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PREPARED BY



[Richard D. Fladung](#)

1401 McKinney Street,
Suite 2200
Houston, Texas 77010
713.951.5626
richard.fladung@strasburger.com

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[David K. Meyercord](#)
[C. Scott Nichols](#)

HEALTH INDUSTRY GROUP

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Medical Practitioners and Their Related Healthcare Entities Still Have Exposure for Infringement of Patented Medical and Surgical Procedures

Another big judgment was awarded in a healthcare patent suit on June 11, 2008. A United States District Court of Oregon jury found that Arthrex Inc. willfully infringed U.S. Patent No. 5,601,557 claiming a method for surgical repair of a shoulder using suture anchors. The Court then awarded Smith & Nephew \$14.7 million in damages. While this suit was only filed against a medical device manufacturer, if named in a subsequent lawsuit, medical practitioners and their related healthcare entities could also have exposure to infringing this patented surgical method.

As discussed at the Strasburger Health Law Counsel Series in June, medical practitioners and their related healthcare entities are exempt from liability due to infringement of patents involving a medical or surgical procedure, **if the patent application was filed after September 30, 1996**. See 35 U.S.C. 287(c)(1). Congress passed this statute because it recognized that granting an inventor rights to exclude others from using his or her method of medical or surgical procedure was ultimately detrimental to the public, and potentially harmful to physicians and their related healthcare entities who were required to use such procedure if it was deemed the acceptable standard of care in the industry. While this 1996 statute is good news for the medical practitioners and their related healthcare entities, this inchoate protection continues to ripen as the patent applications resulting in patents filed before 10/1/1996 expire.

For example, in the *Arthrex* case, since the patent application was filed before the 1996 statute went into effect, medical practitioners and their related healthcare entities could theoretically be held liable for infringing the surgical methods claimed in the patent. Furthermore, as

[David K. Meyercord](#)
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the Smith & Nephew method patent in the *Arthrex* case will not expire until February 11, 2014, this patent is one of many surgical method patents that still have a significant patent life remaining to be enforced against medical practitioners and their related healthcare entities. See 35 U.S.C. 154(c).

In summary, medical practitioners and their related healthcare entities are protected against infringement for patented methods for surgery resulting from applications filed on or after 10/1/1996 and, as time marches on and the pre-10/1/1996 surgical method patents expire, their protection from all infringement of patented surgical methods will ripen. But for the time being, medical practitioners and their related healthcare entities are still exposed to infringing the pre-10/1/1996 surgical method patents.

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