Outreach Program, CAZ



Aly Goodwin Gregg

Aly Goodwin Gregg is Manager, Client Services for Maple Creative, LLC in Charleston. Ms. Gregg has a Bachelor of Science degree in journalism with a specialization in broadcast news from the West Virginia University Perley Isaac Reed School of Journalism. She is a volunteer executive committee member for the Chemical Alliance Zone, serving as Chair of the Communications and Outreach Committee.

The chemical industry in West Virginia has been an important economic resource, a resource that has provided jobs, spin-off industry support jobs and a positive economic impact for more than seven decades.

Unfortunately, the chemical industry is at a crossroads, transforming from a labor-intensive sector to a highly technical industry. The concern for this important economic resource begs the question: “Can its future be as bright as the past?”

The answer will have many facets that include legislation, regulations, the need and costs of balancing many other influences. New employment training must be implemented to replace an aging work force as it retires. And these jobs must be balanced with environmental regulations and concerns.

In 1999, chemical corporations, businesses, nonprofit organizations, service providers, universities, labor organizations, community and governmental leaders from the four counties

that border the Kanawha River (Cabell, Kanawha, Putnam and Wayne) formed the Chemical Alliance Zone (CAZ) to promote the region to the international chemical industry as a potential destination for economic investment.

“The uniqueness of the CAZ is its diversity of support,” said Rick L. Hodge, Chairman of CAZ. “Since we began this organization, it has been driven and sponsored by local businesses like the law firm of Bowles Rice, who support the chemical industry in this valley and have effortlessly volunteered and contributed much-needed funds to further this effort.”

The CAZ consists of board of directors and an executive committee that serve on a volunteer basis. Tom Graff, Managing Partner of Bowles Rice McDavid Graff & Love, volunteers his time on behalf of CAZ and serves as its treasurer.

“When CAZ began we knew that we would have to rely initially on the volunteer spirit of both the chemical industry in this valley and other supportive businesses. What we’ve discovered from our participant businesses in the CAZ is a commitment to see the chemical industry in West Virginia continue to succeed and prosper,” Hodge said.

West Virginia offers many enticing benefits to companies looking to relocate. The strategic goals for the CAZ include attracting businesses that may benefit from close proximity, in addition to promoting the current availability of land and infrastructure to chemical companies looking to relocate.

The CAZ offers quick, safe and reliable transportation alternatives such as trucking, airfreight, railroad car and river barge. The zone is within 500 miles of 60% of the United States population



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Share the Vision

Thomas A. Heywood, Esquire
Bowles Rice McDavid Graff & Love PLLC

Governor Wise, the West Virginia Development Council and many of the State's leading groups and companies – including the West Virginia Manufacturers Association – are participating actively in the creation of West Virginia's future through **West Virginia: A Vision Shared**.

West Virginia: A Vision Shared is the State's economic development plan, created by West Virginians for West Virginians. The product of a year-long process, **West Virginia: A Vision Shared** describes a bright vision of the West Virginia we all dream of, and outlines the path of how to get there. The vision and plan may be found at www.wvcouncil.org.

As Chairman of the Government Affairs Committee of the WVMA and a member of the WVMA Board, I am delighted at the zealous commitment by the WVMA and its members to the **Vision Shared** project.

The several authors in this edition of *Views & Visions* have it just right: we must work together to create a globally competitive, growth culture in West Virginia. To do so, we must first envision the future we want, and then have


(Bernier . . . continued from page 4)

Dow's West Virginia Operations is committed to lead by example. Yes, we have reduced our work force by about a thousand jobs. But our partnership with EDS and CDI will likely cut the job loss in half. And the jobs that remain will be more secure.

We are removing layers of management and empowering our work force to take charge. We are deciding which plants can compete globally. We are taking the cost out of our operations to attract new Dow investment. The Tech Center is now Dow's third largest Research & Development facility and we are working to make


the discipline to put in place the building blocks which will help us realize that vision. The good news is that in **West Virginia: A Vision Shared**, West Virginians have already come together to create the vision. Now we must execute the plan.

The West Virginia Development Council has taken responsibility for execution of the plan. Two leaders of our State, Mike Basile and Ken Perdue, have agreed to serve as Chairman and Vice Chairman of this important effort. The Benedum Foundation has provided a generous grant to pay for staff support for the project. Business groups around West Virginia have rallied in enthusiastic support of the plan.

The vision will be realized only by our active commitment to make it so. Get involved today. Find out more about **Vision Shared**. Insist that the State's leadership stay the course. Volunteer to help, and get involved. If each of us makes a personal commitment to **West Virginia: A Vision Shared**, the brightest days for West Virginia's chemical manufacturers and all West Virginians lie ahead. 

this location a premiere site for other R&D and IT companies.

What are the messages we are taking forward? Just two: 1) There is competitive advantage in doing business in West Virginia. 2) You can compete in the global economy by doing business in West Virginia.

Of course, much work remains to be done. We must define West Virginia's niche and, as I said earlier, unite behind a common vision and strategy and then move ahead. 



Thomas A. Heywood

Tom Heywood is a member of the firm and is located in the Charleston office. He has significant experience in health care, corporate, finance and commercial law. He currently serves as Chairman of the firm's Client Development Committee and Chairman of the firm's Health Care and Government Relations Groups. Mr. Heywood earned his Bachelor of Arts degree in International Relations from Stanford University, and his law degree from Harvard Law School.

Understanding the Rub in Intellectual Property Law for Chemical Products

Anthony P. Tokarz, Esquire
Bowles Rice McDavid Graff & Love PLLC



Anthony P. Tokarz

Anthony Tokarz is a member in the Charleston office and focuses his practice on intellectual property, environmental and complex litigation involving scientific and technology-intensive cases. He earned his Bachelor of Science degree from Fairmont State College and his law degree from the College of William and Mary. Mr. Tokarz earned his Master of Laws degree from George Washington University. He retired from the United States Marine Corps with the rank of Colonel.

The chemical industry unquestionably has a need for the protection of intellectual property. Generally, intellectual property is a product of human mental activity (“brain power”) encompassing a wide range of creative ideas from chemical formulas, processes, artwork, poetry, songs, mechanical devices and computer software which have commercial value. The laws affecting intellectual property encompass all the statutes, regulations and court decisions that collectively determine the ownership, rights and interests associated with intellectual property.

Although designed to protect an owner’s interest, intellectual property laws cannot prevent someone from trampling on the owner’s rights. However, these laws do entitle the owner to utilize the court system to halt the infringing conduct and obtain compensation for monetary damages. Thus, the degree of protection afforded intellectual property is directly related to the enforcement strength provided by the particular legal category embodying the property and the diligence of the property owner.

The most widely recognized legal categories¹ of intellectual property law are:

Patent Law

A patent is an exclusionary right granted by the federal government to the owner of the patent which excludes others from making, using, selling, offering to sell and importing into the United States products that are covered by one or more “claims” of an issued patent. The term of the patent depends upon the type of patent obtained. The most common type, a utility patent, is effective when issued by the U.S. Patent and Trademark Office (“USPTO”) and expires 20 years after the

application filing date. A design patent for a nonfunctional design has a term of 14 years after the date the patent issues. A plant patent lasts 20 years from the application filing date. Notably, in the chemical industry a patent can be obtained in most cases for both the newly developed chemical and the process employed in manufacturing the chemical.

Copyright Law

A copyright is granted by the federal government to the creator of an original work of authorship or expression that is fixed in a tangible medium produced by authors, composers, designers, programmers and web page designers. Significantly, a copyright does not protect the underlying idea and concepts, only the literal form that the expressive work takes. A copyright normally lasts for the life of the creator plus 70 years.

Trademark Law

A trademark is a word, name, symbol, slogan or device used to identify and distinguish the owner’s goods, or, in the case of a service mark, the owner’s services. Trademarks registered with the USPTO are renewable and thus can last indefinitely.

Trade Secret Law

Trade secrets commonly consist of a formula, pattern, compilation, program, device, method, technique or process that: 1) Derives independent economic value, actual or potential, from not being known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and 2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. There is no applicable federal law concerning trade secrets so it is a matter of state law.

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Managing Chemical Plants in the Kanawha and Ohio Valleys

*Halcott P. Foss, Plant Manager
Cytec Industries*

I have the unique position of having been the plant manager for three different plants in West Virginia, two in the Kanawha Valley and now one along the Ohio River. You might wonder if operating a plant is the same in both areas.


Not surprisingly, the experiences are somewhat similar, while being significantly different. The biggest difference I have noticed is lunch. I was born and raised in the South, and although I have lived outside the South, I still find it unsettling to go to Ohio for lunch. I can't pretend that I'm still down South when I'm stepping over buckeyes to get to Taco Bell.

Most of the plants along the Ohio River are further from population centers than are the plants along the Kanawha. Nonetheless, safety is just as much a part of life up north, as it is in the Kanawha Valley area. My plant has worked over 7.5 million hours without a lost time injury, and every time I start thinking we're doing a great job, I find that one of the other plants along the river is doing even better. What a great competition, to see who can have the fewest accidents! I must brag on my plant just a little, however. I discovered the West Virginia Safety Council's Governor's Safety Award when I was a manager in the Kanawha Valley. Cytec just won the award for the first time in its 55-year history in October.

Geography also provides the other major difference that I have observed. In the Charleston area, everyone was focused on the West Virginia state government. When Plant Managers meet along the Ohio, about half are from West Virginia and half from Ohio. Topics of discussion tend to be along the lines of business conditions, and safety incidents rather than how to cope with new developments in Charleston.

As a result of many of these differences, the plants along the Ohio generally have non-adversarial relationships with the media, and their neighbors are most concerned with job creation. West Virginia is, however, West Virginia, and some things don't change that much as you move around the state. The people that you meet along the Ohio River are every bit as nice as the ones I met in the Kanawha Valley. They want to work hard, and they are extremely honest. They are the reason that I am happy that I discovered West Virginia fourteen years ago, and the reason that keeps me living here.

Like the plants along the Kanawha River, many of the plants along the Ohio date back many years and often have some difficult work practices that seem to go along with older plants. Those well-entrenched mindsets are a part of managing older plants, whether those plants sit along the Kanawha or the Ohio River.

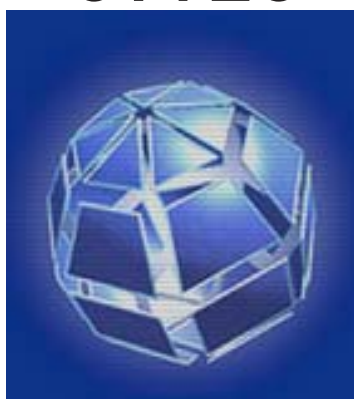
Being a Plant Manager in West Virginia is a challenge, but one I still look forward to each day. It doesn't seem to matter which river runs past the plant; what seems to matter is the quality of the people with whom you associate. 



Halcott P. Foss

Hal Foss is the Plant Manager for Cytec Industries, Incorporated, located at Willow Island, West Virginia in Pleasants County. He has previously been the Plant Manager for Rhone-Poulenc (now Aventis) at Institute, West Virginia and for Olin Corporation (now Clearon) in South Charleston. Mr. Foss has a Bachelor of Science degree in chemistry from Davidson College and a master's degree in chemical engineering from Columbia University. He lives with his wife, Roberta Green, in Vienna, West Virginia and is an avid golfer with an unfairly high handicap.

CYTEC



Making



GREAT CHEMISTRY

CAZ names new Executive Director



Robert Baptista has been named executive director of the Chemical Alliance Zone. Baptista, a former vice president of manufacturing for Bayer Corp., assumed the newly created position January 1, 2002.

Rick Hodge, chairman of CAZ's board of directors, said, "We are thrilled with Bob's credentials and are glad to have him head up our efforts. Bob's participation in the global business environment has provided him with a strong background in the global chemical industry which is essential to our future economic development efforts in the Chemical Alliance Zone."

Baptista has been active in marketing programs to attract raw materials suppliers, customers and energy producers to invest in new facilities at chemical plant sites. As a vice president of manufacturing for Bayer in the United States, Baptista was responsible for numerous plant sites producing synthetic rubber and specialty chemicals. He joined Bayer in 1972 as a research and development chemist after obtaining his doctorate in chemistry from Stevens Institute of Technology.

The Business of Chemistry in West Virginia

Direct Employment:	14,500
Rank among states:	22
Additional Jobs Supported by the Business of Chemistry	63,600
Average Wage	\$58,972
Manufacturing Facilities	73
Value of Industry Production	\$7.3 Billion
Rank among states	19
Additional Production Supported by the Business of Chemistry	\$16 Billion
Foreign Exports	\$263 Million

The business of chemistry in West Virginia directly employs 14,500 people, representing 17.6% of the state's manufacturing workforce.

SOURCE: American Chemistry Council, February 13, 2001

Bailey, Moore named firm's newest Members



Greg Bailey

Greg Bailey and John Moore were named Members of the Firm effective January 1, 2002.

Greg joined the firm in 1998 following his tenure as General Counsel to the Kanawha County Board of Education. He is a member of our Education Practice Group, frequently participating in lectures and seminars. He and his wife, Alisa, have two daughters: Cassady, 18, and Greer, 15.



John Moore

John is a member of the Charleston Business Tax Group and has been a part of the Bowles Rice family since 1999. John has more than 20 years of experience in insurance, managed care, hospital and physician business matters. He and his wife, Joni, also have two daughters: Katie, 18, and Elizabeth, 16.

New Faces at Bowles



Eric L. Calvert is an associate in the Charleston Business Tax Practice Group and focuses his practice on banking and corporate law. Mr. Calvert earned his Bachelor of Science degree in Business Administration from West Virginia University in 1990 and received his J.D. in 2001 from the West Virginia University College of Law. He worked in the banking industry and as a consultant in information systems and finance until beginning law school in 1998.



Rochelle "Rocky" Lantz Glover is an associate in the Charleston Labor and Employment Practice Area. She earned her B.A. degree in English from Wake Forest University and received her J.D. from the West Virginia University College of Law. Prior to joining the firm, Ms. Glover served as Law Clerk to the Honorable Robert B. King, U.S. Circuit Judge for the Fourth Circuit.



J. Breckenridge Martin, an associate in our Parkersburg office, concentrates his practice in litigation, commercial and real estate law. Mr. Martin received his doctor of jurisprudence from The West Virginia University College of Law, where he was a member of the Clinical Law Program. He received his BBA in Finance from the University of Georgia in 1995.

Occupational Pneumoconiosis: A Non-Coal Problem

Phyllis M. Potterfield, Esquire
Bowles Rice McDavid Graff & Love PLLC



Phyllis M. Potterfield

Historically, workers' compensation law in West Virginia developed to address the diseases of silicosis and coal worker's pneumoconiosis in employees in the mining industries. Beginning in the 1980's and continuing through the 1990's to the present, however, occupational pneumoconiosis claims have been made in increasing numbers by employees of contractors and manufacturers. Indeed, by the mid-1990's, it was estimated that over one-half of the new claims for occupational pneumoconiosis benefits were filed not against coal companies, but against non-coal concerns. The cost of occupational pneumoconiosis claims in West Virginia is no longer a problem limited to the coal industry.

It should not be questioned that workers who in fact develop a disabling lung disease due to causes and conditions arising out of and in the course of their employment should receive compensation. In West Virginia, however, far too often compensation is awarded to employees who are not in fact disabled or who acquired their disability as a result of non-work related diseases or exposures, including life-style choices. As a consequence of these liberal awards, many West Virginia contractors and manufacturers have experienced increased workers' compensation costs, putting them at a competitive disadvantage when compared with companies in other states. Additionally, these liberal awards limit the resources which are available to compensate or retrain employees who are truly disabled by workplace injuries.

Causes of the Problem

The ease with which occupational pneumoconiosis benefits are awarded under the West Virginia workers' compensation system begins with the fact that the legal definition of occupational pneumoconiosis is broader than the medical definition. Specifically, by statute, *oc-*

cupational pneumoconiosis includes not only the medically-recognized pneumoconioses, such as silicosis, coal worker's pneumoconiosis, siderosis and asbestosis, but also any "disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of employment." This definition has allowed physicians retained by workers' compensation claimants to simply diagnose "mixed-dust pneumoconiosis" without finding any specific causative agent and indeed without even inquiring into the nature of any dust exposure. Moreover, in West Virginia, contrary to prevailing medical opinion, there is no requirement that an employee's chest X ray demonstrate changes sufficient to diagnose occupational pneumoconiosis before benefits are awarded.

Not only does West Virginia workers' compensation law set forth a broad and overly-inclusive definition of occupational pneumoconiosis, but it also compounds the problem by failing to require any proof of exposure to the types and quantities of dust which can in fact cause an occupational pneumoconiosis. Rather, the statute merely refers to exposure to "the hazards of occupational pneumoconiosis," which the West Virginia Supreme Court of Appeals has vaguely defined as exposure to "minute particles of dust in abnormal quantities." There is no requirement that the level of exposure ("the dose") be in excess of any scientifically accepted standard, such as those established by NIOSH or the ACGIH, or adopted by OSHA or MSHA. As a practical matter, if an employee merely alleges that he or she has worked in a dusty environment, the burden shifts to the employer to prove the negative, often a costly, if not impossible, task.

Compounding the problem further is the so-called statutory presumption included in West

(continued on page 19)

Phyllis Potterfield has practiced extensively in chemical, asbestos and other toxic tort civil litigation since 1981. She also practices in workers' compensation law and has been recognized for her expertise in this area. Ms. Potterfield received her undergraduate degree from Tulane University and her law degree from Tulane University College of Law.

The Changing Toxic Tort Litigation Landscape in West Virginia

Charles M. Love, III, Esquire and Fazal A. Shere, Esquire
Bowles Rice McDavid Graff & Love PLLC

The toxic tort litigation landscape changed irrevocably in West Virginia with the 1999 state Supreme Court's decision in *Bower v. Westinghouse Electric Corp.* *Bower* recognizes a claim for recovery of future medical monitoring costs due to the defendant's tortious conduct, although the plaintiff does not allege a present physical injury. *Bower* has a six-part test, each of which a plaintiff must affirmatively prove before liability attaches to the defendant. The test the plaintiff must prove is that: 1) he or she has been significantly exposed; 2) to a proven hazardous substance; 3) through the tortious conduct of the defendant; 4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; 5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and 6) monitoring procedures exist that make the early detection of a disease possible.

The first medical monitoring trial based on the *Bower* decision took place in the context of a class action tobacco lawsuit in the Circuit Court of Ohio County, West Virginia, before Judge Arthur Recht. The trial lasted from September 5 to November 14, 2001 and involved a class of asymptomatic West Virginia smokers who had a five-pack year smoking history, that is, they had smoked a pack a day for five years or some equivalent variation thereof. At the end of the trial, the court decided as a matter of law that the plaintiffs had proven the first two elements of *Bower*, that is, the plaintiffs had shown that they had been significantly exposed to a proven hazardous substance.

Accordingly, the jury in the tobacco trial was left only to decide if the plaintiffs had met their

burden in proving the next three elements of the *Bower* case. Defendants resoundingly won these issues before the jury. With respect to element 3 of *Bower* that defendants be shown to have engaged in tortious conduct, the jury found that the product was not defective, that the tobacco companies were not negligent in the design, manufacture and sale of the cigarettes, and that the tobacco companies did not fail to live up to any undertaking to the plaintiffs. That ruling by the jurors sealed the plaintiffs' fate since the plaintiffs had to prevail on each element of the *Bower* test to succeed in proving liability.

The jury further found that the plaintiffs had an increased risk of contracting disease as a proximate result of the smoking exposure pursuant to element 4 of *Bower*. However, the jury found, pursuant to element 5 of *Bower*, that the increased risk of disease did not make it reasonably necessary for all class members to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of exposure. Finally, with respect to element 6 of *Bower*, the jury found that the monitoring procedures proposed by the plaintiffs would make the early detection of smoking related diseases possible. The jury also rejected plaintiffs' punitive damage claim and found that the tobacco companies had not engaged in willful, wanton and reckless misconduct.

In an effort to expand the "medical monitoring" concept to "property monitoring," a novel class action was filed initially on August 4, 2000, in the Circuit Court of Putnam County, West Virginia, styled *Carter v. Monsanto Company, Solutia Inc., The City of Nitro, Amherst Coal Company, Arch of West Virginia Inc., Arch*



Charles M. Love, III

Charlie Love is a member of the firm and Chairman of the firm's Litigation Practice Group. He concentrates his defense practice in insurance, toxic tort, products liability and commercial litigation. Mr. Love earned both his Bachelor of Arts degree and his law degree from West Virginia University.

(continued on page 22)

(Webber . . . continued from page 1)

directly employed by the state chemical industry earn an average of \$60,505 a year.

To ensure that the industry continues to play a key role in West Virginia's economy, Cabell, Kanawha, Putnam and Wayne counties have together established a Chemical Alliance Zone (CAZ). The CAZ brings together companies in central West Virginia with education, government and labor leaders, working to grow the chemical industry in the area. Its goals are to catalyze community efforts to improve the region's business conditions, attract new chemical investments to the area and conduct joint activities that include all chemical plants in the region.

To paraphrase former U.S. House of Representatives Speaker Tip O'Neil, all industries are local. Partnerships such as the CAZ and our work with the West Virginia Chemical Industry Council (CIC) illustrate what a difference can be made at the local level. At the American Chemistry Council, we depend on these local partnerships as we work on a state, national, and often international, level on behalf of the leading companies engaged in the business of chemistry. Some of our main areas of focus include the following:

Performance

During the last 13 years, our Responsible Care® initiative has helped our member companies make significant environmental, health and safety strides. Companies have decreased toxic chemical releases substantially while at the same time improving their production. Many companies also report a positive effect on their bottom lines – in decreased insurance premiums and a more favorable view from the investment community. Now, we are committed to raising the bar – making Responsible Care® an *ethic* that is embraced in our members' organizations as well as throughout our supply chain – as we move closer to our vision of no accidents, injuries nor harm to the environment.

Advocacy

We continue to pursue common-sense advocacy that addresses issues of major importance to our industry. At the state level, we work with the CICs on legislation like the *West Virginia Voluntary Remediation and Redevelopment Act*. One of our top national priorities this year has been the passage of a comprehensive energy policy that protects industry from the volatile energy market. Business tax relief, trade promotion authority and enhanced rail competition are also high on our legislative priority list.

International Advocacy

As our industry has become increasingly global, so have our member companies become increasingly affected by overseas regulation. For instance, the pending European Union legislation that calls for testing 30,000 chemical substances will affect any of our members who import into Europe. Consequently, we've become more engaged in the international policy debate, and we've become more proactive in initiating our own global chemicals management policy.

Research

We have initiated a number of research and testing programs to assess the risks of chemicals in the environment. For instance, through the High Production Volume testing program, 487 companies have made voluntary commitments to provide hazard-screening information on 2,155 chemicals by the end of 2004. More than 35 chemical companies will voluntarily conduct product evaluations as part of EPA's pilot program to assess chemicals for potential effects on children. In addition, our industry has made a \$100 million commitment to our Long-Range Research Initiative. Current LRI efforts are focused on endocrine, cancer, respiratory, risk and exposure assessment and neurotoxicity research. Although there is already a great deal of information available on the approximately 9,000 chemicals in the marketplace, the amount of information that will be

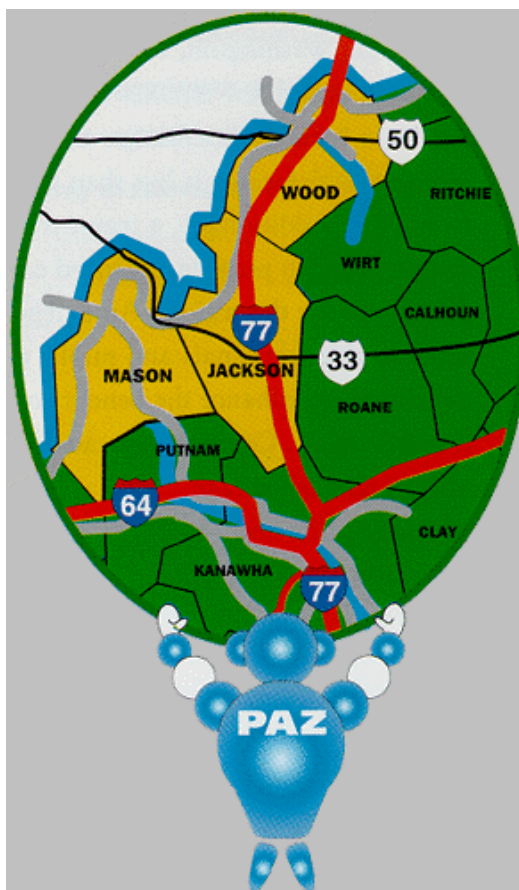
(continued on page 17)

Fred Webber became President of the American Chemistry Council on June 3, 1993 following many executive offices in the public and private sector. Mr. Webber served for five years in the Nixon and Ford Administrations as Assistant Secretary of the Treasury for Legislative Affairs, Special Assistant to the President for Legislative Affairs and Special Assistant for Legislative Affairs to the Secretary of Labor. Founded in 1872, the American Chemistry Council is the oldest trade association still in operation in the Western Hemisphere, representing nearly 200 members who produce more than 90% of the basic chemicals in North America.

(Bowen . . . continued from page 3)

Early in the conceptual phase of the project it was recognized that information technology would be a key for providing information as well as marketing. Thanks to the donation of an electronics-trading platform by SAIC, PAZ is forming a subsidiary to develop an e-commerce trading platform.

It is easy to be excited by the accomplishments the last five years. We have learned a little about what works and what doesn't work in marketing our "product," and we have incorporated these "best practices" into our plans for the future. Marketing the benefits of locating in West Virginia, knocking down barriers and creating opportunities while developing a broad electronics recycling industry will keep PAZ busy well into the future.



The Polymer Alliance Zone (PAZ) was formulated in 1996 as a pilot project of the State of West Virginia through an executive order of Governor Gaston Caperton. PAZ has the highest concentration of production of high-technology, specialty and engineering polymers in the world. Currently there are 63 members of the Polymer Alliance Zone, including both polymer and related industries. To learn more about PAZ, log on to their website at www.pazwv.com.

(Webber . . . continued from page 16)

made available between now and 2004 will increase significantly – thanks to initiatives like these.

Security

Our industry has a culture of safety going back many years. In fact, according to Labor Department data, we are one of the safest industries in the United States, and the world.

Although we have been working to strengthen security at our facilities and prevent the misuse of our products for some time, this work has been accelerated since September 11.

We will continue to work closely with federal law enforcement, national security and safety experts, as well as Congress and EPA, to improve the security of our facilities. The business of chemistry has many facilities in West

Virginia, and we need to ensure the safety of our plants, employees and neighbors in the surrounding communities.

There is one final, but crucial piece of the puzzle: communications. Our goal is to show our stakeholders what a vital role the business of chemistry plays in their lives. We aim to increase their awareness of the benefits that our industry provides: that we are a critical part of the nation's infrastructure; that we are the country's number-one exporter and hold one of every seven patents issued; and, that we make lives better, healthier and safer every day. Good chemistry makes it all possible, and this is the message we are working to drive home – starting locally and building globally.



(McKinney . . . continued from page 7)

The challenges are clear. We continue to face a litigious climate and liberal court system in West Virginia that is not conducive to business. We face media negativity in West Virginia that greatly affects on decision-makers. Cost competitiveness in West Virginia with regard to workers' compensation and medical costs continues to be an issue. Economic development incentives need to be competitive with other states and other countries. Work force readiness and development need to remain areas of concern. The regulatory climate needs to remain open and responsive to potential investor requests. We can be successful and chart a course that will lead us toward a bright future if we address each challenge and work together to make a difference. Sometimes our biggest mistake is not believing in ourselves.

Window of Opportunity

The West Virginia chemical industry plays a vital role in furthering the economic development efforts of our state. With great competition to keep businesses in West Virginia and recruit new investment, West Virginia brings a unique quality of life offering to the table. That offering includes a safe, friendly, family-oriented, strong work ethic, easily accessible way of life located in the breathtaking mountains of our glorious state.

There are many regional initiatives underway at this time. The Chemical Alliance Zone, Polymer Alliance Zone, BIDCO, Advantage Valley and others are working together to show

the world what we have to offer. As business leaders, government officials and concerned citizens, we accept the role of ambassadors for the state that we all love and are proud to call home. Our mission is clear. We will get there together by achieving the following goals:

- 1) Balanced court system;
- 2) Fair regulatory requirements;
- 3) Competitive benefits costs;
- 4) Progressive labor environment;
- 5) Competitive tax incentives; and
- 6) Educated and well trained work force.

To achieve our goals we must:

- 1) Orchestrate a team effort;
- 2) Embrace globalization;
- 3) Compete for scarce resources;
- 4) Maximize use of innovative technologies;
- 5) Listen and actively communicate with stakeholders and investors;
- 6) Strengthen existing media relationships while finding new avenues to communicate messages;
- 7) Work within a limited budget and maximize dollar value; and
- 8) Provide a safe and environmentally responsible industry.

As we move forward, the industry, our state, communities, suppliers and educational system will all flourish together. It will not matter which community is involved; the net effect will be more business for our region and as our manufacturing sector grows, the region will grow. In spite of recent economic challenges, good things are happening in the chemical industry.



(Potterfield . . . continued from page 14)

Virginia workers' compensation law. Under this presumption, as interpreted and applied, if an employee has worked in a dusty environment for ten out of fifteen years prior to his date of last exposure and has sustained a chronic respiratory disability, it is presumed that he or she is suffering from occupational pneumoconiosis. Relying on this presumption, workers' compensation benefits are frequently awarded to claimants whose chest X rays do not demonstrate any evidence of occupational disease and for whom no diagnosis of occupational pneumoconiosis would be made by any competent physician in a clinical setting. Although the presumption is not conclusive, once again the burden shifts to the employer, and the employer is required to prove, at its expense, both that the disability is not due to occupational exposure and that it is due to some specific non-occupational cause. Proof that the history, course and pattern of the chronic respiratory disability are inconsistent with an occupational pneumoconiosis, such that any practicing physician would "rule out" occupational pneumoconiosis as the cause, is frequently not enough.

West Virginia workers' compensation law also mandates the awarding of 5% permanent partial disability to claimants whose X rays do show changes sufficient to diagnose occupational pneumoconiosis but for whom the changes are essentially benign with no disability or impairment. Despite the fact that the ability of these employees to perform their jobs has not been impacted in any way by an injury or disease, under West Virginia workers' compensation law, they can receive up to \$10,130.00, in permanent partial disability benefits. Current regulations also allow benefits to be awarded based upon certain pulmonary function test results contrary to guidelines of the American Thoracic Society, the professional organization of pulmonary medical specialists, as adopted in the *AMA Guides to the Evaluation of Permanent Impairment*. Although the *AMA Guides* have governed the assessment of impair-

ment for other types of workers' compensation claims in West Virginia since 1995, they have not been approved to assess impairment in occupational pneumoconiosis claims.

Solutions to the Problem

The first step in addressing the *occupational pneumoconiosis problem* created by present West Virginia workers' compensation law is education. The executive and legislative branches, as well as the Compensation Programs Performance Council, which has the authority to promulgate regulations and recommend statutory amendments, must be educated not simply about the nature of the problem as discussed herein, but more importantly about the competitive disadvantage the current law creates for West Virginia businesses. This education might also extend to the medical community. West Virginia companies must be willing to devote time and money to compiling specific data to support this position. Companies which have comparable facilities in West Virginia and in other states should be a particularly helpful source of information. Nationwide industry groups may be another.

The next steps involve making specific proposals for legislative and regulatory changes. These proposals might include:

- Amendments to require an employee to make a *prima facie* showing that federal, state or industry-wide dust standards have been violated before he or she can pursue a claim for occupational pneumoconiosis benefits.
- Elimination of the presumption that chronic respiratory disability is due to occupational pneumoconiosis based merely on years of employment and adoption of a standard that claimants must present the opinion of a medical expert that their disability is related to a specific dust hazard in the work place of the employer against whom the claim is made.

(continued on page 23)

(Gregg . . . continued from page 8)

and its transportation network enables quick and reliable shipping. For example, a product manufactured from within the CAZ could be transported to a major ocean port such as Norfolk, Virginia, in a day's time. Similarly, those same products could be shipped out of the CAZ via major interstate highway (I-64, I-77 and I-79, which converge within the CAZ) within the same day. These factors make the CAZ well situated for national and international commerce.



Perhaps the most attractive feature the CAZ and West Virginia offer is its work force. A strong, skilled and stable work force is available to chemical companies that are looking to relocate. The work ethic is strong, as is the industry's reputation in labor relations. In addition, this region has the ability to attract and retain top technical talent.

The community located within CAZ at large is, and has been, very supportive of the industry. Also, elected officials at every level – local, county, state and federal – are support-

ive and readily available to address the needs of industry in this region. Spin-off and support business offers both local warehousing and contract manufacturing services readily available to the chemical industry.

The Chemical Alliance Zone is home to sites owned by large and small corporations. The West Virginia chemical industry manufactures products that are used in the production of cosmetics, detergents, shampoo, rubber, automotive products, paints and coating, fire retardants

and agriculture products.

Building on the strengths of this region and encouraging further economic investment, the CAZ anticipates attracting at least \$4 billion of chemical industry investment in the next decade. Through continued strategic partnerships between the chemical industry, the business community and residents within the zone, CAZ fully expects to exceed even its own expectations. For more information about CAZ, log onto www.cazwv.com.



The Chemical Alliance Zone is situated in a strategically centralized part of the eastern United States. With its excellent infrastructure and proximity to major markets, it is an ideal location for industrial development. There are 18 major metropolitan areas within 500 miles of the CAZ.



What is Responsible Care®?

Responsible Care® is the Chemical Industry's commitment to continuous improvement in all aspects of environmental, safety and health protection. Although voluntary, all member companies throughout the world have committed to the principle of continuous improvement through self-evaluation and regular assessment with key indicators of performance being published on an annual basis.

The six codes of Responsible Care® are:

- Employees Safety and Health
- Process Safety
- Community Awareness and Emergency Response
- Pollution Prevention
- Distribution
- Product Stewardship

(Tokarz . . . continued from page 10)

Although each category of intellectual property law focuses upon a specific type of intellectual property, the laws affecting the categories often team-up with regard to a particular item of intellectual property. For example, patent law often works together with copyright and trademark law in protecting product design. However, it is not the teaming but rather the collision of trade secret and patent laws that too often occurs for a chemical product invention.

Thus, the inventor and/or owner of a newly created chemical compound may have a difficult decision in determining whether to pursue protection through the legal category of a patent or a trade secret. Although a patent provides a monopoly to exclude others from using the invention, the patent protection lasts for only 20 years from the filing date of application. Moreover, because the major policy underlying patent law is to promote the advancement of science and technology, full disclosure of the invention is required to obtain a patent. In other words, the patent application must not only describe the invention but also provide sufficient information to enable one knowledgeable in that field to make and use the invention.


Also, if the invention has more than one mode, the patent applicant cannot withhold or conceal the best mode, but must disclose it. Until recently, it was possible to pursue a patent application while simultaneously maintaining the invention for which the patent is being sought as a trade secret, because patent applications were kept confidential by the USPTO until the patent actually issued. However, in 1999, revisions to the patent law were enacted which required patent applications filed on or after November 29, 2000 be published 18 months after the application filing date. This disclosure requirement will undoubtedly cause difficulties in maintaining trade secrets in patent applications.

A major consideration in determining whether protection of the invention as a trade secret

would be effective and feasible is whether the invention can be reverse-engineered, i.e., analyzing the invention to determine exactly how to duplicate it. The “reverse engineer” could then likewise claim a property interest in the trade secret invention. Thus, there are obvious difficulties in relying on the protections afforded trade secrets.

As demonstrated with regard to chemical inventions, as well as others, the decision whether to patent the invention becomes one of risk analysis. For example, when the chemical compound invention is not susceptible to sophisticated electronic and chemical analysis, the trade secret approach may be the most feasible. The best-known example is the syrup used to make Coca-Cola which has never been patented and remains a trade secret notwithstanding the sophisticated equipment available to analyze chemical products.

Even though a chemical invention cannot be reverse-engineered at this time, technological advances may enable reverse engineering to occur five years from now. Consideration must also be given to market analysis and projections and personnel who may come to know the trade secret.

The analysis of the overlapping categories of intellectual property law, particularly in the chemical invention area, requires that the choice of protection be viewed as broadly as possible. Legal, in addition to scientific and business resources, must and should be brought to bear in the evaluation and decision making process for any new product. Failure to do so may result in lost opportunities for scientific and technological advancements as well as lost profits. 

¹ There are other forms of legal categories of intellectual property law consisting of unfair competition laws, common law copyrights and trademarks, moral rights, rights of publicity and semiconductor mask works. For purposes of this article, these less common forms of intellectual property will not be addressed.

(Love/Shere . . . continued from page 15)

of *Illinois, Inc. and Apogee Coal Company*. The Carter plaintiffs, who are property owners abutting a creek downstream from a landfill, claim that the defendants placed or allowed toxic waste to be placed in a landfill. The plaintiffs then assert that the toxic waste migrated into waterways, resulting in the downstream contamination of their properties and making it “reasonably necessary to test, determine and otherwise quantify” the presence of toxicity on their properties in order to determine what action, if any, should be taken. To the extent that the testing revealed anything, plaintiffs allege that they will seek in addition, medical monitoring, property monitoring, actual damages for personal injury, actual damages for property damage, and relocation costs.


The trial court in *Carter*, upon motion of the defendants, found that *Bower* does not create or establish a property monitoring cause of action. The trial court, however, did not dismiss the action pertaining to the property monitoring claim and instead certified the question of whether a property monitoring claim is cognizable under West Virginia common law to the West Virginia Supreme Court, where it is currently pending for resolution.

Mass Litigation Panel Challenge

Another interesting scenario in the mass tort landscape is set to develop in a West Virginia federal court relating to the Mass Litigation Panel (“Panel”) created recently by the state Supreme Court for the ostensible purpose of efficiently marshalling case management and trial methodologies for mass litigation. The Panel, embodied in Rule 26 of the West Virginia Trial Court Rules, provides for the consolidation of mass claims wherever filed in West Virginia and their subsequent assignment to a member or members of the Panel or to a judge assigned by the Chief Justice of the West Virginia Supreme Court. Panel consolidation has so far been applied in asbestos, tobacco and Phen-fen litigation. The federal action, styled

Norfolk Southern Ry. Co., et al. v. Chief Justice Warren R. McGraw, et al., was filed on November 29, 2001 by four railroad companies seeking a declaratory judgment against the jurisdictional reach of the Panel. Specifically, the lawsuit by the railroads asserts that the joining of thousands of asbestos claims pending in West Virginia into the Panel and the automatic referral of all newly-filed asbestos cases to the Panel violates defendants’ due process rights to present a defense as the consolidation virtually guarantees jury confusion and a verdict in favor of all plaintiffs.

In support of their declaratory judgment action, the railroads have argued that the consolidated treatment of asbestos cases pursuant to the dictates of the Panel would force them to settle because of the risk of bankrupting judgment in mass trials. Furthermore, the railroads assert that even if they dared to “bet the company” by litigating the mass cases to conclusion, they would have no appeal of right because the Supreme Court has complete discretion whether to allow an appeal and has previously exercised that discretion to deny appeals objecting to consolidation of trial cases.

With so much of mass tort law evolving in new directions, a cautious wait and see approach may not be the wisest or best bet for business. After all, we have turned a corner in tort liability litigation. A plaintiff is no longer constrained to seek compensatory damages for a real and cognizable injury. Rather, the law has evolved to allow a plaintiff to seek redress for a future and indeterminate injury, although seemingly there may be little possibility of the injury actually occurring. 



Fazal A. Shere


Fazal Shere, a member in the Charleston office, concentrates his practice in civil litigation, toxic torts, mediation and arbitration in regard to construction and contractual disputes and federal criminal defense. Mr. Shere received his undergraduate degree from Aligarh Muslim University, India, his master's in Business Administration from the University of New Orleans and his law degree from Tulane University College of Law.

(Potterfield . . . continued from page 19)

- Elimination of 5% permanent partial disability awards based upon X-ray diagnoses of occupational pneumoconiosis without evidence of any pulmonary impairment, instead providing that if only an X-ray diagnosis is made the claimant receive medical benefits only with the awarding of any disability benefits delayed until evidence of actual impairment has been demonstrated.
- Amendments to the current workers' compensation rules which govern medical evaluations and impairment ratings in occupational pneumoconiosis claims to conform West Virginia's standards to the standards of the

American Thoracic Society and the AMA *Guides to the Evaluation of Permanent Impairment*.

Conclusion

In the present political climate, none of these proposed changes may be realistic. Regardless, the education process, with the compilation of specific data to demonstrate that West Virginia workers' compensation law is out of step with the laws of other states and is negatively impacting West Virginia's ability to attract and keep manufacturing jobs, must continue in earnest. 


(Caryl . . . continued from page 5)

Other more obscure credits, such as the one enacted in 1992 for production of synthetic motor fuel from coal-based liquids, and the one enacted in 1996 for engaging in the production of value-added products from raw agricultural products, have never been used and, for that reason, are targeted for repeal.

Beyond incentive tax credits, the other area of tax reform that is gaining traction is the long-standing need to establish an independent board to hear challenges to state tax assessments. Initially, the Legislature received mixed signals from the executive branch about the need for such a board, but the new leadership in the Department of Tax and Revenue appears to be open-minded on the issue. Now, at the recommendation of a Special Joint Committee, a bill has been introduced which would establish just such a board.

Over the coming weeks, the prospects for enactment of these significant proposals will become clearer. Even then, it is likely to remain uncertain whether they represent the first stages of the major restructuring process or, in the

words of the late Peggy Lee, "Is that all there is?" In the meantime, we can take some measure of encouragement from the little things.

For example, officials of the Department of Tax and Revenue have recently agreed that the direct use exemption from sales tax applies to the portion of a consultant's fees related to his recommendations about a piece of equipment directly used in a manufacturer's production process. Indeed, a journey of a thousand miles, often starts with one small step. 

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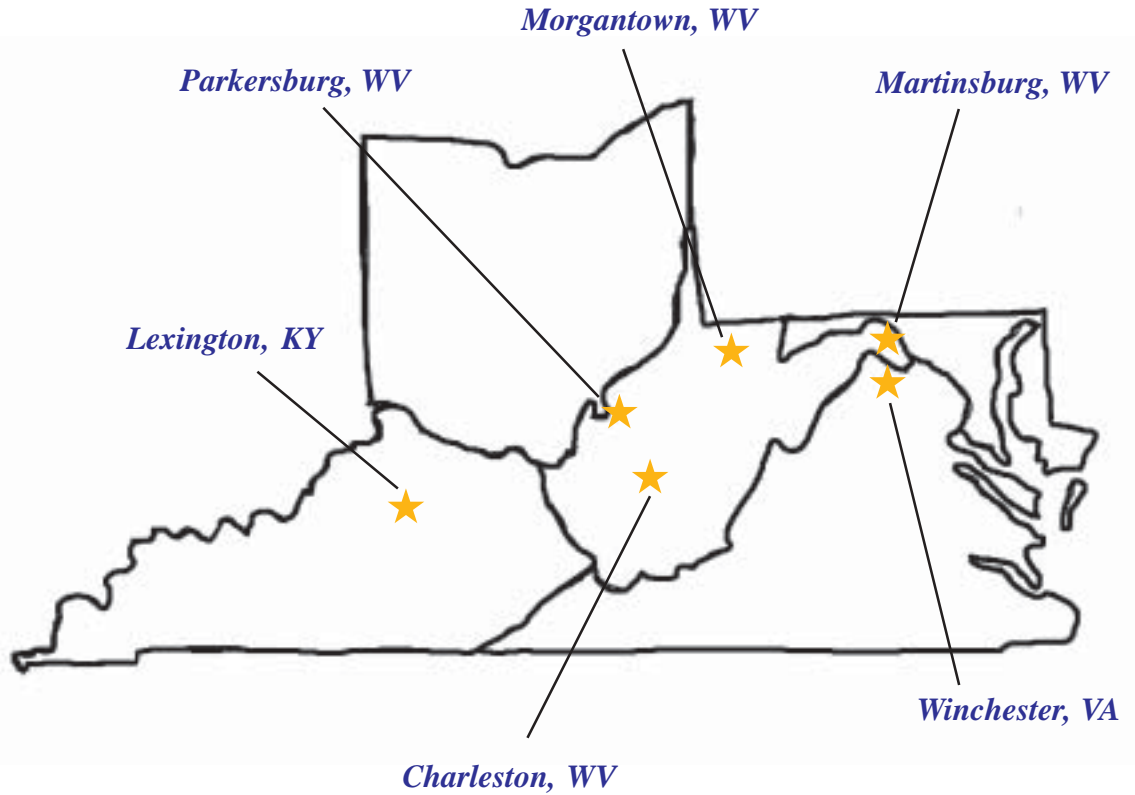
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