

## TRIAL TIPS

### PUMPING UP THE PATENTS

The technology behind the Aero Bed wasn't complicated, but that only made William Frankel's job more difficult.

By Susan Hansen

Getting set for trial this past winter, Brinks Hofer Gilson & Lione partner William Frankel had a problem that patent litigators don't ordinarily face. Instead of worrying that jurors might not comprehend the patented technology behind his client Aero Products's self-inflating Aero Bed mattresses, Frankel fretted that the invention might seem so simple that lawyers for defendant Intex Recreation Corp. could easily shoot down his infringement claims.

"It was not a highly complex matter we had to dumb down," says Frankel, lead counsel of the Chicago-based Brinks Hofer's five-member trial team. "Conversely, we didn't want the other side to minimize the invention's validity."

To guard against that, Frankel told jurors the story behind the Aero Bed's technology. His first witness last February, in Chicago federal court, was inventor Robert Chaffee. The idea for a self-inflating mattress occurred to Chaffee in 1988, while staying with friends on his way to a college reunion in Syracuse, New York. Although the air mattress he slept on was comfortable, blowing it up was a pain. Chaffee, who owned an engineering consulting firm, eventually designed an inflation system with a valve that automatically opened and shut when the air pump was turned on and off. He filed a patent application in 1989, licensed the technology to Wauconda, Illinois-based Aero Products in 1992, and received a patent in 1994.

Chaffee "was able to say what he did without talking patent-ese," says Frankel. "He was a bit of a reticent personality, but he got very enthusiastic as he got into it."

Next the Brinks Hofer team called on former Aero chief executive Kevin McColgan, who testified that the company had built a line of inflatable mattresses around Chaffee's invention—and that the beds had generated hundreds of millions of dollars in sales. He described Aero's trademarked "One Touch" system, which allows users to adjust mattress firmness by manipulating a valve. McColgan recalled the company's

distress when it discovered that San Francisco's Intex was selling knock-off Aero Bed mattresses, and using the "One Touch" trademark on its Web site. (Aero's suit named two other defendants: Quality Trading, an Intex-owned Web site that sold the company's mattresses, and Wal-Mart Stores, Inc., which sold Intex products. Aero's case was aimed exclusively at Intex, which had indemnified Wal-Mart in its sales agreement.)

To drill home the case, Frankel put technical expert Albert Karvelis, vice president of Naperville, Illinois's Packer Engineering, on the stand. First, Frankel played a minute-long animated video that gave jurors a general overview of how Aero's inflation system worked. Then Karvelis explained how the specific parts of the system functioned. He walked over to the jury box with both the Aero and Intex valves to show jurors that the two were virtually identical.

Intex's lead trial counsel—David Makous of Los Angeles's Lewis Brisbois Bisgaard & Smith—called Chaffee to the stand as an adverse witness, and pointedly asked him to show the court where in his patent he had actually supplied the required detailed description of how

his valve technology worked. Judge John Darrah largely shut down this line of questioning, however, saying that the court had already ruled on claim construction.

To prove that Intex hadn't infringed, Makous called engineering consultant Martin Siegel. He testified that Intex's valve was not the same as Aero's since, among other things, it had a different mechanism for sealing in air.

On cross, Frankel pointed out that Siegel had spent most of his career designing equipment for NASA, and had no real experience working on valves for inflatable products. He also explained that Siegel had never tried to inflate an Aero mattress, and that he hadn't conducted any testing to back up his claim about the differences between the products.

After a seven-day trial, and less than a day of deliberations, the jury awarded Aero \$2.95 million for Intex's willful patent infringement, plus \$1 million on the trademark claim. In July the court doubled damages on Aero's patent claim, to \$5.9 million. Plus, it ruled that Intex must pay attorneys' fees.

Intex counsel Makous says he will appeal. At this point, though, it looks like Frankel has deflated the defense.



Brinks Hofer's Frankel took the air out of the defense's case by telling an inventor's story.

**Case:** Aero Products International, Inc. v. Intex Recreation Corporation, Quality Trading, Inc., and Wal-Mart Stores, Inc.

**Winner:** Aero Products

**Technology:** Automatic inflation device for air mattresses

**The Stakes:** Intex could have to pay \$6.9 million in damages for patent and trademark infringement, plus attorneys' fees. A motion to stop Intex from selling its self-inflating mattresses is pending.

**Lesson Learned:** Put on witnesses who don't speak "patent-ese."