Attorney blends chemistry, law into an interesting career brew

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Caryn C. Borg-Breen, co-founder of Green, Griffith, Borg-Breen LLP, didn't see herself using her chemistry background to pursue a legal career.

While she was a Ph.D. student at the University of North Carolina at Chapel Hill, she recalls attending a presentation given by a patent attorney.

"I remember it sounded really boring to me, which is kind of hilarious when I look back it now," Borg-Breen said. "Being able to blend science and the law together has been a good match for me."

Caryn C. Borg-Breen

Borg-Breen earned her bachelor's of science degree in chemistry from the College of William & Mary in 1994, and she obtained her doctorate in chemistry from UNC-Chapel Hill in 1999.

She joined Leydig, Voit & Mayer Ltd. in April 2001 as a technical adviser. Borg-Breen continued working at the firm in the summer while at Northwestern Pritzker School of Law and joined full-time

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LAW FIRM LEADERS

Cook County starts expungement program aimed at pot convictions

PETER HANCOCK
Capitol News Illinois

SPRINGFIELD — Cook County State's Attorney Kimberly M. Foxx filed motions in court Wednesday to vacate more than 1,000 low-level marijuana convictions, following through on a recently passed state law legalizing adult recreational use of the drug.

"We are undoing the harm prosecutors have caused," Foxx posted on Twitter Wednesday. "Prosecuting these cases was not in the public interest, or in the interest of public safety."

They were the first of what are expected to be many filings across the state to expunge potentially hundreds of thousands of criminal arrest and conviction records for marijuana-related offenses.

"A criminal record carries with it more than stigma. It prevents people from being considered for job opportunities, from getting a loan or a mortgage, from renting an apartment, from applying for financial aid for college, from getting a professional license and more," Gov. J.B. Pritzker said during a news conference following the court hearing. "In sum, it can crush a person's ability to live a full and dignified life."

On June 25, Pritzker signed HB 1438, making Illinois the 11th state to fully legalize recreational marijuana, and the first to do so through a legislative process. Supporters have dubbed it "the most equity-centric" legalization law in the country because it specifically sets aside a portion of the tax revenue generated by legalization to reinvest in low-income and minority communities and other areas that experienced "high rates of arrest, conviction and incarceration" for marijuana-related crimes.

Although recreational use of

EXPUNGE • Page 8

CDLB PEOPLE

Chadwick A. Hoyt

Michael D. Rosenthal

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Neal, Gerber Eisenberg LLP added **Chadwick A. Hoyt** as a partner in the corporate and securities practice group.

Hoyt's practice focuses on national and international structured finance transactions with an emphasis on mortgage-related transactions, particularly with the purchase, sale and securitizations of performing and nonperforming residential and commercial mortgage loans and other real estate assets.

He joins from Mayer Brown LLP.

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Polsinelli P.C. hosted the quarterly MD Angels event on Dec. 5 at its Chicago office.

The event focuses on health-care startups and investments and featured presentations from national health-care startups.

MD Angels is the largest physician-based investment group in the Midwest and brings together health-care entrepreneurs and physician investors.

Michael D. Rosenthal, a shareholder in Polsinelli's corporate and transactional practice, hosts the program quarterly.

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The Glenbrook South High School business department held a networking breakfast and panel discussion for students and female business leaders on Dec. 3 at Glenbrook South High School in Glenview at its fourth annual Women in Business breakfast.

Panelists included Glenbrook South alum **Corinne C. Heggie**, equity partner at the Wochner Law Firm LLC in Northbrook; **Dana Hall**, partner at Ernst & Young; **Karen Schwartz** of Dreamtown Realty; **Rachel Canning**, co-founder of RL Canning; and **Veronica K. Couzo-Kamenjarin**, labor and employment counsel at IDEX Corp.

THE FELLOWS
ILLINOIS BAR FOUNDATION

Fellows Breakfast

On Friday, December 6, 2019, the Fellows of the Illinois Bar Foundation hosted the annual IBF Fellows Breakfast, honoring Allen N. Schwartz (Kralovec, Jambois & Schwartz) with the Honorary Fellow Award and Michael J. Rooney (Illinois Institute for Continuing Legal Education) and Justice Mary Jane Theis (Illinois Supreme Court) with the Distinguished Service to Law & Society Awards.

IBF President Deane B. Brown (far left) and IBF Chair of the Fellows John L. Nisivaco (far right) with the Fellows Breakfast honorees and their introductory speakers, from left to right: William J. Anaya, Michael J. Rooney, J. Timothy Eaton, Justice Mary Jane Theis, Judge David E. Schwartz, and Allen N. Schwartz.

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THE BAR NEWS
FROM THE ILLINOIS STATE BAR ASSOCIATION

WHEN IS A PERSON OR TRUST AN ILLINOIS RESIDENT?

Are the thousands of residents leaving Illinois extricating themselves correctly from their former home state? Have they properly moved their trusts to avoid Illinois taxation? In his December Illinois Bar Journal article, "When Is a Person or Trust an Illinois Resident?," Richard Sugar examines these questions in the context of Illinois estate and income taxes and considers a few special situations impacted by Illinois law. He also takes a look at the present state-level tax environment in light of recent U.S. Supreme Court pronouncements pertaining to states' ability to tax their subjects.

Read more on *The Bar News* at *https://bit.ly/2E3BbOi.*

ARDC NAMES NEW COMMISSIONER, MEMBERS OF REVIEW BOARD

The Illinois Attorney Registration and Disciplinary Commission (ARDC) has announced the appointment of LaShana T. Jackson as an ARDC commissioner and the appointments of Bradley N. Pollock and Esther J. Seitz to the ARDC's Review Board.

Read more on *The Bar News* at *https://bit.ly/2YvSaCd.*

BORG-BREEN

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after graduating in 2003.

In 2014, Borg-Breen and her co-founders, Robert F. Green and Christopher T. Griffin, launched their new firm.

In her practice, Borg-Breen represents plaintiffs and defendants in patent litigation arising under the Hatch-Waxman Act. She advises biotechnology, chemical and pharmaceutical companies in a range of matters involving intellectual property, licensing and patent law.

The Daily Law Bulletin spoke to Borg-Breen about her path to the legal profession, her work starting out in the patent field and her recent case before the U.S. Federal Circuit Court of Appeals in Washington, D.C.

The following interview has been edited for length and clarity.

Law Bulletin: Did you always think you would use your science background to work in patent law?

Borg-Breen: When I was in college studying chemistry, I'm not sure I knew anything about patent law… The first time I was exposed to it was in graduate school … I really liked thinking about science but when you are in a lab, and you're trying to get reactions to work and trying to get results that you can publish, it's much less glamorous than thinking about science that has already been done.

When I finally got the chance to actually get into the field, it was so great to be on the flip side where people have already discovered something and to be able to be excited about it but not bogged down by being in the lab.

LB: Did you work exclusively on scientific patents when you began at Leydig?

Borg-Breen: As a patent attorney, I started out doing patent drafting. I would actually draft the applications and prosecute them at the [U.S. Patent and Trademark Office].

It was all different. The technology was all over the place. I really liked that mix. And then once you add the law to it, it just became even more fascinating, like a big scientific chess game.

[As a technical adviser] I did a lot of patent application drafting for Cabot Microelectronics in Aurora.

I also did a lot of work with Alberto Culver … as well as various personal care products, like hair straightening formulas and shampoos. It was really a huge range of work. All loosely connected to chemistry and all technology but not in one area all the time.

> "it was so great to be on the flip side where people have already discovered something and to be able to be excited about it but not bogged down by being in the lab."

LB: Are there any particular cases you would like to highlight?

Borg-Breen: There is a pretty important case that I was lead on which is unusual because there are not very many women litigators that get to be lead attorneys on cases. This is a case we took to trial in March 2017.

It's exciting to be in a position to make new law or try to undo what we think is bad law …That has been a really exciting case … I see so few women get the opportunity to be in that position, to be lead in a case in district court, especially because our cases go to trial so infrequently, anyway. It was just a really great opportunity.

[Borg-Breen was lead counsel in an ongoing patent case in the U.S. Federal Circuit Court of Appeals, stemming from a bench trial before U.S. District Judge Noel L. Hillman in New Jersey in March 2017. Her firm represents Horizon Pharma Ireland in the case brought by Actavis Laboratories UT Inc. over patent infringement claims for a topical pain medication to treat osteoarthritis. Hillman ruled in favor of Horizon on several claims. But he also found that the transition phrase, "consisting essentially of," which is commonly used in patents, is an indefinite term, following recent U.S. Supreme Court precedent in *Nautilus, Inc. v. Biosig Instruments Inc.* (2014).

As a matter of first impression, a federal circuit panel majority affirmed Hillman's ruling that found the transition phrase to be an indefinite term.

Borg-Breen has requested an en banc hearing before the entire Federal Circuit Court, which has yet to issue a response. The case is *Horizon Pharma Ireland Limited, et al. v. Actavis Labs. UT Inc.*, No. 17-2149]

NOTEBOOK

From page 1

Supreme Court explained in *Milkovich* that a statement packaged as an opinion (such as "in my opinion John Jones is a liar") isn't protected if the defendant implied knowledge of facts that would support the allegedly defamatory declaration.

A federal judge in the Northern District of Indiana granted Biomet's motion for summary judgment, and the 7th U.S. Circuit Court of Appeals affirmed — because Biomet's statements about Yeatts contained "no provably false factual connotation." *Yeatts v. Zimmer Biomet Holdings*, No. 19-1269 (Oct. 8, 2019).

Here are highlights of Judge Joel M. Flaum's opinion (with light editing and omissions not noted):

Biomet is a global corporation that manufactures and sells medical devices and is headquartered in Warsaw, Ind. Biomet subsidiary Biomet Argentina employed plaintiff-appellant Alejandro Yeatts from 2005 to 2015 and, more specifically, as the business manager for South America from 2008 through 2014. His responsibilities in that role included implementing Biomet's compliance policies.

In 2008, Biomet terminated its distribution agreement with its Brazilian distributor Prosintese, run by Sergio Galindo, after it learned that Galindo had bribed healthcare providers to promote and market Biomet products. Such conduct is prohibited by the Foreign Corrupt Practices Act.

Despite the termination of Biomet and Prosintese's distribution arrangement, Prosintese continued to own the government registrations for Biomet's products in Brazil. Biomet could not obtain new registrations in a timely manner, so in June 2009, Biomet entered a "private instrument for cancellation of business relationship" with Prosintese and Galindo.

The 2009 document prohibited Prosintese and Galindo from "importing, storing, promoting, distributing or in any way marketing in Brazil the products made by Biomet." It did, however, permit Biomet to cooperate with Prosintese and Galindo as "necessary to implement the new Biomet distributors in Brazil," until Biomet could acquire new registrations.

Bio2, one of the distributors that replaced Prosintese in Brazil, hired Galindo as a consultant. Yeatts continued to communicate with Galindo, now in his new role with Bio2, about product registrations but also about Galindo's advice on products, the market and prices.

Yeatts claims his boss — the president of Biomet's international subsidiary — told him to keep a good relationship with Galindo because he owned Biomet's product registrations and that Biomet's legal department told Yeatts he could have additional contact with Galindo through Bio2.

The Department of Justice investigated Biomet for FCPA compliance relating to the bribery payments, which led

7th U.S. Circuit Court of Appeals
Yeatts v. Zimmer Biomet Holdings
No. 19-1269
Judges Joel M. Flaum, Frank H. Easterbrook and Daniel A. Manion

In October 2013, Biomet received an anonymous whistle-blower email claiming that Biomet continued to work with Galindo as a Brazilian distributor. Per the 2012 DPA, Biomet informed the DOJ and the monitor of the allegations, and the DOJ launched a separate investigation into potential corruption.

Yeatts complains that neither Biomet nor the DOJ interviewed him as part of their investigations, yet they considered his interactions with Galindo and whether those interactions were beyond what the 2009 document permitted.

Biomet concluded Yeatts continued to sell and market Biomet products with Galindo despite his knowledge that Galindo had bribed doctors and his knowledge that Galindo and Prosintese were forbidden from marketing Biomet products.

Yeatts states that his boss and Biomet's legal department approved all of his interactions with Galindo and that Biomet used him as the "fall guy" in the DOJ investigation. Biomet suspended Yeatts in April 2014 and eventually terminated him in September 2015.

In October 2014, pursuant to the monitor's recommendation, Biomet issued a restricted parties list, which was considered a best practice. Biomet's leadership team, its outside counsel and the monitor worked together to create the list, which included Yeatts.

Biomet's chief compliance officer, vice president and general counsel distributed the RPL via email to Biomet employees and business partners in Latin America.

The email attached the RPL, which listed Yeatts as included per the "Brazil Investigation" and as "suspended in connection with corruption-related investigation involving Biomet Brazil."

The DOJ concluded its second investigation in 2017, finding Biomet had not complied with the 2012 DPA and resulting in more criminal charges against Biomet. To resolve the additional charges, Biomet entered a second DPA ("2017 DPA") and paid a criminal penalty of $17.4 million.

Yeatts filed suit in the Northern District of Indiana alleging that Biomet defamed him by including his name on the RPL. Specifically, Yeatts challenged as false and defamatory Biomet's statement that he "poses a risk to Biomet's efforts to comply with anti-bribery laws because of improper activity supposedly uncovered by the comimply false facts that are objectively verifiable.

Biomet counters that the statement about Yeatts posing a risk cannot be proven false or verified by a fact-finder because it is merely Biomet's opinion.

The statement that Yeatts was suspended in connection with the corruption investigation is true. Yeatts does not contest the accuracy of the statement; rather, he disputes the implication of his suspension — i.e., that he engaged in misconduct or criminal behavior.

Truth, however, is a total defense to a defamation claim. The statement is accurate, and none of the facts Yeatts attempts to raise as disputed (i.e., whether he actually engaged in misconduct) would disprove the fact of his suspension. As such, that statement is not actionable defamation.

Next, as to Biomet's expressed concern that Yeatts posed a compliance risk, the Supreme Court has addressed the difference between statements of opinion and statements of fact. In *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), the court compared the following examples: "in my opinion John Jones is a liar" and "Jones shows his abysmal ignorance."

In the first example, despite the qualifier that it is "my opinion," the court explained the statement is defamatory because the speaker "implies a knowledge of facts which lead to the conclusion that Jones told an untruth." The latter example about Jones's ignorance, however, is not defamatory because there is no "provably false factual connotation."

Likewise, in *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998), we considered whether the statement "Sullivan is a very poor lawyer" defamed the plaintiff.

We contrasted hypothetical assertions that a lawyer is dishonest, forged his credentials or lost all his cases — all verifiable statements of fact. "But to say that he is a very poor lawyer is to express an opinion that is so difficult to verify or refute that it cannot feasibly be made a subject of inquiry by a jury." We thus concluded the statement was not defamatory.

The statement that Yeatts posed a "significant and unacceptable compliance risk" is like the "abysmal ignorance" or "very poor lawyer" statements. There is no provably false factual connotation.

Though Yeatts claims a fact-finder could determine the precise limits Biomet placed on his interactions with Galindo and whether he violated those limits, those factual resolutions would not be dispositive of whether Yeatts posed a compliance risk.

Even if Yeatts proved to a jury that he did not violate the specific limits Biomet imposed on his interactions with Galindo, that does not mean Biomet was incorrect or unreasonable in considering Yeatts a compliance risk.

Like in *Sullivan*, where we determined it would be unmanageable to ask the court "whether 'in fact' Sullivan is a poor lawyer," it is equally unmanageable to ask a court "to determine whether 'in fact'" Yeatts posed a compliance risk.