LEGAL TIMES
LAW AND LOBBYING IN THE NATION'S CAPITAL

Did Martin Marietta's Probe Backfire?

Acquitted Ex-Employee Says He Was Scapegoated

BY GREG RUSHFORD

When questions were raised in 1984 about possible financial improprieties at the Martin Marietta Corp., Frank Menaker Jr. swung into action.

Menaker, 49, who has been the company's top in-house lawyer since 1981, headed an internal probe that led the company to plead guilty to charges that it had defrauded the Pentagon through false travel billings.

The investigation at the Bethesda, Md.-based defense giant also fingered a mid-level executive as responsible for the billing scheme. That $54,500-a-year employee, William Pollard, was fired and subsequently charged by the U.S. attorney in Baltimore with conspiring to defraud the federal government.

Menaker's tack saved the company hundreds of millions of dollars, since Martin Marietta could continue its defense work. The company seemed to have put the problem behind it.

But earlier this month, a federal jury in Baltimore acquitted Pollard on all counts. That verdict—and disclosures that came to light during the two-week trial—raise questions about whether Martin Marietta set Pollard up to take the fall.

They also show how these increasingly popular internal investigations—designed to showcase a company's integrity and help preserve its bottom line—can turn into embarrassments if they are deemed exercises in damage control.

In this instance, Martin Marietta's internal probe actually helped acquit the man whom the probe had found to have been responsible for the wrongdoing. Company documents, wrested from Martin Marietta by Pollard's lawyers after protracted litigation, were used to discredit key witnesses and to argue that the company had scapegoated Pollard.

Pollard, 39, is now preparing to sue his former employer for malicious prosecution and defamation.

"There is no doubt in my mind that if we had not obtained the documents behind the investigation that Frank Menaker directed, my client would have been unjustly convicted," says Pollard's lawyer, James Maxwell of D.C.'s three-lawyer Maxwell & Bear.

"The apparent objective of the corporate investigation was to placate the government and save the company money," Maxwell charges.

Martin Marietta lawyer Frank Menaker Jr. ran internal probe.

Menaker, general counsel and vice president at Martin Marietta, declines to be interviewed, but a company spokesman, Phillip Giaramita, defends the probe and its treatment of Pollard.

If Pollard sues, says Giaramita, "We expect to defend ourselves vigorously and to prevail."

Competing Interpretations

The company documents that Maxwell used in winning an acquittal for Pollard were the raw material of Martin Marietta's internal probe. They included thousands of pages of notes, transcripts, and electronic recordings of interviews with employees by Menaker and the law firm retained to assist in the investigation, D.C.'s Crowell & Moring.

In addition to Crowell & Moring, Martin Marietta turned for legal and political help to two prominent figures who serve on its board of directors: former Attorney General Griffin Bell of Atlanta's King & Spalding and former Secretary of Defense Melvin Laird. Bell and Laird helped persuade the Defense Department not to suspend Martin Marietta.

The papers and recordings that derived from the probe are not available for public review; they were released to Pollard's lawyers last year under a protective order insisted upon by Martin Marietta.

Pollard's lawyers, however, were able to use them as a guide to questioning witnesses during the trial before U.S. District Judge Joseph Young of the District of Maryland. On May 3, the 12-member jury acquitted Pollard of one count of conspiracy to commit fraud and two counts of mail fraud.

A review of court records and trial testimony suggests that Menaker's investigation turned up evidence that casts doubt on the contention that Pollard defrauded the government. Nonetheless, Martin Marietta singled out Pollard to federal investigators as the person responsible for the alleged criminal activity.

Moreover, Menaker's probe focused on questionable corporate financial activities that Menaker himself had been instrumental in arranging, court records show. And in the course of his investigation, Menaker took unusual steps that left Pollard in an isolated and untenable legal position.

Pollard's lawyers put these revelations to great use in the trial, particularly when it came to undermining Menaker, a key government witness.

Menaker recounted for the jury how his internal probe came about. He testified that he had launched the probe after syndicated columnist Jack Anderson published an article on Oct. 6, 1984, that criticized a creative financial arrangement Menaker had helped devise for Martin Marietta.

Menaker's scheme involved a sharing of airline commissions between Martin Marietta's travel agency and Maxim Group Inc., Martin Marietta's travel operations subsidiary, which Pollard headed. The scheme enabled the defense contractor to collect airline commissions that arguably should have been returned to the government, which had paid for the tickets. (Pleading guilty to one count of making a false statement to the government and two counts of mail fraud, Martin Marietta paid the government a $4.5 million settlement in 1987.)

After the billing arrangement came to light, Pentagon auditors told Menaker they wanted to see Maxim's books. But Menaker and his staff reviewed them first, and, according to his trial testimony, Menaker saw immediately that something was wrong with Maxim's accounting.

After interviewing two of Pollard's subordinates, who allegedly told him they had been creating false documents on Pollard's orders, Menaker testified that he then confronted Pollard.

James Maxwell: Martin Marietta "made my client a scapegoat."

"He told me that it was his decision alone with regard to the documentation," Menaker testified, indicating that Pollard had confessed wrongdoing.

Menaker said he reported his findings to Laurence Adams, then Martin Marietta's president and chief operating officer, and to Thomas Pownall, then the company's chairman. He looked outside the company for legal help to continue the internal probe.

In November 1984, when then Assistant U.S. Attorney Elizabeth Trimble of Baltimore convened a grand jury, the company retained Brian Elmer and Richard Beizer, partners at Crowell & Moring. Over the next 18 months, Elmer and Beizer flew around the country interviewing witnesses and reviewing documents to prepare the company's defense in the looming criminal case. Neither would comment.

Menaker also arranged for Pollard to be represented by Paul Friedman, a partner in the D.C. office of New York's White & Case. Friedman defended Pollard until early 1987; Martin Marietta picked up the legal tab, which amounted to more than $200,000.

It's not unusual for companies to pay an employee's legal expenses. The employee's lawyer, of course, must devote himself solely to the client's interests, not to the company's.

Friedman contends that's what he did. But he says he encountered stiff resistance from the company when he sought documents emerging out of the internal probe. He also says he objected when Menaker took steps that Friedman argues made it difficult for his client to mount a defense.

Isolating Agreement

While Assistant U.S. Attorney Trimble's criminal investigation was ongoing, Menaker authorized a joint defense agreement with lawyers for five other company employees, including the two Pollard subordinates who were the main witnesses against Pollard.

Under the terms of the deal, the records of Martin Marietta's internal probe were shared by the company and the five employees. Pollard, however, was excluded from the agreement to share information.

Asked at trial why he had excluded Pollard, Menaker responded that the agreement included only witnesses whose interests paralleled Martin Marietta's. But he denied that the joint defense agreement was an effort to isolate Pollard.

Not surprisingly, that claim is not given much credence by Pollard's defenders.

"I was surprised and certainly found it unusual that [Martin Marietta] wouldn't share information with us," says Friedman. "We tried every way we could to persuade the company to make that material available to us."

Meanwhile, Martin Marietta, at the government's urging, stopped paying Pollard's legal bills. Friedman says he offered to continue representing Pollard for free, but Pollard instead turned to Maxwell & Bear.

Pollard says he switched counsel because he felt Friedman had been placed in an "awkward position," and he wanted lawyers with no connection to Martin Marietta.

Maxwell & Bear then launched an aggressive effort to get their hands on the company documents from the probe. They succeeded after a two-year struggle that eventually landed before the Supreme Court. *(See "Martin Marietta Counsel to Face Questions on Probe Role," Legal Times, April 10, 1989, Page 2.)*

Using the material compiled by Menaker and Crowell & Moring, Pollard's lawyers—Maxwell and his partner, Robert Bear—were able to attack the credibility of the most important of Pollard's accusers: Richard Westfall, Pollard's deputy at Maxim, who testified under immunity. Westfall was a party to Martin Marietta's joint defense agreement.

Under cross-examination by Maxwell, Westfall admitted that he had wanted Pollard's job and had given Pollard financial papers to sign knowing that they were not accurate. Although he believed that Pollard had known the papers were false, Westfall conceded that Pollard had never specifically instructed him to create inaccurate documents.

Westfall, who still works for Martin Marietta, also testified that Pollard's activities had been known to the company's senior management. And he acknowledged that he had felt intimidated by Menaker when he had testified against Pollard during the internal probe.

Professional Judgments

Besides getting Pollard off on the conspiracy count by attacking the Martin Marietta witnesses, Maxwell also disposed of the mail-fraud counts—one of which was identical to the charge the company had pleaded guilty to. Maxwell simply showed that the documents in question had been delivered by Federal Express, not the U.S. Postal Service.

Paul Friedman ran into resistance from defense contractor.

One of the assistant U.S. attorneys who tried the case, Carmina Hughes, calls it "sheer speculation" to conclude that Maxwell's success was attributable to his use of Menaker's probe. Hughes notes that Pollard, now a real-estate broker in Rockville, Md., was an effective witness. None of the jurors contacted would discuss their verdict.

Before Pollard's acquittal, Martin Marietta's conduct seemed sound, purely from a business standpoint. After all, the company, which had $5.8 billion in sales in 1989, probably spent no more than $10 million to dispense with a problem in a manner that preserved its business with the Pentagon.

In 1987 alone—the year the company pleaded guilty—Martin Marietta received nearly $3 billion in defense contracts.

And even if it settles with Pollard, the company is still probably better off. But that is little comfort to Pollard and his advocates.

"When corporations investigate suspected problems internally, they use the results to protect their economic interests," Maxwell declares. "Their problem is, they made my client a scapegoat."

Maxwell says that he has commenced discussions with Martin Marietta over a possible settlement of Pollard's threatened suit against the company. A company spokesman would only say that Martin Marietta considers the matter closed. □

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CA4'S MARTIN MARIETTA RULING PIVOTAL IN POLLARD ACQUITTAL

Scarcely a white collar crime seminar has been held in the last couple years without mention of the Fourth Circuit ruling that the Martin Marietta Corp. had to turn over to a former executive documents from an internal audit, despite its claims of work product and attorney-client privilege. The ruling was instrumental in the acquittal of William C. Pollard on conspiracy and mail fraud charges, according to his lawyer, who says that without the exculpatory materials his client would have been "unjustly convicted."

MARTIN MARIETTA DOCUMENTS KEY TO ACQUITTAL OF "FALL GUY"

It looked for a while as if former Martin Marietta Corp. executive William C. Pollard was the designated "fall guy" who would be "hung out to dry" in an alleged defense contract fraud scandal after the aerospace conglomerate reached a separate plea agreement with the government and then refused to turn over to Pollard exculpatory documents from the corporate internal investigation. According to Pollard's attorney, James S. Maxwell of Maxwell & Bear, Washington, D.C., had it not been for the Fourth Circuit's decision to "pull the clothesline in" by ordering the release of these exculpatory materials, Pollard's May 3 acquittal on conspiracy and mail fraud charges would have been well nigh impossible.

Pollard was indicted April 17, 1987, and charged with one count of conspiracy to defraud the Department of Defense and two counts of mail fraud. According to the indictment, Pollard facilitated a scheme whereby more than $1 million in travel cost "rebates" paid by travel agencies to Maxim—a Martin Marietta subsidiary—were characterized improperly as "fees" instead of credits against travel costs. The overall effect, according to the government, was that Martin Marietta could overstate the costs for which it received reimbursement from the DOD.

Martin Marietta had already pleaded guilty to fraud charges and was fined $12,000 and ordered to pay $250,000 in costs. The firm also paid $3.1 million as part of an administrative settlement with the Department of Defense. The case gained some notoriety when Martin Marietta refused to turn over to Pollard materials it had gathered during the course of an internal corporate investigation. The trial was delayed for three years while the case traveled through the appellate process.

Fourth Circuit Orders Disclosure

Pollard had subpoenaed, pursuant to Fed.R.Crim.P. 17(c), a number of Martin Marietta documents from an internal audit, including audit reports, selected notes, transcripts and recordings of interviews with employees in Martin Marietta and the travel agencies, plus all company communications related to the administrative settlement. The company refused to comply with the subpoena and defied the trial court order to disclose, triggering a contempt order.

Martin Marietta appealed the contempt order, claiming that the subpoena was overbroad and, alternatively, that the requested items were protected by the attorney-client and work product privileges. The United States Court of Appeals for the Fourth Circuit disagreed, concluding that the documents sought were within the scope of a Rule 17(c) subpoena and met the standards of *U.S. v. Nixon*, 418 US 683 (1974). Since Pollard did not have direct contact with the DOD, the charge against him was essentially a charge that he obstructed the internal audit and thus the materials relating to the audit were clearly of evidentiary value, and the subpoena of the administrative agreements was a good faith effort to acquire evidence by Pollard for a defense that "Martin Marietta hung him out to dry while protecting its own interest." *In re Martin Marietta Corp.*, 856 F2d 619, 622 (CA4 1988).

The court also found that Martin Marietta had impliedly waived the attorney-client privilege as to the requested materials because the information was either communicated to others or involved details which had been published. With respect to the work product privilege, the court distinguished between opinion work product material and non-opinion work product materials. The court found that although the doctrine of implied waiver applied to non-opinion work product materials, it did *not* apply to those work product materials which incorporated *opinion*, and remanded to the lower court for bifurcation of which work product materials remained shielded.

On remand, according to Maxwell, the magistrate went through the disputed materials *in camera* and delivered to the defense team virtually everything they had asked for, excising only that which was "pure opinion" such as "little notes in the margins" and other "fancies of the attorneys."

If the Fourth Circuit had not ordered these documents released, said Maxwell, Pollard would have been "unjustly convicted." When the Martin Marietta investigation began, Maxwell noted, there was a great public outcry and demand for "fat cat defense contractors to be skinned." So, he said, during the grand jury investigation, the government turned to Martin Marietta and told the company it had two choices. The first was to accept a plea bargain and the second was to reject the plea bargain and then face crippling economic consequences, Maxwell said. This was not an agreement reached at "gun point," said Maxwell, but rather one in which the government used an "economic cannon." If and when indicted, Martin Marietta would face not only the expense of litigation but also the prospect of being debarred, thus losing all its lucrative government contracts.

Given the millions of dollars at stake, the relatively light monetary penalty involved in the plea agreement, plus the corporation's primary obligations to its stockholders, it is not surprising, Maxwell said, that the company elected as a matter of pure economics to accept the government's offer.

Pollard a "Fall Guy"

The government, however, also wanted a "human being," Maxwell said, and thus compelled Martin Marietta to fire Pollard and to stop paying his legal fees. In addition, he said, the company agreed to share its records and documents with everyone else under investigation with the sole exception of Pollard. Therefore, Maxwell observed, Pollard was the only Martin Marietta employee indicted and he was the only employee being denied access to potentially exculpatory materials. According to Maxwell, when asked why Pollard was denied this information, a Martin Marietta executive said that giving Pollard the documents and reports "didn't fit into the company's defense plans." All of the plea offers extended to Pollard involved pleading guilty to a felony, Maxwell observed.

The documents proved crucial to Pollard's defense, said Maxwell, who speculated that perhaps no indictment would have been returned had Pollard had access to this information earlier. For example, the defense gathered devastating impeachment materials from the corporate documents which severely undermined the credibility of the key prosecution witness. The defense learned that the witness, an alleged "whistle blower," had not only made false statements during the internal investigation, but that he had lied on his resume when he credited himself with holding a degree in computer science which he had not earned. The defense was also able to show that this witness wanted Pollard's job, Maxwell added.

In Maxwell's view, there was no "scheme," no actual wrongdoing, and Martin Marietta basically pleaded guilty to a three-count information alleging something that "never happened." According to Maxwell, the corporation set up a "model" procedure for coordinating travel arrangements and commissions which even the government conceded was sound. All the witnesses testified that the company sustained a loss and, hence, owed the government nothing. In addition, the two correspondences underlying the mail fraud counts involved packages sent by Federal Express, not through the U.S. Mail. However, Maxwell continued, Martin Marietta was "hoist with its own petard," [See *Hamlet*, Act III, scene iv] when it was unable to adequately explain how the travel procedures were being implemented, and thus was "trapped" into accepting the plea offer.

The most astounding aspect of this case, according to Maxwell, was the manner in which Martin Marietta's internal audit was allowed to "drive the criminal justice system." The government relied heavily on the company's internal audit, and the government's own investigation was "literally styled to the Martin Marietta audit," he said. The larger issue here, he said, is whether the government should indict where their information is based on the corporation's investigation and the "selected snippets" of information the company chose to turn over.