

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMERICAN SOCIETY FOR	:	CIVIL ACTION
TESTING & MATERIALS	:	
	:	
vs.	:	NO. 02-7217
	:	
CORRPRO COMPANIES, INC.,	:	
MICHAEL BAACH, WARREN	:	
ROGERS and WARREN ROGERS	:	
& ASSOCIATES, INC.	:	

**DECISION**

**JOYNER, J.**

**August 10, 2005**

This declaratory judgment action was tried before the undersigned in January, 2005. The parties have submitted their proposed factual findings, legal conclusions and briefs and the matter is now ripe for disposition. Accordingly, the Court now makes the following:

**FINDINGS OF FACT**

1. Plaintiff, the American Society for Testing and Materials ("ASTM") is a Pennsylvania Non-Profit Corporation with its principal place of business at 100 Barr Harbor Drive, West Conshohocken, Pennsylvania. ASTM's mission is to provide a forum for volunteer technical experts to develop and publish standards for materials, products, services and systems and standardized methods for testing different properties and materials. To that end, it is composed of 136 technical committees, broken down into

2,200 subcommittees and some 6,000 different task groups. (Complaint, ¶s 1, 9-11; N.T. 1/4/05, 22-23). ASTM has some 30,000 members, 22,000 of whom work on the various technical committees and/or subcommittees. Its membership is drawn up primarily of scientists and technical experts from 110 different countries representing various companies, manufacturers, major users, academia and government(s). (N.T. 1/3/05, 24).

2. Defendant Corrpro Companies, Inc. ("Corrpro") is an Ohio Corporation with its principal place of business at 1090 Enterprise Drive, Medina, Ohio. Corrpro primarily is in the business of providing corrosion control and cathodic protection (*i.e.* rust/corrosion prevention) services. (Complaint, ¶2; N.T. 1/6/05, 47-50).

3. Defendant Michael Baach is a resident of the State of Ohio with an address at 4167 Sierra Circle, Medina, Ohio. At all times relevant to this cause of action, Mr. Baach was the Executive Vice President of Sales and Marketing for Corrpro. (Complaint, ¶3; N.T. 1/5/05, 94).

4. Defendant Warren Rogers is a resident of the State of Rhode Island with an address at 747 Aquidneck Avenue, Middletown, Rhode Island. At all times relevant to this cause of action, Mr. Rogers was the President of Warren Rogers Associates. (Complaint, ¶4; N.T. 1/5/05 147). In addition, Dr. Rogers was a member of the Corrpro Board of Directors between sometime in the

mid-1990's until 2001 or 2002. (N.T. 1/5/05, 155-156).

5. Warren Rogers Associates, Inc. ("WRA") is a Rhode Island Corporation with its principal place of business at 747 Aquidneck Avenue, Middletown, Rhode Island. Warren Rogers Associates is primarily in the business of providing mathematical and statistical consulting services. (Complaint, ¶5; N.T. 1/5/05, 147).

6. In the late 1970's, Dr. Warren Rogers devised a statistical method for assessing and predicting when unprotected underground steel storage tanks ("UST's") would fail by evaluating the variables in the soils surrounding the tanks. (N.T. 1/5/05, 148-149). WRA was eventually retained by most of the major oil companies to implement this procedure for them, so as to enable them to prioritize the removal and replacement of existing steel tanks. (N.T. 1/5/05, 149). Eventually, Dr. Rogers was also asked by Randy Nelson of the United States Environmental Protection Agency ("U.S. EPA") whether this statistical method (which subsequently came to be known by the acronym "MTCF" for "meantime to corrosion failure") could also be used to determine whether the state of corrosion on tanks was not so far advanced as to preclude the addition of cathodic protection. (N.T. 1/5/05, 149).

7. Since approximately the mid 1980's, WRA began regularly subcontracting with Corrpro to do the field work necessary to

enable WRA to do its storage tank assessments. (N.T. 1/5/05, 150-152).

8. Until late 1994, the only method for assessing underground storage tanks older than ten years old that was approved by the U.S. EPA and those states which followed U.S. EPA regulations involved manned-entry internal inspection as the assessment method, which most often was followed by installation of interior lining rather than cathodic protection. (P-136, ¶37; N.T. 1/6/05. 59).

9. In or about July, 1993, Randy Nelson sent a letter to a number of parties that he believed might be interested in the development of a standard under the auspices of ASTM on the assessment of underground storage tanks prior to cathodic protection. (Nelson Dep., 19, 52-53; Defendant's Exhibit 3 [hereinafter "D-3"]; Plaintiff's Exhibit 51). Defendants Baach and Rogers were included among those interested parties to whom Mr. Nelson sent the letter. (Nelson Dep., 56-59; P-51).

10. In ASTM, a standard first begins to be developed through the formation of a task force or group, which is a small group of members who work to develop an initial consensus and first draft of something and then move it forward. The process can be put in motion by a member raising an issue at a meeting and proposing that a standard be developed or, as is often the case, ASTM receives a request from a government agency, such as

the Consumer Product Information Agency or the Environmental Protection Agency or from an individual company. After the completion of the task group's work, the proposed standard will move to the subcommittee level, where it is first officially balloted. There is a percentage affirmative requirement and any negative votes that are submitted must be considered by the originating subcommittee. (N.T. 1/4/05, 25-27, 29, 33). From there, the proposed standard moves to the main committee, which can vary in size from 50 to over 1,000 members with every member receiving a ballot. There are percentage return requirements, *i.e.*, a certain percentage of committee members must cast their ballots and a certain percentage must vote affirmatively. (N.T. 1/4/05, 27). From there, all 22,000 members of ASTM working on technical committees have the opportunity to review the proposed standard and then it's reviewed by the 9-member Committee on Standards, which looks to see whether or not the process of ASTM has been followed and that the committee which developed the standard was balanced (*i.e.*, that the committee membership was made up of individuals with diverse areas of expertise and divergent economic, business, etc. interests). (N.T. 1/4/05, 27-28, 30-31).

11. In Mr. Nelson's letter of July 27, 1993, he scheduled a meeting for Friday, July 30, 1993 in St. Paul, Minnesota to begin work on the standard and thus the task group was formed. (P-51;

Jones Dep., 122).

12. Although Dr. Rogers was already a member of ASTM at that time, having joined in or about 1991 when he participated in a task group developing a standard for statistical analysis of gasoline inventory data, Mr. Baach did not join until June, 1994. (N.T. 1/5/05, 71, 152-153).

13. At the time an individual applies for membership in ASTM, they are required to disclose their corporate affiliations and thus ASTM knew that Michael Baach was a Vice President with Corrpro and that Warren Rogers was the President of Warren Rogers Associates. ASTM does not pay or otherwise compensate members who serve on task forces or committees for the time that they expend in standard setting activities. (N.T, 1/4/05, 88; Brooke Deposition, 88).

14. Nothing within ASTM's policies, procedures or guidelines prohibits an individual from participating in standard setting activity because he/she or his/her company may have a financial interest in the technical standard(s) upon which he or she is working. (N.T. 1/4/05, 89-90; Brooke Deposition 87-93).

15. William Jones, who is an Executive Vice President at WRA was also a member of ASTM's E-50 Committee on Environmental Assessment and of the task group initially formed by Randy Nelson, having joined ASTM along with Dr. Rogers to work on the standard for statistical inventory reconciliation ("SIR"). Mr.

Jones was also a member of the G-01 Committee and thus likewise participated in the process of developing the ES-40 (Emergency Standard) and the G-158 Standards. (N.T. 1/5/05, 79-80; N.T. 1/6/05, 6-7; Jones Dep., 43, 52-58). Although Dr. Rogers was a member of the E-50 Committee, he was not a member of the G-01 Committee. (N.T. 1/5/05, 82-83).

16. In addition to Mr. Baach, Corrpro was also represented on the initial Task Group and later on the E-50 committee, by Thomas Mehalick, who was the Manager of UST Services for Corrpro in its West Chester, PA office. (N.T. 1/5/05, 76, 111-112; N.T. 1/6/05, 152-153, 200; Exhibits P-54, P-55, P-70)

17. Included among the members of the task group and the E-50 committee was a representative of the National Leak Prevention Association, Tony Rieck, and Hirsch Caudill, an attorney who represented the Armor Shield Company. (Jones Dep., 52-54; P-51; N.T. 1/5/05, 153-154; N.T. 1/6/05, 58-59, 67-68; Nelson Dep., 24). Derick Sharp, President of the Armor Shield Corporation, was also an ASTM member and participated on both the E-50 and G-01 Committees. (N.T. 1/5/05, 154, Exhibit D-30).

18. Armor Shield is an Ohio corporation with its principal place of business in Falmouth, Kentucky. Armor Shield is in the business of providing equipment, materials and installation services for interior lining on underground storage tanks and using manned entry for internal inspection of UST's. (N.T.

1/6/05, 61, 100; Exhibit P-136 ["Armor Shield Complaint"], ¶36).

19. ASTM promulgated the ES-40 Standard for Procedures for the Assessment of Buried Steel Tanks Prior to Addition of Cathodic Protection on November 14, 1994. The ES-40 Standard recognized, *inter alia*, the MTCF method as a viable non-invasive method for evaluating whether a UST was suitable for upgrading with cathodic protection. As an emergency standard, ES-40 had a "life" of two years and thus ES-40 expired in 1996. (P-60, P-136, ¶24, P-137, ¶25; N.T. 1/4/05, 35; N.T. 1/5/05, 80-82).

20. Derick Sharp, Tony Rieck and Armor Shield were adamantly opposed to the creation of the ES-40 Standard and frequently endeavored to disrupt and impede the progress of the committee's work. (Nelson Dep., 24-25, 42-45). In addition, Mr. Sharp frequently threatened to sue various individuals and companies on numerous occasions throughout the standard development process. (N.T. 1/5/05, 153-155, 206-207).

21. Sometime after the promulgation of ES-40, the E-50 (environmental risk) committee moved to transfer the development process of the standard to the G-01 (corrosion) committee. (N.T. 1/4/05, 35; 1/5/05, 82-83). In October, 1998, the permanent standard, G-158 was adopted and published by ASTM, following ASTM's denial of an appeal of the proposed permanent standard by Derick Sharp. (N.T. 1/4/05, 38; N.T. 1/5/05, 159; Exhibits D-28, D-29, D-30, D-31, D-32). In denying Mr. Sharp's appeal, ASTM

found that the proposed standard was within the scope of the G-01 Committee, that the G-01 Committee did not violate the conditions of balance<sup>1</sup> and that the G-01 Committee followed ASTM's procedural requirements and its criteria for due process. (N.T. 1/4/05, 161-163; N.T. 1/5/05, 15-17; Exhibit D-32; Exhibit P-5; Pierce Deposition, 24-25). ASTM never restricted or suspended either Dr. Rogers or Mr. Baach from participating on the E-50 or G-01 Committees nor did it ever inform either that their activities at ASTM were unwelcome or improper. (N.T. 1/6/05, 97-98, 150-153).

22. The G-158 Standard also recognized as a valid method for evaluating the suitability of a tank for upgrading by cathodic protection alone a non-invasive method with primary emphasis on statistical and electrochemical analysis of external site environment corrosion data (*i.e.*, the MTCF method). (Exhibit D-30).

23. Shortly after the adoption and publication of the G-158 permanent standard, on or about November 12, 1998, Armor Shield instituted an anti-trust lawsuit against ASTM, Corrpro Companies, Inc., Harco Technologies, Inc. (a Corrpro subsidiary), Michael Baach, Warren Rogers, Warren Rogers Associates, James

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<sup>1</sup> To be balanced, a committee could not be made up of more members who are or were affiliated with a commercial "producer" than members who were classified as "users" or "general interest." (Pierce Deposition, 87).

Bushman and J.B. Bushman & Associates<sup>2</sup> in the United States District Court for the Northern District of Ohio. ("Armor Shield litigation"). In that lawsuit, Armor Shield alleged that the defendants had restrained trade by, *inter alia*, conspiring with one another to manipulate and violate ASTM's regulations that all standards be developed through a rigorous and unbiased review process so as to promulgate the emergency ES-40 and G-158 permanent standards. The complaint did not name or mention either Thomas Mehalick or William Jones or any other individual employees or representatives of Corrpro and WRA other than Mr. Baach and Dr. Rogers. (Exhibits D-136, D-137; N.T. 1/4/05, 41, 101, 159; N.T. 1/6/05, 71, 81, 200-202).

24. No. 10.1 of ASTM's By-laws provides for indemnity for Society Members as follows:

Any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed action, suit or proceeding whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director, officer, employee or agent of the Society, or by reason of the fact that he is or was serving on a committee operating under the auspices of the Society, shall be indemnified by the Society against expenses (including attorney's fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he

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<sup>2</sup> Mr. Bushman had, for a time, served as the Chairman of the E-50 committee and had also been one of the co-founders of Corrpro, along with Mr. Baach and several others. Mr. Bushman's affiliation with Corrpro ended in September, 1993 when, pursuant to a negotiated severance agreement, Mr. Bushman formally resigned as an officer, employee and member of the Board of Directors of Corrpro. (N.T. 1/6/05, 62-65).

acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Society and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. A director of the Society shall not be liable for monetary damages for any action taken, or any failure to take any action, as a director except to the extent that by law a director's liability for monetary damages may not be limited. (Exhibits P-16, D-1).

25. In or around May, 1999, Defendants in this action first demanded that Plaintiff indemnify them for their reasonable attorney's fees, expenses and defense costs and for any liability which may arise out of the Armor Shield litigation. (N.T. 1/5/05, 166, Exhibit D-39). Previously, via letter dated December 2, 1998 from ASTM President James Thomas, ASTM had agreed to reimburse James Bushman for any reasonable attorney's fees and costs which he incurred as a result of the Armor Shield litigation "unless and until it becomes apparent to ASTM that Armor Shield's allegations concerning your conduct are supported by evidence; [t]hat is, until ASTM believes that you operated outside the auspices of the Society, in bad faith, or in a manner that was not in the best interests of the Society..." (N.T. 1/4/05, 43-44; Exhibit P-8).

26. After several months and several more requests from the defendants for a response to their indemnification requests, the Executive Committee of the ASTM Board of Directors met, via telephone conference call on August 26, 1999 to consider the defendants' repeated requests. At that time, "[i]t was the

Committee's judgment, after thorough discussion, that it was not possible to say with assurance at this time that all of the requirements for the granting of indemnification contained in ASTM's by-laws (and in the Pennsylvania not-for-profit corporation law) had been met by any of the parties requesting indemnification...Accordingly, the committee concluded that it was not possible to grant any of these parties indemnification (or, in the case of the Bushman defendants, continued indemnification) at this time. The Committee made clear, however, that this was not intended to be 'final' in any way and was subject to change in the future based upon additional information and developments in the case." (Exhibits D-37, D-40, D-41, D-42; Brooke Deposition, 63, 83, 85; N.T. 1/4/05, 60-61, 63-64, 101, 169-171).

27. At the meeting of the ASTM Board of Directors on October 12-13, 1999, the full Board voted to approve the action of the Executive Committee in denying the defendants' indemnification requests. (Exhibit D-36; Brooke Deposition, 32, 35-37; N.T. 1/4/05, 64-66; 1/5/05, 57-59).

28. Defendants, through their counsel, repeatedly offered to present evidence, provide information or answer any questions that ASTM may have had regarding the allegations in the Armor Shield complaint in order to resolve their claims for indemnification. Despite these offers, ASTM gave the defendants

no opportunity whatsoever to present any information or evidence to either the Board of Directors or the Executive Committee of the Board of Directors. (Exhibits D-40, D-45; N.T. 1/4/05, 100-101, 147; N.T. 1/5/05, 168; N.T. 1/6/05, 71-72; Brooke Deposition, 63, 72-74, 85-87; Pierce Deposition, 70-74).

29. In deciding that the defendants were not made parties to the Armor Shield suit by reason of the fact that they were serving on a committee operating under the auspices of the Society and that they were not acting in good faith and in a manner which they reasonably believed to be in, or not opposed to, the best interests of the Society, Plaintiff ASTM considered only the allegations contained in Armor Shield's complaint and amended complaint. ASTM undertook absolutely no investigation whatsoever to determine the veracity of those averments, despite the fact that it believed the allegations against it in the Armor Shield pleadings to be false and that it had voted to uphold the findings of its own Committee on Standards that its internal regulations and balance requirements had been followed by the E-50 and G-01 Committees in their development of the ES-40 and G-158 standards. (N.T. 1/4/05, 44-55, 77-79, 91-100, 165-174; N.T. 1/5/05, 11-12, 18-20, 29-32; Brooke Deposition, 59-62; Pierce Deposition, 46-47, 59, 65-69).

30. Although they strongly disputed Armor Shield's allegations in its lawsuit, via Settlement Agreement and General

Release dated December 14, 2001, Defendants Baach, Rogers, Corrpro and WRA settled the Armor Shield suit for the total sum of \$1.4 million. Of that total, Warren Rogers and WRA contributed \$50,000 and Michael Baach and Corrpro, Inc. contributed \$1.225 million. The settlement agreement did not specify how much of those amounts were attributable to Warren Rogers or Michael Baach individually or to separate the individual defendants from the corporate entities with which they were affiliated. (Exhibits D-5, D-16, D-25, D-51, D-56-D-65; N.T. 1/5/05, 157-158, 164, 175-177; N.T. 1/6/05, 66, 89-92, 185).

31. Although ASTM contributed nothing toward the settlement, the lawsuit was dismissed in its entirety. (N.T. 1/4/05, 56-58).

32. The defendants again requested that they be indemnified by ASTM after the settlement was finalized in early 2002 but neither the ASTM Board of Directors nor its Executive Committee took any action in response to the defendants' renewed request. (N.T. 1/4/05, 102-104; N.T. 1/5/05, 166-168; N.T. 1/6/05, 92-94; Exhibits D-18, D-45, D-46).

33. In addition to the settlement payment of \$50,000, Defendants WRA and Rogers incurred \$338,083.85 in attorneys' fees, costs and expenses in defending the Armor Shield litigation. (Exhibits D-10, D-11, D-12, D-13, D-53; N.T. 1/5/05, 210-215; N.T. 1/6/05, 3-6, 11-13).

34. WRA paid all of the legal fees, costs and settlement payments on behalf of itself and Dr. Rogers individually. (N.T. 1/5/05, 161; N.T. 1/6/05, 24-25).

35. On or about March 28, 2002, Dr. Rogers and the Board of Directors of WRA entered into a formal agreement that in the event Dr. Rogers succeeded in recovering any reimbursements or indemnity from ASTM, that such sums as were recovered by him under the indemnification clause would be remitted back to WRA in repayment of its having advanced and paid the legal fees, costs, expenses and settlement payments incurred on his behalf in the Armor Shield litigation. (Exhibits D-8, D-9; N.T. 1/5/05, 162-164, 205-206).

36. In addition to the settlement of \$1.225 million, Michael Baach and Corrpro incurred \$615,121.68 in attorneys' fees, costs and expenses in defending the Armor Shield litigation. (N.T. 1/6/06, 174-176; Exhibits D-21, D-22, D-51, D-54). Of that amount, \$80,408.61 was attributable to the defense of Michael Baach alone, given that he was not only represented by the Cleveland, Ohio law firm of Benesch, Friedlander, Coplan & Aronoff, which represented both he and Corrpro, but was also represented by the Cleveland, Ohio law firm of McDonald, Hopkins, Burke & Haber. (N.T. 1/6/05, 84-85, 134-138, 161-166; Exhibit D-51).

37. Although Corrpro advanced the legal fees to the

McDonald, Hopkins law firm for the defense of Mr. Baach, it was eventually reimbursed for all of those fees by Corrpro's Director's and Officer's ("D&O") liability insurance carrier, National Union Fire Insurance Company of Pittsburgh. (N.T. 1/6/05, 138-139, 167-170; Exhibit D-23).

38. After payment of the \$150,000 deductible under the D&O policy, Corrpro was also eventually reimbursed for 50% of the reasonable defense costs, charges and expenses incurred to the Benesch law firm. (N.T. 1/6/05, 139-140, 169-174; Exhibit D-23). There is no obligation on the part of either Mr. Baach or Corrpro to reimburse its insurance carrier should it recover any of these funds through its claims for indemnification against ASTM. (N.T. 1/6/05, 140-141, 215-216).

39. Corrpro thus incurred \$342,356.54 in unreimbursed legal fees and expenses in defending the Armor Shield litigation on its own and Mr. Baach's behalf. (N.T. 1/6/05, 174-177; Exhibit D-54).

40. In addition to its payment of a portion of the legal fees and expenses to the Benesch law firm, Corrpro's insurance carrier has also paid approximately one-half of the \$1.225 million settlement or some \$700,000. (N.T. 1/6/05, 90, 145-146, 178; Exhibit D-54).

41. Michael Baach also had an agreement with Corrpro whereby he agreed that if he succeeded in recovering any

reimbursements or indemnity from ASTM, that such sums as were recovered by him would be remitted back to Corrpro in repayment of its having advanced and paid the legal fees, costs, expenses and settlement payments incurred on his behalf in the Armor Shield litigation. (N.T. 1/6/05, 86-87).

42. The hourly rates charged by the defendants' attorneys and other costs which the defendants incurred in defending and settling the Armor Shield litigation were fair and reasonable, particularly in light of the complexity of the case, the amount sought in the plaintiff's complaint, the inherent risks and overall unpredictability of litigation, and the Cleveland, Ohio marketplace. (N.T. 1/5/05, 164-166, 202-204 N.T. 1/6/05, 88-90, 161; N.T. 1/7/05, 34-36, 44-49; Exhibit D-51).

#### **DISCUSSION**

ASTM commenced this action pursuant to the Declaratory Judgments Act, 28 U.S.C. §2201<sup>3</sup>, *et. seq.* in September, 2002

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<sup>3</sup> Under 28 U.S.C. §2201(a),

In a case of actual controversy within its jurisdiction, ...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Thus under the Declaratory Judgment Act, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and

seeking a declaration that the claims set forth against Corrpro, Baach, Rogers and WRA in the Armor Shield action fall outside the scope of the indemnification agreement contained in paragraph 10 of the ASTM bylaws and that there is no obligation on ASTM's part to indemnify any of the defendants. (Complaint, ¶s36-37).

Generally speaking, under the law of Pennsylvania, construction of an indemnity contract is a question of law for the court to decide, with the court strictly construing the scope of an indemnity contract against the party seeking indemnification. Jacobs Constructors, Inc. v. NPS Energy Services, Inc., 264 F.3d 365, 371 (3d Cir. 2001), citing, *inter alia*, Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986). As with any other contract, the court must determine the intentions of the parties and if the indemnity clause is clear and unambiguous, then the intentions of the parties should be ascertained primarily by looking to the language used in the agreement. Id.; Fallon Electric Co., Inc. v. The Cincinnati Insurance Co., 121 F.3d 125, 127 (3d Cir. 1997); United States Fidelity & Guaranty Co. v. Bilt-Rite Contractors, Inc., Civ. A. No. 04-1505, 2005 U.S. Dist. LEXIS 9299 at \*8 (May 17, 2005).

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reality to warrant the issuance of a declaratory judgment." Invensys, Inc. v. American Manufacturing Corp., Civ. A. No. 04-3744, 2005 U.S. Dist. LEXIS 3961 at \*17 (E.D.Pa. March 15, 2005), quoting Maryland Cas. Co. V. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

Pennsylvania law further provides that claims for indemnification arise only when the party seeking indemnity has made a payment on the underlying claim. Invensys, Inc. v. American Manufacturing, supra., at \*10, citing McClure v. Deerland Corp., 401 Pa. Super. 226, 585 A.2d 19, 22 (1991). Accordingly, indemnification claims are premature until the aggrieved party makes actual payment on an underlying claim pursuant to a settlement or judgment. Invensys, at \*11. The mere expenditure of counsel fees does not constitute the accrual of a cause of action for indemnification. Id.

As noted above, ASTM is a Pennsylvania not-for-profit corporation. As such, its operations must comport with the Pennsylvania Nonprofit Corporation Law, 15 Pa.C.S. §5101, et. seq., ("NPCL"). Under 15 Pa.C.S. §5504, the members of the Board of Directors of non-profit corporations entitled to vote may adopt, amend and/or repeal bylaws. Those bylaws may contain any provisions for managing the business and regulating the affairs of the corporation which are not inconsistent with law or the articles of incorporation. 15 Pa.C.S. §5504(a). Subchapter D of the NPCL governs indemnification and the following relevant provisions of that subchapter specifically provide:

**§5741. Third-party actions**

Unless otherwise restricted in its bylaws, a nonprofit corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or proceeding,

whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation), by reason of the fact that he is or was a representative of the corporation, or is or was serving at the request of the corporation as a representative of another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action or proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that the person did not act in good faith and in a manner that he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal proceeding, had reasonable cause to believe that his conduct was unlawful.

**§5744. Procedure for effecting indemnification**

Unless ordered by a court, any indemnification under section 5741 (relating to third-party actions) or 5742 (relating to derivative and corporate actions) shall be made by the nonprofit corporation only as authorized in the specific case upon a determination that indemnification of the representative is proper in the circumstances because he has met the applicable standard of conduct set forth in those sections. The determination shall be made:

- (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to the action or proceeding;
- (2) if such a quorum is not obtainable or if obtainable and a majority vote of a quorum of disinterested directors so directs, by independent legal counsel in a written opinion;
- (3) by such other body as may be provided in the bylaws; or
- (4) by the members.

#### **5745. Advancing expenses**

Expenses (including attorneys' fees) incurred in defending any action or proceeding referred to in this subchapter may be paid by a nonprofit corporation in advance of the final disposition of the action or proceeding upon receipt of an undertaking by or on behalf of the representative to repay the amount if it is ultimately determined that he is not entitled to be indemnified by the corporation as authorized in this subchapter or otherwise. Except as otherwise provided in the bylaws, advancement of expenses shall be authorized by the board of directors. Section 5728 (relating to interested members, directors or officers; quorum) shall not be applicable to the advancement of expenses under this section.

#### **§5746. Supplementary coverage**

**(a) General rule.**-The indemnification and advancement of expenses provided by or granted pursuant to the other sections of this subchapter shall not be deemed exclusive of any other rights to which a person seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of members or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding that office. Section 5728 (relating to interested members, directors, or officers; quorum) shall be applicable to any bylaw, contract or transaction authorized by the directors under this section. A corporation may create a fund of any nature, which may, but need not, be under the control of a trustee, or otherwise secure or insure in any manner its indemnification obligations, whether arising under or pursuant to this section or otherwise.

**(b) When indemnification is not to be made.**-Indemnification pursuant to subsection (a) shall not be made in any case where the act or failure to act giving rise to the claim for indemnification is determined by a court to have constituted willful misconduct or recklessness.

**(c) Grounds.**-Indemnification pursuant to subsection (a) under any bylaw, agreement, vote of members or directors or otherwise may be granted for any action taken or any failure to take any action and may be made whether or not the corporation would have the power to indemnify the person under any other provision of law except as provided in this

section and whether or not the indemnified liability arises or arose from any threatened, pending or completed action by or in the right of the corporation. Such indemnification is declared to be consistent with the public policy of this Commonwealth.

....

**§5747. Power to purchase insurance**

Unless otherwise restricted in its bylaws, a nonprofit corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a representative of the corporation or is or was serving at the request of the corporation as a representative of another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against that liability under the provisions of this subchapter. Such insurance is declared to be consistent with the public policy of this Commonwealth.

Moreover, under 15 Pa.C.S. §5743(a), indemnification of a representative of a non-profit corporation is mandatory "to the extent that [the] representative has been successful on the merits or otherwise in defense of any [third party] action or proceeding.

At issue here is ASTM's Bylaw #10, which virtually echoes the language of 15 Pa.C.S. §5741:

Any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed action, suit or proceeding whether civil, criminal, administrative or investigative, by reason of the fact that he is or was a director, officer, employee or agent of the Society, or by reason of the fact that he is or was serving on a committee operating under the auspices of the Society, shall be indemnified by the Society against expenses (including attorney's fees), judgments, fines and amounts

paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Society and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. A director of the Society shall not be liable for monetary damages for any action taken, or any failure to take any action, as a director except to the extent that by law a director's liability for monetary damages may not be limited.

We find this clause to be clear and unambiguous: ASTM *shall* indemnify any person who is made a party to any civil proceeding by reason of the fact that he is or was serving on a committee operating under the auspices of the Society against expenses, (including attorney's fees) and amounts paid in settlement actually and reasonably incurred *if* he acted in good faith and in a manner he reasonably believed to be either in or not opposed to the best interests of the Society.

In this case, the evidence evinces that Dr. Rogers and Mr. Baach were clearly sued by Armor Shield and its co-plaintiffs solely because of their involvement in the ASTM standard setting process and their service on the E-50 and G-01 Committees. To be sure, the gravamen of Armor Shield's complaint is that by their service on the ASTM committees, the defendants manipulated the development and promulgation of the ES-40 and G-158 standards to violate Sections 1 and 2 of the Sherman Act, Section 43 of the Lanham Act and various other provisions of Ohio state law. While it is true that the Armor Shield complaint also accused the

defendants of willful misconduct, there is simply no evidence that those accusations were true or that the defendants acted in any manner other than in good faith and in a manner which they reasonably believed to be in the best interests of the Society. ASTM, through its Committee on Standards and its Committee on Technical Committee Operations, essentially made just such a finding when it heard and subsequently denied Derek Sharp's appeal of the standard in September, 1998.

ASTM argues that even if it may have erred in denying the defendants' indemnification claims, its Board of Directors' decision should be upheld as it is protected from Court scrutiny by Pennsylvania's Business Judgment Rule. That rule reflects a policy of noninterference by the judiciary with business decisions of corporate managers, presuming that they pursue the best interests of their corporations, and insulates them from second-guessing or liability for their actions in the absence of fraud or other misconduct. Powell v. First Republic Bank, 274 F.Supp.2d 660, 668 (E.D.Pa. 2003); White v. Associates in Counseling and Child Guidance, Inc., 767 A.2d 638, 643 (Pa. Cmwlth. 2001). Indeed, the Pennsylvania Supreme Court has stated that the business judgment rule insulates officers and directors from judicial intervention in the absence of fraud or self-dealing, if challenged decisions were within the scope of the directors' authority, if they exercised reasonable diligence, and

if they honestly and rationally believed their decisions were in the best interests of the company. Cuker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042, 1048 (1997). See Also, Coleman Capital Advisers, Inc. v. Polar Plastics, Inc., Civ. A. No. 03-6849, 2005 U.S. Dist. LEXIS 15178 at \*20 (E.D. Pa. July 26, 2005); Viener v. Jacobs, 834 A.2d 546, 557 (Pa. Super. 2003). It is obvious that a court must therefore examine the circumstances surrounding the decisions in order to determine if the conditions warrant application of the business judgment rule. If they do, the court will never proceed to an examination of the merits of the challenged decisions for that is precisely what the business judgment rule prohibits. Cuker, 692 A.2d at 1048.

In examining the circumstances surrounding the decisions of ASTM's Executive Board in August, 1999 and of the full Board of Directors in October, 1999 to deny the defendants' requests for indemnification, we find no evidence of either fraud or self-dealing on the part of any of the members of the Board and that the decision was clearly within the scope of the Board's authority by virtue of 15 Pa.C.S. §5744(1). We also find from the testimony of the various members of the Board of Directors who testified at this trial, that the Board rationally believed that its decision was in the best interests of ASTM.

We turn now to the remaining issue, that is, whether the Board exercised reasonable diligence in deciding that the

defendants should not be indemnified. On this point, as all of the various members of the Board called as witnesses in this case, and as ASTM's former General Counsel and President both testified, neither they nor anyone else acting on ASTM's behalf conducted any investigation whatsoever into the veracity of the allegations against Defendants. Rather, the only evidence which they had before them at the time they made their decision to not indemnify was the Armor Shield complaint. Although Defendants repeatedly offered to provide whatever evidence the ASTM Board deemed necessary and repeatedly sought to be heard by the full Board on the issue of indemnification, ASTM never responded to any of the defendants' offers or requests. It is the opinion of this Court that this does not constitute reasonable diligence on the part of the ASTM Board. Accordingly, we find that ASTM's decision to deny the defendants' indemnification is not protected by the Business Judgment Rule and it is therefore subject to Court scrutiny.

Given our findings that Dr. Rogers and Mr. Baach were clearly sued by Armor Shield because of their service on the E-40 and G-01 Committees and that there is no evidence that Defendants were acting in bad faith or in a manner which they reasonably believed to be in opposition to the best interests of the Society, we conclude that the defendants were clearly entitled to indemnification from ASTM under Bylaw 10. We thus must next

consider how much is owed from ASTM to the defendants on their counterclaims.

As noted above in the factual findings portion of this Decision, Defendants Rogers and WRA contributed \$50,000 to the settlement of the Armor Shield action and incurred \$338,083.85 in attorneys' fees, costs and expenses in defending the lawsuit. Michael Baach and Corrpro, Inc. contributed \$1.225 million to the settlement (of which insurance paid \$700,000) and incurred \$342,356.54 in unreimbursed legal fees and expenses in defending the Armor Shield litigation on its own and Mr. Baach's behalf. Although WRA and Corrpro paid the entirety of these amounts on behalf of both themselves and Baach and Rogers individually, the settlement agreement did not distinguish what portion(s) of the settlement were attributable to the actions of the individual defendants and which were attributable to the actions of the corporations. Moreover, we find nothing through our scrutiny of the Armor Shield pleadings which suggests that the corporate entities were sued because of the activities of any individuals other than Baach or Rogers.<sup>4</sup> Finally, given that both Dr. Rogers and Mr. Baach have agreed to turn over any amounts which they should recover under the indemnification provision to the corporate entity which advanced the monies for their defense and

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<sup>4</sup> Again, the record reflects that William Jones of WRA and Thomas Mehalick of Corrpro also actively participated in the development and promulgation of the ES-40 and G-158 standards.

settlement, we conclude that it is appropriate that ASTM pay the sum of \$388,083.85 to WRA plus interest at the Pennsylvania state statutory rate of 6%<sup>5</sup> of 68,672.33 and the sum of \$867,356.54 plus 6% interest of \$98,635.14 to Corrpro.<sup>6</sup>

#### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the parties and subject matter of this action pursuant to 28 U.S.C. §1332.

2. ASTM had the duty to indemnify the defendants for the expenses and attorney's fees incurred in defending the Armor Shield litigation and for the amounts paid in settling that lawsuit.

3. In failing to reimburse the defendants for the amounts which they paid in settling and in defending themselves in the Armor Shield litigation, Plaintiff violated its own Bylaw No. 10.

4. In addition to owing Defendants Rogers and WRA the sum of \$456,756.18 and owing \$965,991.68 to Baach and Corrpro, ASTM is also legally obligated to reimburse the defendants in full for the counsel fees and expenses which they have incurred in having to defend this action.

An order follows.

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<sup>5</sup> See, 41 P.S. §202.

<sup>6</sup> Via Memorandum and Order dated November 20, 2003, we previously found that Corrpro and WRA were proper parties on the counterclaims because under the assignment agreements which were in place with Messrs. Baach and Rogers, they were real parties in interest.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN SOCIETY FOR	:	CIVIL ACTION
TESTING & MATERIALS	:	
	:	
vs.	:	NO. 02-7217
	:	
CORRPRO COMPANIES, INC.,	:	
MICHAEL BAACH, WARREN	:	
ROGERS and WARREN ROGERS	:	
& ASSOCIATES	:	

**ORDER**

AND NOW, this 10th day of August, 2005, it is hereby ORDERED and DECREED that Judgment is entered in favor of the Defendants and against the Plaintiff in no amount on all of the claims raised in Plaintiff's complaint.

IT IS FURTHER ORDERED that Judgment is entered in favor of Defendants Corrpro Companies and Michael Baach and against the Plaintiff in the amount of \$965,991.68 on the said Defendants' counter-claim.

IT IS STILL FURTHER ORDERED that Judgment is entered in favor of Defendants Warren Rogers Associates and Warren Rogers and against the Plaintiff in the amount of \$456,756.18 on the said Defendants' counter-claim.

IT IS FINALLY ORDERED that Defendants shall, within twenty (20) days of the date of this Order submit their bill of attorneys' fees and costs incurred in defending/prosecuting this

action to the Court. Thereafter, Plaintiff shall have twenty (20) days to file its answer and whatever objections thereto that it deems appropriate.

BY THE COURT:

s/J. Curtis Joyner  
J. CURTIS JOYNER, J.