Editors' Note

Welcome to our January 2013 edition of the Jenner & Block Report, a digest of updates about legal developments in the United States that we believe are noteworthy to leaders in the Japanese legal and business communities. Our Featured Development this month highlights one of the first Federal Circuit cases to interpret the U.S. Supreme Court’s ruling in Mayo Collaborative Servs. v. Prometheus Labs, Inc. as to what constitutes patent eligible subject matter. In PerkinElmer, Inc. v. Intema, the Federal Circuit reiterated the principles of Prometheus including that claims must be directed at something more than natural laws or abstract ideas and that adding conventional steps to the natural laws or abstract ideas will not make the claim eligible for patent protection. In this instance, the Federal Circuit reversed the district court and held that the subject matter at issue was not eligible for patent protection. In addition to our Featured Development, this issue features other interesting developments in arbitration, class actions, discovery issues, and developments in patent law. We believe that these summaries will be of interest. If you would like to have more information about any of these developments, please let us know. Thank you for taking the time to read the Jenner & Block Report.

Regards,

The Jenner & Block Team

Terrence J. Truax, Brent Caslin, Joseph A. Saltiel, Jeffrey A. Koppy, and Miwa Shoda.
for personalized medicine dosing processes that identified "relationships between the concentration in the blood of certain . . . metabolites and the likelihood that [a] drug dosage will be ineffective or induce harmful side-effects." Id. The Supreme Court thus made clear that patent protection is unavailable to "laws of nature," even when those (or newly discovered) laws are applied with "additional steps [that] consist of well-understood, routine, conventional activity already engaged in by the scientific community." Id. at 1298.

The Federal Circuit made its first attempt to apply the Prometheus standard in PerkinElmer, Inc. v. Intema, 2012 WL 5861658 (Fed. Cir. Nov. 20, 2012). At issue in Intema was whether Intema's patent, the claims of which were directed towards "[a] method of determining whether a pregnant woman is at an increased risk of having a fetus with Down's syndrome," was directed to patent-eligible subject matter under 35 U.S.C. § 101. The district court had concluded that the patent met the standards of 35 U.S.C. § 101, but held that the asserted claims were anticipated and obvious. Intema appealed the finding of invalidity. On cross-appeal, PerkinElmer contended that the asserted claims were directed to an ineligible subject matter and no more, and claims to specific inventive applications of that subject matter," the Federal Circuit began its discussion by noting that the Supreme Court in Prometheus "emphasized the inventive concept requirement of section 101, stating that simply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable." The Federal Circuit also noted that the process claims in Ass'n for Molecular Pathology v. PTO, 689 F.3d 1303 (Fed. Cir. 2012) ("Myriad"), which covered screening methods for cancer-predisposing mutations in human gene sequences, were "indistinguishable from those before us [i.e., the claims of the '103 patent]." Like the stricken Myriad claims, the Federal Circuit noted, the Intema claims were also directed to analytical methods, and "[n]o action beyond the comparison is required." Id.

After comparing the claims of the '103 patent to the claims in Prometheus and Myriad and concluding that they similarly were drawn to "mental processes and natural laws," the Federal Circuit then sought to determine "if Intema added enough to the statements of ineligible subject matter to direct the claims, not to the ineligible concepts themselves, but to applications of those concepts." The "added" steps of the Intema patent were "measuring" and "determining" steps, neither of which the court found sufficient in view of Prometheus.

Turning finally to the machine-or-transformation test, the
Federal Circuit found further support for its decision that the Intema patent was only directed to ineligible subject matter. Intema argued that the “assaying” step should satisfy the test, but the Federal Circuit explained that even a “purported transformation resulting from ‘assaying a sample’ is insufficient since it could be performed ‘without transforming the [sample], should science develop a totally different system for [assaying for a biochemical screening marker] that did not involve such a transformation.” Similarly, the measuring step merely “transform[ed] data derived from the scan into data regarding the risk of fetal Down’s syndrome. No tangible output or visual depiction of the risk is required.” For all of those reasons, the Federal Circuit reversed the district court’s decision that the Intema patent was patent-eligible subject matter under 35 U.S.C. § 101. Having found that the claims did not meet the § 101 standard, the Federal Circuit declined to rule on whether the claims were also invalid over the prior art.

Intema stands as another cautionary tale of how diagnostic methods claims must be narrow, specific, and embrace more than natural laws or abstract ideas combined with conventional steps known well in the art. Intema more directly demonstrates that such claims must encompass at least some added patentable feature beyond the naturally occurring correlation between a marker and disease.

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Antitrust

Supreme Court Grants Cert On Validity of Pharmaceutical Pay-For-Delay Arrangements.

On December 7, 2012, the United States Supreme Court granted certiorari to decide the question of whether a brand name pharmaceutical company paying a generic pharmaceutical company in exchange for delaying the entry of a generic into the marketplace violates federal antitrust laws. Federal Trade Commission v. Watson Pharmaceuticals, et al., No. 12-416. This arrangement usually comes about as a settlement to ANDA patent litigation where the brand name patent holder pays the allegedly infringing generic company to delay marketing a generic drug until a later date, which protects the patent from a judgment of invalidity or non infringement.

The Federal Trade Commission (“FTC”) opposes such arrangements because they allow drug makers effectively to block or at least delay generic drug competition without allowing the patents to undergo judicial scrutiny, thereby unlawfully preserving the patent monopoly. Further, the FTC believes that reverse payment settlements may be protecting monopolies that are based on invalid patents, which costs consumers an estimated $3.5 billion per year in higher drug prices. The brand name drug companies believe that these types of arrangements are just another valid way to enforce the patent rights granted to them. If these types of

Intema事件における基準は、治療方法クレームが、どの程度狭く、具体的に、当業者に周知の段階と結びつけた自然法又は抽象的概念以上のものを含んでいないかについて、調約を与えるものである。Intema事件は、このようなクレームは、少なくとも、疾患の指標と疾患の関の相互関係から自然的、に発生するもの以上の特許可能な特徴を付加するものでなければならない、という点を、より直接的に示している。

反トラスト

連邦最高裁判所、製薬会社の遅延支払いの取り決めの有効性について、判断の予定である

2012年12月7日、連邦最高裁判所は、ブランド薬品の製薬会社が、ジェネリック薬品の製造業者に対して支払う、市場への参入を遅らせる対価としての支払いについて、これが連邦反トラスト法に違反するか否かを判断するための移送命令を認めた。Federal Trade Commission v. Watson Pharmaceuticals, et al., No. 12-416この議論は、ブランド薬品の特許権者、が特許侵害を主張するジェネリック薬品の製造業者に対し、市場への参入を遅らせることで支払いを行い、これにより無効性又は非侵害の判決を得るまで特許を保護する、というANDA特許訴訟の和解に関して、通常発生するものである。

連邦公正取引委員会（FTC）は、このような取り決めは、特許による司法判断が行われていない段階で、製薬業者がジェネリック薬品の製造業者による競争を阻止又は少なくとも遅延させることを認めるものであり、特許による独占を違法に維持するものである、と主張して、このような取り決めに反していている。さらに、FTCは、このようなリバース支払い和解により、無効な特許に基づく独占が保護される可能性があり、これにより消費者は、本来あるべき価格より高い金額を薬品に支払うことになり、1年あたり推定35億ドルを負担することになる、と主張している。ブランド薬品の製造業者、このような取り決めは、認められている特許権行使の有効な方法のひとつである、と主張している。ブランド薬品の製造業者は、もしこのような取り決めが無効とされると、製薬特許から利益を得ることが損なわれ、かつ、生命の救活や向上に関する新たな発明のための研究開発に投資するインセンティブが減退する、と主張している。
arrangements are invalidated, brand drug companies argue that it would further erode their ability to profit from pharmaceutical patents and correspondingly reduce the incentive to invest in research and development for new life-saving or life-enhancing innovations.

In the decision appealed from in the Watson case, the Court of Appeals for the Eleventh Circuit held that as long as there is no sham litigation or fraud in obtaining the patent, and the anticompetitive effects are restricted to the patent’s lawful scope, a reverse payment settlement does not violate antitrust laws. FTC v. Watson Pharmaceuticals, Inc., 677 F.3d 1298 (11th Cir. 2012). The Second Circuit and the Federal Circuit have ruled similarly in the past. The Third Circuit Court of Appeals in In re K-Dur Antitrust Litigation, 686 F.3d 197 (3d Cir. 2012), however, was contradictory. The Third Circuit held that reverse payments entitle the patent holder to pay potential competitors not to compete and it applied a rebuttable presumption that the reverse payment is anticompetitive. The Supreme Court is expected to resolve the split between the circuits in the Watson appeal, which should include oral arguments in Spring 2013.

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Arbitration & Dispute Resolution

Court Severs Invalid Forum Selection Clause And Compels Arbitration.

When a forum selection clause is invalid because the forum organization that was designated does not exist, the forum selection clause may be severed from the rest of the arbitration agreement and arbitration can be compelled. Control Screening LLC v. Technological Application and Prod. Co., 687 F.3d 163 (3d Cir. 2012). The parties’ mutual mistake as to the non-existent forum rendered the forum selection clause null and void; as a result, the arbitration agreement was treated as if it did not select a forum. Pursuant to Section 4 of the Federal Arbitration Act, a district court is empowered to compel arbitration only within its own district; accordingly, the new forum for the arbitration was required to be in the forum in which the petition to compel arbitration was filed.

Court May Not Appoint Excessive Number Of Arbitrators.

A court may intervene and exercise appointment power when the parties are unable to agree to the selection of an arbitrator, but the court may not appoint more arbitrators than the arbitration agreement permits. BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481 (5th Cir. 2012) (No. 11-20547). The arbitration agreement required three arbitrators, one appointed by each party and a neutral appointed by the parties’ appointees. However, the dispute involved three parties, and after each of the three parties selected their arbitrators there was no seat remaining for a neutral. Pursuant to Section 5 of the Federal Arbitration Act, the district court was authorized to intervene and exercise
appointment power to address the lapse. The district court resolved the issue by directing the parties to proceed with a five-member arbitration panel, but the court of appeals reversed, finding that the district court could not authorize the appointment of more arbitrators than was called for in the arbitration agreement. Thus, the appellate court remanded the case with instructions to the district court to fashion a process for the appointment of three arbitrators.

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### Class Action

**Supreme Court Will Decide Effect Of Stipulation Limiting Jurisdiction On Removal.**

Class action plaintiffs desirous of keeping their cases in state court have attempted to limit the amount in controversy. Prior to the adoption of CAFA, named class representatives would allege or stipulate that the amount of their individual claims were below the jurisdictional minimum for a case in diversity. After the adoption of CAFA, class action plaintiffs have sometimes stipulated that they will not seek damages, in the aggregate, in excess of the $5 million jurisdictional threshold.

In Knowles v. Standard Fire Ins. Co., No. 11-4044 (W.D. Ark. Dec. 2, 2011), plaintiffs submitted a binding stipulation expressly limiting the class’s recovery so that it would not exceed the federal jurisdictional minimum, and the district court found that the plaintiff had shown to a legal certainty that the aggregate damages claimed on behalf of the class would not exceed the jurisdictional minimum. As a result, the district court remanded the case to state court. The Eighth Circuit declined review. The U.S. Supreme Court has, however, agreed to hear the case. The case will determine if, after Smith v. Bayer, such a stipulation to destroy federal jurisdiction is binding on absent class members. Petitioner argues that a named plaintiff, who has not yet been selected as a representative for the class, cannot bind absent class members.

**Class Counsel Conflict Forfeits $7 Million Fee Award.**

In Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012) (No. 10-55309), plaintiffs’ counsel entered into incentive agreements with the five named plaintiffs, and agreed to seek incentive compensation for them based on the value of the verdict or settlement in the case. If the case was settled for $10 million or more, counsel would request the maximum incentive award of $75,000 per plaintiff. The case was settled for $49 million, and counsel sought the maximum incentive awards for the five plaintiffs. The court awarded fees of $7 million, but declined to approve the incentive awards, finding the agreements created an appearance of impropriety, violated the ethics rule against fee-sharing with non-lawyers, and created conflicts of interest between the class and the unnamed class members. The Ninth Circuit reversed and directed the trial court to consider the effect of the conflict on the fee award. On remand, the
district court found the conflict was an automatic ethics violation, which resulted in the forfeiture of counsel’s fees. The Ninth Circuit affirmed. It agreed that counsel committed an ethical violation as the agreements put class counsel and the named plaintiffs in a conflict with the class “from day one,” as the agreements eliminated any incentive for the class representatives to negotiate for a better settlement once the threshold was reached for the maximum incentive award. Even though the settlement was substantially above that threshold, the conflict was disabling and as a result, no attorneys’ fees should have been awarded.

Individual Claim Not Barred By Prior Class Settlement Due To Ineffective Notice.

A group of plaintiffs settled a debt collection class action. Notice of the settlement was provided to plaintiff Hecht, a class member bound by the settlement, through a single publication in USA Today. Hecht later sued on the same theory, and the district court dismissed, enforcing the prior settlement bar. On appeal, the Second Circuit reversed. Hecht v. United Collection Bureau, Inc., 691 F.3d 218 (2d Cir. 2012) (No. 11-1327). The Second Circuit concluded that the original class action was predominantly an action for damages, such that Hecht was entitled to notice and the opportunity to opt out, but the prior notice was insufficient. Even if Hecht’s identity was not ascertainable, such that she was not entitled to individual notice, Rule 23’s flexible reasonableness standard required more than the “mere gesture” at notice provided in the prior settlement.

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Complex Commercial Litigation

New York Adopts Delaware’s “Common Sense” Direct vs. Derivative Test.

In Yudell v. Gilbert, 949 N.Y.S.2d 380 (N.Y. App. Div. 2012) (No. 6903), the New York Appellate Division adopted the Delaware Supreme Court’s Tooley test for determining whether a claim is direct or derivative. The case involved a suit by the trustees of one member of a shopping-center joint venture against the venture’s other members and manager, charging that they breached their fiduciary duties in operating the shopping center. The trial court dismissed the action, holding that the claims were derivative and plaintiffs had not pleaded facts sufficient to show demand futility. The Appellate Division affirmed, holding that although “New York does not have a clearly articulated test” of whether a “claim is direct or derivative,” Delaware’s Tooley standard “provides a framework to determine” the issue. Under that standard, “a court should consider (1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).” Adopting and applying “this common sense approach,” the Appellate Division concluded that “plaintiffs’

複雑商事訴訟

ニューヨーク州、直接訴訟か株主代表訴訟かの判断にあたり、デラウェア州の「常識」基準を採用

Yudell v. Gilbert, 949 N.Y.S.2d 380 (N.Y. App. Div. 2012) (No. 6903)において、ニューヨーク州控訴裁判所は、直接訴訟か株主代表訴訟かを判断するにあたり、デラウェア州最高裁判所のTooley事件の基準を採用した。本件は、ショッピングセンターの合弁会社のうちあるメンバーの受託者が、当該合弁会社の他のメンバー及び管理人に対し、ショッピングセンターの営業に際し忠実義務に違反したと主張して、提訴したものである。原審は、本件請求は株主代表訴訟であり、原審は事前請求の無効性を立証するのに十分な事実を主張しなかったと判断した。そして、本件を退け、控訴裁判所は、「ニューヨーク州では直接訴訟か株主代表訴訟かを判断する明確な基準は存在しないが、デラウェア州のTooley事件の基準は、本件につき判断する枠組みとなる」と判断して、原審を維持した。この基準の下だと、「裁決所は、(1) 誰が損害を被ったか（会社か株主か）(2) 誰が損害賠償により利益を得るか（会社化株主個人か）」を考慮しなければならない。控訴裁判所は、「この常識に適するアプローチ方法」を適用して、「原告の損害は、忠実義務違反及び企業への損害から発生したものであるため、原告による忠実義務違反に基づく請求は株主代表訴訟である」と判示した。
claim for breach of fiduciary duty is derivative, because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity."

**Rule 26 Expert Fees Not Capped By General Appearance-Fee Statute.**

In *Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844 (7th Cir. 2012) (No. 11-3305), the court addressed the “novel question” of how to reconcile Fed. R. Civ. P. Rule 26(b)(4)(E)’s provision for the payment of an opposing expert’s “reasonable fee” for time spent at a deposition, with 28 U.S.C. § 1821(b), which sets witness attendance fees at $40 per day. Finding “surprisingly little law on the issue,” the Seventh Circuit reasoned that Rule 26 and § 1821 were, in fact, in conflict on this point, and that the flexible authorization for a reasonable fee contained in the later-enacted Rule 26 supersedes the specific fee schedule in § 1821(b). Acknowledging that the issue was a “close call,” the court concluded that expert fees and expenses recoverable under Rule 26 are not capped by the $40 per day limitation in § 1821(b).

**Party Sanctioned For Its Affiliate’s Spoliation.**

In *In re Mushroom Direct Purchaser Antitrust Litigation*, No. 06-cv-00677 (E.D. Pa. Aug. 1, 2012), plaintiffs alleged that defendant Basciani conspired with other defendants to increase the price of mushrooms. In September 2007, plaintiffs served Basciani with a document request seeking data concerning mushroom sales and prices. In June 2008, Basciani advised that plaintiffs should seek the data from non-party BFI, Basciani’s affiliate that operated as its distributor. Plaintiffs waited until October 2009 to serve BFI with a subpoena. In the summer of 2009, prior to receiving the subpoena, BFI destroyed certain of the responsive data pursuant to its document retention policy. Plaintiffs moved for sanctions against Basciani. The court found that, at the time of the document destruction, Basciani had control over BFI’s documents and was on notice that Plaintiffs may request such documents from BFI; Basciani, therefore, had a duty to preserve those documents and is liable for BFI’s destruction of them. The court ordered that an adverse inference instruction would be given that would allow the jury to find that the destroyed documents would have been unfavorable to Basciani. The court, however, refused to award any attorneys’ fees or costs, finding that both parties had “allowed a routine discovery production to escalate into costly and unnecessary litigation.”

**California Supreme Court Ruling Expands Temporal Reach of California Unfair Competition Law.**

In *Arvey v. Canon Business Solutions, Inc.*, Case No. S184929, the California Supreme Court recently settled a split in the California Court of Appeal as to whether equitable tolling doctrines, such as the discovery rule and the doctrine of fraudulent concealment, apply to the four-year statute of limitations imposed by the California Unfair Competition Law.

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**規則第26条の専門家証人の費用額は、一般的な証人出廷の費用額を規定する法に拘束されない**

*Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844 (7th Cir. 2012) (No. 11-3305)において、裁判所は、相手方専門家証人が供述録取（デポジション）に費やした時間に対する「合理的な費用」の支払いに関する連邦民事手続規則第26条(b)(4)(E)項を、証人の出廷費用を一日40ドルとする合衆国法典第28巻第1821条(b)項に優先する、と判示した。同控訴裁判所は、この問題は「非常に難しい問題である」としつつも、連邦民事手続規則第26条の回収可能な専門家証人の費用は、合衆国法典第28巻第1821条(b)項による一日40ドルの上限に拘束されないと判示した。

**関連会社による文書破棄につき、制裁を受けた事例**

*In re Mushroom Direct Purchaser Antitrust Litigation*, No. 06-cv-00677 (E.D. Pa. Aug. 1, 2012)において、原告は、被告であるバシアーニ社、他の被告と共謀して、マッシュルームの価格の増加を図るため、バシアーニ社に対し、マッシュルームの販売及び価格に関するデータの提出を要求した。バシアーニ社は、2008年6月、バシアーニ社の関連会社であり販売会社であるBFI社に対してデータの提出を要求すべきである、と原告に伝えた。原告は、2009年10月、BFI社に対して召喚状を送付した。BFI社は、召喚状を受け取る1日前である2009年夏、自社の文書保存規定に従い、関連データの一部を破棄した。原告は、バシアーニ社に対す る制裁を申し立てた。裁判所は、文書破棄が行われた時点では、バシアーニ社はBFI社の文書につき支配力を有していたのであり、原告がBFI社に対しそのような文書の提出を要求する可能性があることを知っていた。よって、バシアーニ社は、これらの文書を保存する義務を有していたのであり、BFI社による文書破棄につき責任を有する、と判示した。裁判所は、反対推定の説を呪し、これにより、陪審員は、破棄された文書の中にはバシアーニ社に不利なものがあったと認定することが可能となった。しかし、裁判所は、「通常の証拠開示手続を、非常に費用がかからない卜必要な証拠まで発展させた」の 案当事者であるとして、弁護士費用の支払いは否定した。

**カリフォルニア州最高裁判所、カリフォルニア州不正競争法が適用される時間的範囲を拡大**

*Arvey v. Canon Business Solutions, Inc.*, Case No. S184929において、カリフォルニア州最高裁判所は、証拠開示規則や詐欺的隠匿の法理等の衡平法上の時効制限法理に、カリフォルニア州不正競争法（UCL）上の4年の消滅時効が適用されるか否かに関する、カリフォルニア州控訴裁判所間での判断の相違を解決した。カリフォルニア州最高裁判所は、これらの法理は、消滅時効期間が経過したUCLに基づく請求を救済する手段として
similar equitable accrual doctrines.

The plaintiff entered into agreements with Canon Business Solutions, Inc. ("Canon") in 2001 and 2002 to lease copiers for a term of 60 months. The agreements included a monthly copy allowance, and required the plaintiff to pay an additional per copy charge for any copies in excess of that allowance. According to the plaintiff, during service visits between 2002 and 2004, Canon employees ran test copies that resulted in the plaintiff exceeding his monthly allowances and owing excess copy fees to Canon. In 2008, the plaintiff brought a claim against Canon in California state court alleging that the company's purported overbilling violated the UCL. The trial court found that the plaintiff's complaint was barred by the UCL's four-year statute of limitations, as the plaintiff's claim had first accrued in 2002 and was not susceptible to equitable tolling doctrines. The court of appeal affirmed. The Supreme Court, however, reversed the appellate court's decision, holding pursuant to the plain language of the statute and the legislative history that common law rules of accrual apply to UCL claims just as they would to any other statute and the legislative history that common law rules of accrual apply to UCL claims just as they would to any other statute.

Delaware LLC Act's Default Fiduciary Duties Remain Open Question

A recent ruling from the Delaware Supreme Court, Gatz Props., LLC v. Auriga Capital Corp., 2012 Del. LEXIS 577 (Del. Nov. 7, 2012), overruled the Delaware Court of Chancery’s interpretation of the Delaware Limited Liability Company Act in Auriga Capital Corp. v. Gatz Props., LLC, 40 A.3d 839 (Del. Ch. Jan. 27, 2012). The governing LLC agreement at issue in the case contained a provision requiring the controlling member to obtain a fair price in the absence of approval by a majority of the minority members for any affiliate transaction engaged in by the controlling member. The Chancery Court read the agreement as imposing contractual fiduciary duties and the Act as imposing default equitable fiduciary duties upon managers and controlling members of LLCs. The Supreme Court found that the contractually imposed fiduciary duties in the governing LLC agreement preempted any necessity for the Chancery Court to interpret the Act. Additionally, the Supreme Court viewed the "fair price" language to be the substantive equivalent of the entire fairness standard found in Delaware corporation law. Thus, whether the LLC Act imposes default fiduciary duties remains an open question.

Corporate Updates

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會社法の最近の動向

デラウェア州有限責任会社法の忠実義務は、未解決の問題として残っている

In the face of this uncertainty, practitioners should address the fiduciary duties of the parties when drafting LLC agreements. Including objective measures of price (e.g., a third-party appraisal) or an objectively performed procedure (e.g., approval by a majority of the minority members) can serve as a safe harbor to protect affiliate transactions by controlling members from judicial scrutiny. Without objective standards, including “fair price” provisions will in essence cause an entire fairness standard to become applicable. To the extent the parties to an LLC agreement desire managers or controlling members to have fiduciary duties, the agreement should specifically describe or disclaim those duties.

Discovery & ESI

Sanctions: Key Documents Produced In Non-Native Format And Inadequate Search.

In one of the Rothstein Ponzi-scheme cases, Coquing Investments v. Rothstein, No. 10-60786 (S.D. Fla. Aug. 3, 2012), the court entered post-trial Rule 37 sanctions against a defendant bank and its outside counsel for several discovery failures, including e-discovery deficiencies. The court cited two primary e-discovery problems. First, the bank produced a key electronic database file in a “non-native” format (a black and white “.tiff” file), which caused important information in the file to be rendered illegible in the version produced to the plaintiff. For example, a red banner with the words “HIGH RISK” was not visible when the document was reproduced in non-color format. Second, the bank and its lawyers made several incorrect representations that a certain document did not exist, but they never searched their own document-review platform for the document. The court held that “the bank was so firmly rooted in its belief that the document did not exist that it failed to conduct a comprehensive search to find it.” As a sanction, the court held that certain factual issues the bank contested at trial that were affected by the discovery failures would be “taken as established” against the bank, which would negatively impact the bank’s post-trial motions and possibly its appeal.

Second Circuit: Failure To Institute Litigation Hold Is Not Per Se Negligent.

In Chin v. Port Authority of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012) (Nos. 10-1904, 10-2031), the Second Circuit “reject[ed] the notion that a failure to institute a ‘litigation hold’ constitutes gross negligence per se.” In so holding, the court expressly rejected a widely cited e-discovery decision authored by U.S. District Court Judge Scheindlin, Pension Committee Of University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010). In the Pension Committee case, Judge Scheindlin had held that the failure to institute a litigation hold after a party “reasonably anticipates litigation” constitutes

証拠開示及び電子の情報

制裁：重要な文書が、ノン・ネイティブ形式及び不適切な検索により開示された事例

ロスティアン・ボンジ・スキーム取引のひとつであるCoquing Investments v. Rothstein, No. 10-60786 (S.D. Fla. Aug. 3, 2012)において、裁判所は、証拠開示を怠ったこと、及び、電子的証拠開示の不備により、被告銀行とその代理人弁護士に対し、規則第37条の裁量裁決を認めた。裁判所は、電子的証拠開示の主な問題として、2点を指摘した。第1に、銀行は、重要な電子データベースを「ノン・ネイティブ」形式（白黒の「.tiff」ファイル）により開示したが、当該ファイル内の重要な情報が、開示を受けた原告側で判別できないものとなっていた。例えば、「危険度高」との文字は、白黒形式では見えないものとなっていた。第2点、被告銀行及びその代理人弁護士は、文書の一部は存在しないと事前に断言して、被告の文書レビュー・プラットフォームは確認していたなかった。裁判所は、「銀行は、当該文書の存在しないとの根深い信念をもっており、これにより十分な検索を行わなかった」と判示した。裁判所は、制裁として、銀行が裁判で争い証拠開示の不備により影響を受けた.GeneratedValueの事実上の問題点が、銀行の主張に反対する事実を「立証するもの」として取り扱われることになり、これにより、銀行の裁判後申立て及び控訴に不利な影響を与え、判示した。

第2巡回区控訴裁判所、リティゲーション・ホールドの発行を行ったことによっても、当然過失とはならない、と判示

gross negligence per se. In Chin, the Second Circuit held that "the better approach" is to consider the failure to adopt good preservation practices as one factor in determining whether discovery sanctions should issue. The Second Circuit further emphasized that case-by-case approach by explaining that "a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction."

**ITC**

**ITC Grants General Exclusion Order Excluding Lighting Control Devices From Importation.**

The United States International Trade Commission ("ITC") issued a General Exclusion Order ("GEO") excluding lighting control devices that infringed a patent owned by Lutron Electronics Co., Inc. ("Lutron") from importation in In re Certain Lighting Control Devices Including Dimmer Switches and Parts Thereof (IV), No. 337-TA-776 (ITC Nov. 8, 2012). A GEO directs the U.S. Customs Service to exclude all infringing articles without regard to source whereas a Limited Exclusion Order ("LEO") directs the Customs Service to exclude all infringing articles that originate from a specified source, the respondent in the ITC action. Here, Lutron sought a GEO, but the ALJ denied that request. To receive a GEO, Lutron had to prove that an LEO was insufficient because it was likely to be circumvented. The ALJ found that Lutron failed to meet its burden. On review, the ITC disagreed with the ALJ's conclusion and entered a GEO. The ITC held that the ALJ incorrectly required Lutron to prove a "pattern of circumvention" rather than just circumvention. Unlike the ALJ, the ITC found that Lutron's evidence of 33 potential entrants to the U.S. market as well as low market entry costs created a likelihood of circumvention of an LEO. The ITC also found persuasive Lutron's evidence that a prior respondent had violated a consent order by selling infringing dimmer switches. In addition, the ITC held that the ALJ incorrectly required Lutron to prove the difficulty of identifying the source of infringing items with "substantial and reliable" evidence. The ITC found that Lutron proved that generic packaging combined with a significant number of non-respondent distributors/retailers made it difficult to identify the actual source of infringing products.

**国際貿易委員会**

ITC、照明制御装置の輸入を禁止する一般排除命令を出す

米国国際貿易委員会（「ITC」）は、In re Certain Lighting Control Devices Including Dimmer Switches and Parts Thereof (IV), No. 337-TA-776 (ITC Nov. 8, 2012)において、ルートロン・エレクトロニクス社（「ルートロン社」）の特許を侵害する照明制御装置の輸入を禁止する一般排除命令（「GEO」）を出した。限定排除命令（「LEO」）では、ITC手続で対象とされた特定のソースに基づく侵害製品の一切の排除が命じられるのに対し、GEOでは、ソースを問わず、侵害製品の一切の排除が視認に命じられる。本件で、ルートロン社はGEOを求めるが、行政法判事（「ALJ」）はこれを退けた。ルートロン社がGEOを得るためには、LEOは回避される可能性が高いため不十分であることを、立証する必要があった。ALJは、ルートロン社はこの立証をできなかった、と判示した。控訴審において、ITCは、ALJの判断に反対し、GEOを認めた。ITCは、ALJがルートロン社に対し、回避だけでなく「回避パターン」の立証を求めたのは誤りであった、と判示した。ITCは、ALJとは異なり、市場への参入費用が低いことに加えて、ルートロン社が提出した33件の米国市場への潜在的参入の証拠によると、LEOの回避可能性は立証された、と判示した。また、ITCは、ルートロン社が提出した、被告は減光スイッチの販売により同意命令に違反したとの証拠について、説得力がある、と判示した。さらに、ITCは、ALJが、ルートロン社に対し、「十分かつ信頼できる」証拠により侵害製品のソースを特定することが難しい、ということの立証を求めたことには、誤りであった、と判示した。ITCは、ルートロン社は、非常に多くの被告以外の代理店や小売業者が存在し、ノープランニング・パッケージが行われていることと相まって、侵害製品のソースの特定は難しいことを立証した、と判示した。
Legislative Developments

USPTO Request For Comments On A Patent Small Claims Court.

The United States Patent and Trademark Office (“USPTO”) recently published a request for public comments on whether the United States should develop some sort of a small claims proceeding for patent enforcement. This issue has been previously raised by patent litigators and industry leaders but has never received the necessary support to have Congress act to implement such a system. For example, efforts to implement a small claims court to streamline certain patent litigation failed in the early 1990s. Recently, however, bar associations, industry groups, patent attorneys, and judges have revived the issue. In May 2012, the USPTO and the United States Copyright Office co-sponsored a “roundtable” of intellectual property experts to consider whether patent and copyright-related small claims proceedings should be developed, what their structure would look like, and what constitutional issues would be implicated. In October 2012, a forum of patent experts was convened as a continuation of the May discussions to focus on small claims proceedings for patent litigation. The request for comments, either for or against the development of small claims proceedings, included certain guidelines and listed topics of interest to the USPTO. These topics included venue and subject matter jurisdiction considerations, the role of attorneys, fees, remedies, enforcement, appellate review, constitutional issues, and the weight that a decision would carry in terms of precedent, res judicata, and estoppel. Finally, the USPTO was interested in the enumeration of any unintended negative consequences and any proposed safeguards to avoid them.

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Patent Law: Recent Trends

U.S. Supreme Court To Decide The Patentability Of Isolated Genes.

In The Association of Molecular Pathology et al. v. Myriad Genetics Inc. et al., No. 12-398, the U.S. Supreme Court will decide whether Myriad’s patents to isolated breast cancer genes are patentable. Myriad holds patents on the BRCA1 and BRCA2 genes, which are associated with a heightened risk of breast cancer, and uses these genes to test a patient’s cancer risk based on the presence of these genes. The Association represents a group of doctors challenging Myriad’s patents, claiming that human genes are products of nature and thus unpatentable. The Federal Circuit previously upheld patentability, noting that the isolated DNA is a man-made composition different from naturally occurring DNA. The Association compared its case to the recent case of Mayo v. Prometheus, where the Supreme Court held that a natural correlation could not be patented. The Federal Circuit, however, disagreed with the Association, holding that the patent was valid.

立法上の展開

USPTO、小規模特許訴訟裁判所につき、パブリック・コメントを求める

米国特許商標局（USPTO）は、小規模の特許侵害訴訟に関する特別な手続を創設すべきか否かにつき、パブリック・コメントを求める。特許事務所は、人工生成された核遺伝子を特許することができなかった。例えば、特許侵害訴訟を迅速化するための小規模訴訟裁判所の制定が検討されたが、実現せず、検討は1990年代に終了した。しかし、最近、弁護士会、業界団体、弁理士、裁判官が、この問題を改めて取り上げた。2012年5月、USPTO及び米国著作権局がスポンサーとなって、知的財産の専門家の「一団」が、特許及び著作権に関する小規模訴訟手続を創設すべきか否か、どのような手続とすべきか、どのような憲法上の問題が潜在的に行うかについて検討を開始した。2012年10月、特許専門家は、特許訴訟の小規模訴訟手続につき5月の議論を継続するため、集められた。パブリック・コメントの要請では、小規模訴訟手続の創設に賛成か反対かを問わず、ガイドラインや興味深いトピックが含まれている。これらのトピックには、裁判所や対象権利権の問題、弁護士の役割、費用、裁判方法、執行方法、制約、憲法上の問題、事例における裁判の重要性、裁判力、禁反証が含まれている。また、USPTOは、望ましくない結果やこれを避けるためのセーフガードについても、関心を示している。

特許法：最近の動向

連邦最高裁判所、隔絶遺伝子の特許可能性を判断する予定である

The Association of Molecular Pathology et al. v. Myriad Genetics Inc. et al., No. 12-398において、連邦最高裁判所は、乳癌の隔絶遺伝子に関するミリアド社の特許が特許可能か否かにつき、判断することになった。ミリアド社は、乳癌の可能性と関連するBRCA 1及びBRCA 2遺伝子についての特許を保有しており、これらの遺伝子の存在による患者が癌になる可能性を検査するために、これらの遺伝子を利用している。分子病理学協会は、ミリアド社の特許の有効性を争う医師のグループを代理して、人間の遺伝子は自然の産物であり、よって特許不可である、と主張した。連邦巡回裁判所は、從前、隔絶DNAは人間が作成したものであり、自然に発生するDNAとは異なる、と指摘して、特許可能性を維持していた。分子病理学協会は、自然の関係者間は特許となり得ないと連邦最高裁判所が判示したMayo v. Prometheusの判決と本件を比較した。しかし、連邦巡回裁判所は、遺伝子は自然の産物ではなく、他の有効な物質と同様に、自然法のもとで人間の産物である、と判示し、分子病理学協会の主張に同意しなかった。本件は、2013年夏頃に連邦最高裁判所で口頭弁論が開かれる予定で
genes are not natural products, but products of man following, as all materials do, laws of nature. The case is likely to be argued in Summer of 2013.

**Damages For Infringment Of Method Claim May Cover Foreign Sales Based On Domestic Testing.**

A jury awarded a patentee over a billion dollars for infringement of two patents relating to sequence detection in storage devices. *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, Case No. 2:09-cv-00290 (W.D. Pa. Dec. 26, 2012). The award included damages based on sales of chips that were never used in the U.S. to perform the allegedly infringing process. The district court permitted the patentee to seek damages based on these sales because the defendant achieved the sales through its U.S.-based "sales cycle." As part of this cycle, the defendant performed the infringing method in simulations and on prototype chips in an effort to be selected as chip supplier for a disk drive manufacturer. The district court held that the plaintiff could seek damages for foreign sales to the disk drive manufacturer on the theory that the sales would not have been made "but for" the infringing tests in the U.S. In addition, the jury found that the infringement was willful, so it is possible that the district court will enhance the damages over the amount awarded by the jury and will also likely result in an award of attorneys' fees.

**Fed. Cir. Rules America Invents Act Retroactive False Marking Provision Not Unconstitutional.**

In *Brooks v. Dunlop Mfg., Inc.*, No. 2012-1164 (Fed. Cir. Dec. 13, 2012), the Federal Circuit ruled that the provision of the America Invents Act ("AIA"), any person could bring a qui tam suit on behalf of the government alleging false marking, with half of any recovery going to the plaintiff and half going to the federal government. The AIA, enacted in 2011, eliminated this provision. Under the new law, a plaintiff must show that it has suffered "competitive injury" in order to bring suit for false marking. More so, the AIA provided that this law applied retroactively to all pending false marking suits. Congress did so essentially to eliminate the wealth of suits that had been brought since 2009 when the Federal Circuit's rulings dramatically increased the potential recovery from false marking claims. In *Brooks*, plaintiff's case had been brought prior to the enactment of the AIA based on the false marking of an expired patent, but was dismissed after the passage of the law based on the retroactive provisions. Plaintiff argued the retroactive nature of the law violated the due process clause. The Federal Circuit rejected that reasoning and affirmed the dismissal, finding there was good reason to pass the law, such as to combat the perceived abuses and inefficiencies from the qui tam provision.
No Proximate Cause If Physicians Would Be Unaffected By Clearer Warning.

In Sager v. Hoffmann-La Roche, Inc., No. A-3427-09T4A (N.J. Super. Ct. App. Div. Aug. 7, 2012), the New Jersey Superior Court Appellate Division reversed verdicts for plaintiff in Accutane-related personal injury cases. Applying Florida law, the court held that, to establish proximate cause for a failure to warn case, plaintiffs had to show that a stronger warning would have caused their physicians to make a different decision concerning which drug to prescribe. Because the physicians themselves testified that they still would have prescribed Accutane for plaintiffs even if the warnings had clearly identified the risk of developing the disease that plaintiffs developed, plaintiffs had not and could not establish that the allegedly inadequate warning was a proximate cause of their injuries.

Expert Testimony Improper As Test Conditions Unlike Crash Conditions.

In Hoffman v. Ford Motor Co., No. 10-1137 (10th Cir. Aug. 16, 2012), the Tenth Circuit reversed a jury verdict for plaintiff, who was paralyzed during an automobile accident when her seatbelt allegedly failed and she was thrown from the vehicle. Plaintiff hired an expert who testified that the seatbelt experienced “inertial unlatch” during the accident based on testing the expert had done on seatbelt buckles under laboratory conditions. Defendant had filed a Daubert motion, which the district court denied. The jury apparently credited the expert testimony and ruled for the plaintiff, awarding $4.5 million. The Tenth Circuit reversed, holding that the district court erred in permitting plaintiff’s expert testimony to go to the jury. Rather, the district court should have granted the Daubert motion because the expert failed to show that the test conditions he created for the “inertial unlatch” test bore any similarity to the conditions that existed during the actual crash.

Eighth Circuit Reverses Daubert Ruling Rejecting Expert Testimony.

In Kuhn v. Wyeth, Inc., 686 F.3d 618 (8th Cir. 2012) (Nos. 11-1809, 11-1815), the Eighth Circuit reversed a summary judgment for defendant following a Daubert ruling excluding plaintiff’s medical causation expert in a case alleging that the defendant’s drug caused plaintiff to develop breast cancer. The dispute over the admissibility of plaintiff’s expert’s testimony hinged upon a particular study that defendant had argued undermined the expert’s causation opinion. The study showed an increased occurrence of breast cancer among users after 5 years of use of the drug; it did not show an increased occurrence of breast cancer from shorter-term use of the drug, and plaintiff was a short-term user. Plaintiff’s expert explained that the fact that increased rates of breast cancer were not observed before five years of use might have been the result of the study’s design and subject selection criteria, and that the study did not allow for any conclusion about breast cancer rates of short-term users of the drug. The court held that the expert’s opinion was not undermined by the study and that the expert’s opinion was admissible.

製造物責任

より明確な警告によっても医師の判断が変わらない場合には、因果関係は認められない


専門家証人の証言が、実験が行われた条件が事故時のような条件と異なるため不適切とした事例

Hoffman v. Ford Motor Co., No. 10-1137 (10th Cir. Aug. 16, 2012)において、第10巡回区の訴訟裁判所は、自動車事故により麻痺障害を負った原告に対する有利な陪審裁判を覆した。当該自動車事故の際、原告は、シートベルトを着用しておらず、自動車から投げ出されたとされていた。原告が受任した専門家証人は、実験室条件のもとシートベルトの留め金がつか行われた試験において、当該事故において「留め金が外れる慢性の現象」が発生したと証言した。陪審員は、専門家証人のによる当該証言の信頼性を認め、原告に450万ドルの損害賠償を認める判決を下した。第10巡回区裁判所は、原告の専門家証人の証言を陪審員に判断させた点で連邦地方裁判所は誤りを犯した、と判示し、原審を覆した。専門家証人は、「慢性の現象」を判断した実験室条件が、実際の事故時に対応した条件と同様であることを立証できなかったことから、連邦地方裁判所はDaubert申立てを認めるべきであった、とされた。

専門家証人の証言が、実験が行われた条件が事故時のような条件と異なるため不適切とした事例

Kuhn v. Wyeth, Inc., 686 F.3d 618 (8th Cir. 2012) (Nos. 11-1809, 11-1815)において、第8巡回区の訴訟裁判所は、被告の医薬品により原告が乳がんを発症したとする訴訟において、医薬品の因果関係に関する原告の専門家証人の排除を、当該専門家証人が確保した実験室条件が、実際の事故時に対応した条件と同様であることを立証できなかったことから、連邦地方裁判所はDaubert申立てを認めることができる。
Eighth Circuit found that the expert's scientific explanation as to why the study did not undermine his opinion was sufficient to raise a jury question, and the trial court should have allowed the plaintiff to go to the jury with the expert's testimony.

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Securities Litigation

Emerging Growth Company Offerings Boosted By JOBS Act

The Jumpstart Our Business Startup Act (JOBS Act) was enacted last year with the goal of promoting emerging growth companies (EGCs) by, in part, enhancing an issuer’s flexibility when raising capital in evolving market conditions. To qualify as an EGC, among other things, an issuer must have less than $1 billion in total annual gross revenue during its most recently completed fiscal year at the time of registration with the SEC.

Two important provisions in the JOBS Act permit confidential submissions of registration statements to the SEC and allow issuers to “test-the-waters” by communicating with investors before, during and after a public offering without violating SEC rules against gun-jumping. The two provisions can be used together to enhance the issuer’s ability to react to evolving market conditions; an issuer that is unsure whether to proceed with a public offering can submit a draft registration statement to the SEC, and then reach out to accredited investors and qualified institutional buyers to gauge market interest and evaluate the price and other terms of the offering. Without attracting attention from the market, the issuer can begin the SEC review and comment process so that if the issuer does decide to proceed with the public offering it can complete the offering in as few as 21 days by publicly filing the initial confidential registration statement and any amendments at least 21 days before a road show. This flexibility is available for both initial registration statements and secondary offerings by selling shareholders or registrations of employee benefit plans on Form S-8 for as long as the issuer maintains its status as an EGC, and draft registration statements can be kept on file with the SEC indefinitely. The confidential review option created by the JOBS Act also cut the time an issuer’s draft registration statement is publicly available before going effective from 90-180 days down to an average of 33 days. The SEC will also publicly release comment letters and issuer responses no earlier than 20 business days following the effective date of a registration statement.

While issuers must carefully follow the guidelines and procedures to qualify as an EGC under the JOBS Act, the opportunity to test the market and get a head start on the SEC review process for a potential public offering can be well worth the effort.

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証券訴訟

JOBS法により、新興企業の公募が増加する

新規事業活性化法（JOBS法）は、市況での展開にあたり資本を調達する際において、株式発行人により柔軟性を与えることによって、新興企業（EGC）を促進することを目的として、昨年制定された。ある株式発行人がEGCに該当するためには、証券取引委員会（SEC）登録時において、直近の事業年度の年間総利益が10億ドル以下であることが必要である。

JOBS法の2つの重要な条項により、株式発行人は、SECへの登録届出を非公開で行うことができ、また、公募の前後を通じて、SEC規則に抵触することなく、投資家のコミュニケーションを取り「事前チェックを行う」ことができる。この2つの条項により、株式発行人による市況展開への反応が向上し、また、公募の継続につき確信のない株式発行人も、SECに登録届出を行い、信頼性の高い投資家や機関投資家とコンタクトをとって市場の関心を探り、価格やその他の公募条件を評価することができるようになった。株式発行人は、市場から関心を得られないのである場合でも、SECの検討手続を開始して、株式発行人が公募の継続を決定した場合には「ラード・ショー」の開始までに21日前の期間を確保して最初の非公開登録届出及び修正から21日で公募を完了することができるようになった。このような柔軟性は、最初の登録届出に加えて、株式発行人がEGCとしての地位を維持し続け、かつ、登録届出書のドラフトがSECに期間の定めなく保管される限り、株主の売却や従業員によるフォークS-8の福利厚生契約への登録による売り出しの際にも可能となった。また、JOBS法が非公開での審査の選択肢を創設したことにより、株式発行人による登録届出書のドラフトが有効になる以前の公開期間が、90日間から180日間の幅から、33日まで、短縮されることになった。さらに、SECは、コメンタル・レターを発表し、株式発行人は、登録届出書が有効になった日から20営業日後に回答することになった。

株式発行人は、JOBS法においてEGCに該当するためのガイドライン及び手続きに注意深く従う必要があるが、将来的な公募に備えて市場の状況を試験的に調査しSECによる検討手続を開始できる機会は、十分価値があると考えられる。
Fine For Lack Of Proper Controls Without Allegations Of Improper Payments.

Oracle Corp. will pay $2 million to resolve SEC allegations that the company’s Indian subsidiary maintained $2.2 million in off-book “secret side funds.” According to the complaint, Oracle’s India employees inflated prices for the company’s goods and services on eight government contracts and directed that its local distributors retain the excess funds, purportedly for “marketing and development expenses.” The SEC charged Oracle with a books and records violation for the subsidiary’s failure to properly carry these funds on its books as prepaid marketing expenses. Further, the SEC alleged that Oracle India employees directed its distributors to use the funds to pay phony invoices from non-existent third parties. According to the SEC, Oracle lacked the proper internal controls to prevent these payments, thereby exposing itself to the risk that the funds were used for bribery or embezzlement. Notably, the complaint does not allege that the funds were actually used to violate the FCPA’s anti-bribery provisions or that any employees knew or intended that they might be used in that fashion. Rather, Oracle’s failure to seek transparency in third party payments or to audit distributor margins indicated a lack of proper controls. See SEC Release 2012-158 (Aug. 16, 2012). SEC v. Oracle Corp., No. 12-cv-4310, complaint (N.D. Cal. Aug. 16, 2012).


In Sullivan v. Harnisch, 969 N.E.2d 758 (N.Y. 2012), the plaintiff was the Chief Compliance Officer for two hedge fund firms. He alleged that, in that role, he raised objections to the majority owner regarding sales the majority owner had made for the benefit of himself and family members, from which the firms’ clients were excluded. Thereafter, the plaintiff was terminated and filed a wrongful discharge claim under New York law. The court held that plaintiff was an at-will employee, and as such, he could be terminated for any reason subject to certain exceptions. One of those exceptions applies where a member of the bar is dismissed for complying with ethical obligations to report misconduct by one of his colleagues. The plaintiff argued that his role as Chief Compliance Officer raised similar ethical obligations. The court found that the exception was narrow and that plaintiff’s role as Chief Compliance Officer did not involve ethical obligations so closely related to his employment duties that the two could not be separated. Accordingly, the court found that the exception did not apply and dismissed the lawsuit.

Failure To Reveal Internal Investigation Was Not Securities Fraud.

In In re Boston Scientific Corp. Securities Litigation, 868 F.3d 21 (1st Cir. 2012) (No. 11-2250), a putative class action suit was brought by shareholders, in which they alleged that
several of the corporation’s public filings and statements were materially misleading for failure to reveal the existence of an internal investigation that led to the dismissal of 10 sales representatives and a Divisional Vice-President of Sales. The investigation had examined compliance with internal policies concerning trips with customers in which food and entertainment spending limits were exceeded. The court dismissed plaintiffs’ securities fraud claims, finding that there was no duty to disclose an investigation that was ongoing and with an uncertain outcome, and that the termination of the employees was not material in light of the size of the sales force and other factors that contributed to a loss in income.

SEC Announces First Whistleblower Award Under Dodd-Frank Act.

The Securities and Exchange Commission has announced the first award under the Dodd-Frank program providing for awards to whistleblowers who share original information that leads to a successful SEC enforcement action. Order Determining Whistleblower Award Claim, Exchange Act Release No. 67,698 (Aug. 21, 2012). The identity of the whistleblower and the defendant were not revealed. The SEC stated that the whistleblower “provided documents and other significant information that allowed the SEC’s investigation to move at an accelerated pace and prevented the fraud from ensnaring additional victims.” The enforcement action led to a court ordering over $1 million in sanctions, about $150,000 of which has been collected to date. The whistleblower received 30 percent of that amount; the award will increase if additional money is collected. The SEC noted that it did not approve a second individual’s claim involving the same matter because that individual’s information did not lead or significantly contribute to the enforcement action.

SEC, ドッドフランク法に基づく内部通報者への初めての賞を発表

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