MASSBAR ASSOCIATION

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MBA COMPLEX COMMERCIAL LITIGATION SECTION NEWSLETTER WINTER 2015

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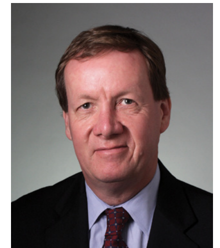
Look throughout this issue for photos from the ComCom Kick-off Reception held Wednesday, Nov. 5, 2014.

MESSAGE FROM THE CHAIR



PAUL E. WHITE
Sugarman, Rogers, Barshak and Cohen PC

I am truly honored to serve as the chair of the newly formed Complex Commercial Litigation Section (colloquially known as "ComCom"). I invite you to join us as we pursue our mission of becoming the premier bar association section for lawyers across the state who handle complex matters in the different fields of business litigation.

Those who represent business litigants are fully aware of the myriad business litigation challenges that their clients face, and it is the diversity of those issues that led us to structure ComCom with three separate committees. The committees cover the practice areas of Business Litigation, Intellectual Property, and Bankruptcy and Insolvency. As you can see from the format of this inaugural newsletter, the committees drive the core activities of our section. They provide content for our newsletter, *ComCom Quarterly*; devise and run continuing legal education programs for our members; and plan our Annual Symposium. We have an ambitious schedule for the coming year, which will elevate the profile of our section within the legal community and in those state and federal courts across the state where complex business litigation claims are handled.

ComCom will also serve as a source of ideas and action for resolving business disputes fairly and efficiently. In an era when business competition is increasingly intense, our clients demand fair value for their legal services. Fair value means that the quality services they are entitled to expect will be delivered in an efficient, cost effective fashion. Thus, one of the immediate goals for our section is to provide input to the recently formed Massachusetts Superior Court committee headed by Judge Raymond Brassard that has been tasked with implementing one of Chief Justice Gants' key judicial initiatives for this year: the development of effective voluntary alternatives within the court system to a full-scale jury trial. Such trials are not always well-suited for the resolution of "document-heavy" disputes that frequently present complex issues with which the average lay juror has little familiarity.

This initiative presents a unique opportunity to find more efficient mechanisms for resolving business disputes than the standard jury trial. Options to consider include variants on the current "Pilot Program" in the BLS that puts limits on the scope of discovery, as well as abbreviated "mini-trials." But whatever options the Superior Court ultimately makes available, they will only be accepted by business litigants as an alternative to the traditional offering of full discovery followed by a jury trial if they are supported and endorsed by business litigators to whom clients turn with their business disputes. The ComCom Section Council therefore plans to take a leading role in developing some recommended alternatives to trials that can be considered by the Brassard Committee as it seeks additional pathways for the fair, cost-effective resolution of business disputes.

I urge all of our members to share your views on this important subject by posting any ideas you have (and responding to the ideas of others) on the My Bar Access discussion board at http://access.massbar.org/home. We need your input on this important initiative. We can most effectively serve our own clients by making sure we give them the best means for fairly and efficiently resolving their business disputes.

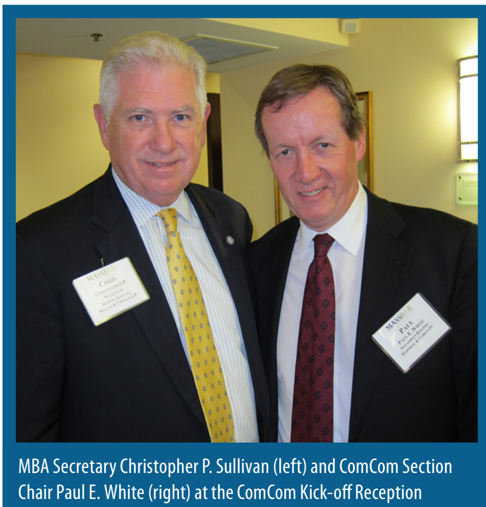
As our section gets underway, we are taking steps to welcome new members and get them involved in leadership roles. Each of the committees has its own leadership structure — and there are numerous opportunities available to lawyers to get involved in the different activities of each committee. We particularly welcome and encourage young lawyers to join this vibrant new section. You will meet other business litigators from different firms, many with different practice areas, but all sharing a common commitment: to improve the quality of justice, promote collegiality within the profession, and provide the ideas and action that will shape our commonwealth's response to the challenges of business litigation in tomorrow's world. We hope you will join us as we pursue these important endeavors.

CLAWBACK CLAIMS AFTER THE COLLAPSE OF A PONZI SCHEME

BY ERIC J. SILVA

After the collapse of a Ponzi scheme, a trustee or receiver is typically appointed to administer an estate with minimal liquid assets and a number of duped investors. In many cases, legal claims are the primary assets from which to potentially provide a fair and equitable distribution to investors and other creditors.

Other than claims against insiders and third parties that may also be pursued by certain investors, a bankruptcy trustee may pursue clawback actions against investors who received transfers prior to the collapse of the scheme. One theory underlying a clawback claim is that the transfers were actual fraudulent transfers that may be recovered and used in an equitable distribution. This article explores certain characteristics of Ponzi scheme clawback claims sounding in actual fraudulent transfer liability.



MBA Secretary Christopher P. Sullivan (left) and ComCom Section Chair Paul E. White (right) at the ComCom Kick-off Reception

1. OVERVIEW OF A PONZI SCHEME

A Ponzi scheme is an investment fraud with little or no legitimate earnings whereby proceeds from new investments are diverted to pay purported returns to earlier investors in order to cultivate the illusion of a profitable enterprise and encourage further investment. Certain investors may receive funds in excess of their principal investment during the course of the scheme. Amounts paid from a Ponzi scheme in excess of principal are fictitious profits since the funds are not earned on any legitimate investment and are paid at the expense of other defrauded investors who receive less than the full amount of their principal investment. The scheme tends to collapse when the inflow of funds from new investments is insufficient to satisfy withdrawal requests.

The operator of the scheme will often fabricate rates of return, account statements, and other information in order to further the fraud and attempt to avoid detection. For example, the account statements in the Madoff Ponzi scheme did not reflect actual securities that could be liquidated and were entirely fictitious. *See In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 234 (2d Cir. N.Y. 2011).

Rather than relying on fabricated documents, a trustee will often obtain records from third parties and develop a database of transfers between accounts. Claims of investors are ultimately determined based on the difference between the verifiable amount invested and the amounts received prior to the collapse of the scheme. In addition to being used to verify claims submitted by investors, the database is also used to identify parties who received fictitious profits from the scheme.

MBA member Eric J. Silva is an attorney with James C. Frenzel PC in Atlanta and a member of the State Bar of Georgia. His practice is dedicated to representing parties in transactions involving distressed assets, receivers in receiverships, and creditors, committees, and court-appointed trustees in commercial bankruptcy and insolvency matters.

2. OVERVIEW OF AN ACTUAL FRAUDULENT TRANSFER

Pursuant to 11 U.S.C. §§ 548(a)(1)(A) and 550, a trustee can avoid and recover a transfer of an interest of the debtor in property that was made within two years prior to the petition date with actual intent to hinder, delay or defraud any creditor. Using the strong-arm powers provided in 11 U.S.C. § 544, a trustee can assert similar fraudulent transfer claims under state statutes that may allow the trustee to avoid and recover transfers that were issued more than two years before the petition date. While 11 U.S.C. § 546(e) is expressly inapplicable to claims of actual fraud under Section 548(a)(1)(A), certain clawback defendants who received either a margin or settlement payment have invoked

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IP LICENSEE RIGHTS ECLIPSE FOREIGN INSOLVENCY LAW IN U.S. CHAPTER 15 BANKRUPTCY PROCEEDING

BY TIMOTHY J. DURKEN, JAGER SMITH PC

The U.S. Supreme Court denied a petition for writ of certiorari on Oct. 6, 2014 and let stand the Fourth Circuit Court of Appeals' benchmark decision in *Jaffe v. Samsung Electronics Co. Ltd.*, 737 F.3d 14 (4th Cir. 2013). The Fourth Circuit's decision in *Jaffe* rejected the application of foreign insolvency law to a U.S. Chapter 15 bankruptcy proceeding and in so doing acted to protect the intellectual property rights of U.S. patent licensees of a foreign debtor.

In *Jaffe*, Qimonda AG, a German corporation undergoing insolvency proceedings in Germany, filed for an ancillary proceeding in a U.S. Bankruptcy Court to obtain certain benefits available under Chapter 15 of the Bankruptcy Code. Qimonda was a semiconductor manufacturer and its principal assets consisted of 10,000 patents, including about 4,000 U.S. patents. The patents were subject to cross-license agreements with Qimonda's competitors to avoid the infringement risk caused by a "patent thicket" of 420,000 overlapping patent rights in the industry. Qimonda's German administrator sought to reject the cross-licenses of the U.S. patents paid for in kind by licensees and re-license the patents in exchange for cash royalties.

At issue was whether Bankruptcy Code § 365(n) was applicable in Qimonda's Chapter 15 proceeding. Under Section 365 of the Bankruptcy Code, debtors generally have the right to reject burdensome executory contracts, but there are exceptions. To protect the intellectual property rights of licensees, Congress enacted § 365(n) in 1988 to allow a licensee to elect to retain its intellectual property rights in the event its licensor files for bankruptcy. German insolvency law has no similar protection and allows debtors to reject such license agreements. The question in *Jaffe* was which nation's law would control — the law of Germany or the United States?

In 2005, Congress replaced a largely dis-

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DOES THE DOCTRINE OF INEQUITABLE CONDUCT STILL HAVE LIFE AFTER *THERASENSE*?

BY THOMAS P. MCNULTY

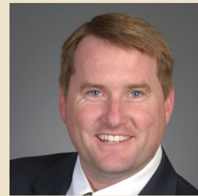
In May 2011, the *en banc* Federal Circuit Court of Appeals sought to cut back on the incidence of inequitable conduct pleadings in patent litigation. The court made significant changes to the doctrine, with the express goal of making inequitable conduct harder to prove. *Therasense, Inc. v. Becton, Dickinson & Co.,* 649 F.3d 1276 (Fed. Cir. 2011) was crafted to reduce allegations of inequitable conduct. But has it really?

Inequitable conduct occurs when an applicant for a patent, or the attorney for an applicant, breaches the duty of candor and good faith owed to the U.S. Patent and Trademark Office, generally by failing to submit or mischaracterizing known material prior art or by affirmatively misstating material facts, through argument or through affidavits. Inequitable conduct is a powerful weapon for an accused infringer because a successful claim renders the entire patent unenforceable, including claims not being asserted in the litigation. Such a finding may also render other patents within the same family unenforceable.

Inequitable conduct is proven by showing that an applicant or attorney withheld or misrepresented material information with the intent to deceive the patent office. *Therasense* raised the materiality standard to "but-for" materiality — at least one claim of the patent would not have issued had the information been in the hands of the examiner. *Therasense* also heightened the intent standard, doing away with the prior "sliding scale" analysis whereby the higher the materiality, the lower the showing of intent to find inequitable conduct. Under *Therasense*, materiality can no longer be used as evidence of intent.

Therasense arose from the Federal Circuit's belief that inequitable conduct allegations were being "overused to the detriment of the public … bogging down patent litigation." The decision stated that allegations of inequitable conduct "plagued not only the courts but also the entire patent system," required patent prosecutors to "bury PTO examiners with a deluge of prior art references," and appeared in "nearly every patent suit." In support of this list of horrors, however, the court cited only two studies, one estimating that 80 percent of patent cases included inequitable conduct allegations, and the other finding inequitable conduct allegations in about 40 percent of all patent cases.

Further analysis suggests that the Federal Circuit may have overstated the problem. At the appellate level, the Federal Circuit historically addressed inequitable conduct only 12.5 times per year and actually found inequitable conduct to have occurred only 2.5 times per year.[1] Even at the District Court level, studies suggest that inequitable conduct was pled at levels much lower than the 40 percent rate suggested by the *Therasense* court.[2] The *Rantanen* study suggests that inequitable conduct pleadings actually peaked in 2008, appearing in only about 30 percent of all patent cases that year, and dropped to about 20 percent by 2011, the last full pre-*Therasense* year. This post-2008 drop may actually have been the result of *Exergen Corp. v. Wal-Mart Stores Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009), which heightened the pleading requirements for inequitable conduct to correspond with the fraud pleading requirements of Federal Rule of Civil Procedure 9(b), which suggests that the overpleading problem, such as it was, may have already been resolved.



Tom McNulty focuses on intellectual property protection with the firm of Lando & Anastasi LLP, in Cambridge. He has litigated utility and design patents, trade secrets, trademarks and trade dress, and unfair competition claims for both plaintiffs and on the defendants in federal district and appellate courts, and in front of the International Trade Commission.

The *Therasense* decision seems to have affected the frequency at which inequitable conduct becomes an issue in a patent case. There are only 14 post-*Therasense* cases in which inequitable conduct was dealt with substan-

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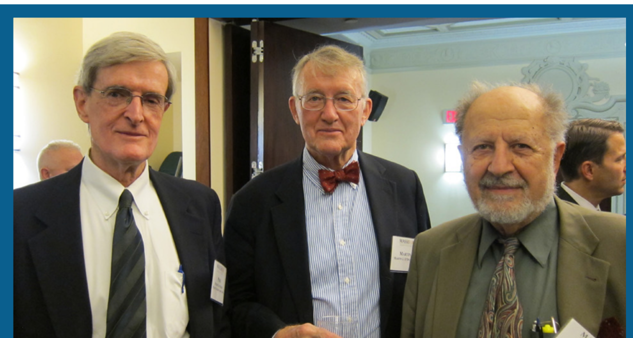

(From left) Philip Saunders, Martin O'Donnell and Jerry Cohen

TWO BIG YEARS FOR PATENT LAW AT THE U.S. SUPREME COURT

BY PAUL CRONIN AND JAMES HALL, NUTTER, MCCLENNEN & FISH LLP

During the last two years we witnessed significant changes in patent law, as the U.S. Supreme Court continued its recent practice of overturning — often unanimously — decisions of the United States Court of Appeals for the Federal Circuit, the sole appellate court commissioned to hear appeals of patent cases. And each of the Supreme Court's six patent decisions also continued the trend of shaping the legal battle zone in favor of accused infringers, and against so-called "patent trolls."

FIVE KEY SUPREME COURT DECISIONS OF 2014

1. Attorney's Fees in Patent Litigation

35 U.S.C. § 285 provides that, in patent litigation, "the court in exceptional cases may award reasonable fees to the prevailing party." The Federal Circuit has construed the phrase "exceptional cases" strictly as involving either "material inappropriate conduct" or cases that are both "objectively baseless" and "brought in subjective bad faith." Naturally, this has resulted in very few cases being found exceptional by district courts, and many district court findings of exceptionality under Section 285 have been overturned by the Federal Circuit's exacting standard. This changed in April, when the Supreme Court decided a pair of cases focused on cost and fee shifting in patent cases. In *Octane Fitness LLC v. Icon Health & Fitness Inc.*, 134 S. Ct. 1749 (2014), the Court was asked to review the Federal Circuit's standard for finding cases exceptional. The Supreme Court unanimously overturned the Federal Circuit and significantly loosened the standard for finding a case "exceptional" under Section 285. Now, in order for a court to do so, a litigant need only show that the case "stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." The court also held that Section 285 demands a simple discretionary inquiry by the District Court, rather than proof by

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AS THE BUSINESS LITIGATION SESSION TURNS 15, WE CELEBRATE THE COURT'S JOURNEY THROUGH NATIONAL CALAMITY, LOCAL DRAMA AND MORE

BY DEREK DOMIAN

Derek Domian is an attorney at Goulston & Storrs PC, whose practice is dedicated to complex business and commercial disputes, real property disputes, professional malpractice and other disciplinary matters, and appellate representation.

Fifteen years ago this October, after years of study and scrapped alternatives, the Business Litigation Session was born. Launched as a two-year pilot program, the session dedicated to the resolution of complex business disputes would waste little time becoming a mainstay of the Massachusetts legal system. The pilot program would graduate into a permanent session of the Superior Court for Suffolk County, its one session would grow into two, its one venue would expand to four, and its respected steward, Judge van Gestel, would be joined by other esteemed members of the bench, two of whom would later rise to the Supreme Judicial Court.

If necessity spurs invention, the Business Litigation Session received two good kicks. First, the Massachusetts bar spent the 1990s and early 2000s watching other jurisdictions devote specialty courts, sessions and judges to the business disputes clogging their judicial systems. Second, a nationwide survey placed Massachusetts at the bottom of nearly every polled category concerning its reputation for handling business litigation. Given the state's highly respected judiciary, the reputation was undeserved, but perception can be reality.

The Business Litigation Session — with active case management and a predictable and thoughtful jurisprudence — quickly rehabilitated Massachusetts' image. While the program was still in its pilot phase, a poll of the Massachusetts bar indicated that over 95 percent of its members would have recommended the Business Litigation Session to colleagues and, perhaps more tellingly, clients.

At 15, it's difficult for any business litigator to avoid the contributions made by the Business Litigation Session to the jurisprudence surrounding business disputes. This jurisprudence reflects the experience of a court born just in time to witness historic events on the national and local stage: the mortgage meltdown that ushered us to the fiscal brink; the largest Ponzi scheme in our nation's history that toppled over investments and lives in Massachusetts; and, of course, the Demoulas saga, whose latest chapter dominated the headlines earlier this year but whose long litigious prologue, as Judge van Gestel recently only half-joked, virtually assured that every judge sitting in the Business Litigation Session had some involvement. In between the high drama the session would catch its breath by adding to the jurisprudence of such bread and butter matters as non-competes and e-discovery. In celebration of the Business Litigation Session turning 15, let's survey the court's journey through matters both momentous and mundane.

1. *Commonwealth v. Fremont Investment & Loan*: *The Simmer Before the Meltdown* (No. 07-4473-BLS1,(Feb. 26, 2008) (Gants, J.), aff'd in *Comm. v. Fremont Invest. & Loan*, 452 Mass. 733 (2008))

February 2008: The fiscal cliff was not yet in vertigo-inducing view. Mortgage-backed securities were not yet known as the singular evil inflicted by Wall Street. Ever so presciently, Judge Gants' decision in *Fremont* would sound the alarm on "the increasing prevalence of mortgage-backed securities" that transferred the lurking risks of subprime mortgage loans from originators to Wall Street investors.

At issue in *Fremont* was a product that had outpaced national and state regulation: mortgage loans with a "teaser" rate significantly lower than the adjustable rate that kicked in two or there years down the road, a high debt-to-income ratio of the borrower, and a loan-to-value ratio of upwards to 100% tolerated by an indifferent originator. The Attorney General sought to enjoin the defendant from foreclosing on these loans. Judge Gants granted the injunction by relying on Chapter 93A's "penumbra" concept of unfairness. Judge Gants needed only to find the essential evil of this new species of mortgage loan — one doomed to foreclosure — embraced by the concept of unfairness reflected

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CHAPTER 93A CLASS CERTIFICATION REQUIRES SHOWING OF COMMON CAUSATION

BY BENJAMIN J. WISH, TODD & WELD LLP

In *Bellermann v. Fitchburg Gas and Electric Light Co.*, No. SJC-11492 (Oct. 30, 2014), the Supreme Judicial Court raised the bar for plaintiffs to certify a class under Chapter 93A, which generally imposes more lenient requirements than class certification under Mass. R. Civ. P. 23(b). It upheld the denial of plaintiffs' motion to certify a class, because it found that the causation of the claimed injuries was not a class-wide inquiry. The court made clear that under Chapter 93A's "similar injury" requirement a prerequisite for certifying a class is class-wide similar causation, even where the injury itself is similar.

Customers of Fitchburg Gas and Electric Light Co. (FG&E) sued FG&E for gross negligence and violations of Chapter 93A, based on FG&E's alleged failure to restore power following a major ice storm in December 2008 for up to two weeks. FG&E knew there were

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(From left) Owen Gallagher, Karen Friedman, Adam Whitney and Mark Bross

NEWS FROM THE COURTS

SUPERIOR COURT: Effective Feb. 2, 2015, the Massachusetts Superior Court has adopted an interim procedure for conducting jury *voir dire* in all counties. The order allows for limited *voir dire* questioning under the supervision of the trial judge, if requested by a Rule 9A motion. Deadlines apply to the Rule 9A motion. Standing Order 1-15 is a "must read" for anyone with a case going to trial in the Superior Court in 2015: www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/standing-order-1-15.pdf.

BUSINESS LITIGATION SESSION: As Judge Thomas Billings rotates out, Judge Edward Leibensperger will join the BLS, sitting in BLS1 beginning in July 2015. Judge Leibensperger was a longtime partner at McDermott, Will & Emery before his 2011 appointment to the Superior Court. Practitioners may be interested in Judge Leibensperger's "Trial Tips" video at www.mcle.org/main/practicetips/. ComCom welcomes Judge Leibensperger, and acknowledges Judge Billings' accomplished service in the BLS.

U.S. DISTRICT COURT: The Judges of the District of Massachusetts recently announced their appointment of Donald Cabell as a magistrate judge sitting in Boston. Magistrate Judge Cabell recently served for two years as the Justice Attaché at the U. S. Embassy in Paris. He previously served for 17 years as an Assistant U.S. Attorney and before that worked as a civil litigator in Boston. ComCom welcomes Magistrate Judge Cabell to the bench. ■

BUSINESS LITIGATION
CONTINUED FROM P. 4

in a different but related statutory prohibition against "high cost" mortgage loans.

Later that year, as the country lunged towards the fiscal cliff on the carcass of mortgage-backed securities, Judge Botsford, an alumna of the BLS and now ruling for the SJC, would uphold Judge Gants' decision, reciting the oft-quoted but suddenly revitalized statement that Chapter 93A does not define unfairness because "there is no limit to human inventiveness in this field."

2. *Askenazy v. Tremont Group Holdings Inc.*: *The Jurisdictional Limits of the Largest Ever Pyramid Scheme* (No. 10-04801-BLS2 (Jan. 26, 2012) (Sanders, J.))

More than 20 Massachusetts investors lost millions when two hedge funds that served as Madoff "feeder" funds went up in smoke with the collapse of Bernie Madoff's Ponzi scheme. The investors not only sued the general partner of the funds, Tremont, but Tremont's upstream parent corporations: Oppenheimer and MassMutual. In making her way through a number of motions to dismiss, Judge Sanders reinforced the limits of upstream jurisdiction.

First, Judge Sanders reiterated that a wholly-owned subsidiary does not automatically confer jurisdiction over an out-of-state parent. That fulcrum only exists "upon a showing tantamount to what is necessary to pierce the corporate veil" — a showing that requires more than ownership or common directors and officers.

Second, Judge Sanders likewise refused to impute "aiding and abetting" liability to MassMutual for Tremont's fraud. Such liability requires "substantial assistance or encouragement to the other party." MassMutual's common ownership and "modest overlap" of senior executives and directors was not enough. *Askenazy* reminds us that liability even for a world-historic fraud has its limits.

3. *National Economic Research Associates Inc. v. Evans*: *Modern Technology Doesn't Trump the Good Old Attorney-Client Privilege, at Least Not Yet* (No. 04-2618-BLS2 (Aug. 3, 2006) (Gants, J.))

Bound by a number of restrictive covenants, Evans desired employment advice from his lawyer. Every bit the modern client, he sought this advice over email. Evans did so discreetly: while he used his work-issued laptop, he communicated over his personal Yahoo email account. Unbeknownst to him, his laptop saved screen shots of his communications to its hard drive. His former employer now had his laptop and his communications.

Judge Gants denied the employer's request for permission to review the attorney-client communications. This denial is significant in two respects. First, it reinforced the expectation of privacy one has in "private" communications with one's lawyer, even when sent and received over a work computer via the Internet. Even though the employer had issued an employment manual pertaining to an employee's network and computer usage, Judge Gants ruled the policy wasn't explicit enough when it came to the employer's right to review the content of private email communications. Second, Judge Gants, confessedly out-of-tune with the modern technology of "screen shots," was very much in-tune with the practicalities of the modern day attorney-client relationship. It's a relationship increasingly conducted over email. Evans makes sure that technology does not surreptitiously take what it gives.

4. *Getman v. USI Holdings Corp.*: *The Not Pro-Business Litigation Session* (No. 05-3286-BLS2 (Sept. 1, 2005) (Gants, J.))

A business court needn't be pro-business. At least, it needn't be pro-employer. The Business Litigation Session hasn't gone out of its way to embrace non-competes. *Getman* typifies this reluctance.

Getman signed a non-compete with his brokerage firm, Hastings-Tapley. Several years later, a "much larger" insurance brokerage firm, USI Holdings, purchased Hastings-Tapley. Getman grew unhappy with his new employer and left. He sought a declaration that the non-compete did not restrict his right to compete with USI. Ruling in Getman's favor, Judge Gants reasoned that the non-compete "materially changed" when the larger firm stepped into the shoes of the smaller one. Judge Gants would go on to partially enjoin Getman from soliciting his former clients at USI, attempting to stake a

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(From left) Judge Mitchell Kaplan, Ben Wish, Julie Green and Joseph Cacace

INEQUITABLE CONDUCT CONTINUED FROM P. 3

tively by the Federal Circuit, or about four per year, much less than the 12.5 per year previously reported. However, of these 14, four cases resulted in a finding of inequitable conduct, with a fifth, *Ohio Willow Wood Co. v. Alps S. LLC*, 735 F.3d 1333, 1337 (Fed. Cir. 2013), overturning summary judgment of no inequitable conduct and remanding for consideration of issues of fact (and on remand, inequitable conduct was found based on withheld and misrepresented information). Thus, the success rate increased, from a finding of inequitable conduct in about 20 percent of pre-*Therasense* Federal Circuit decisions, to about 31 percent of post-*Therasense* decisions.

A look at cases in which inequitable conduct was found reveals a shift away from cases based on the withholding of references towards cases involving material misrepresentations of fact. *Aventis Pharma S.A. v. Hospira Inc.*, 675 F.3d 1324 (Fed. Cir. 2012), the first post-*Therasense* Federal Circuit case to find inequitable conduct, did involve the withholding of material references, but intent was based in large part on inventor testimony found to be misleading and non-credible. In *Intellect Wireless Inc. v. HTC Corp.*, 732 F.3d 1339 (Fed. Cir. 2013), the Federal Circuit found a pattern of deceptive behavior in the submission of false declarations during prosecution and a failure to clearly correct the false statements. Indeed, the court suggested that the submission of false declarations was virtually *per se* material. Likewise, in *Apotex Inc. v. UCB Inc.,* 763 F.3d 1354, 1362 (Fed. Cir. 2014), the Federal Circuit found inequitable conduct in several affirmative acts of the applicant, including concealing knowledge that a prior art product was made by the claimed process, misrepresenting the nature of the prior art product, and filing results of "experiments" in the application when the experiments had not actually been performed. Finally, the panel in *Am. Calcar Inc. v. Am. Honda Motor Co.,* 768 F.3d 1185, 1191 (Fed. Cir. 2014) found inequitable conduct based on the withholding of select information about a disclosed prior art system with which the inventor was quite familiar. By withholding the select information, the applicant effectively misrepresented the nature of the prior art system.

(From left) Jim Harrington, Michelle Schaffer and MBA Secretary Christopher P. Sullivan

In another notable aspect of the *American Calcar* decision, the claims had previously been found valid over the withheld information, which would seem to suggest the information could not meet the "but-for" materiality requirement. The court approved of this seeming contradiction, however, by noting that materiality in this context is judged under the USPTO's standard of examination — namely, that a claim is invalid based on a preponderance of the evidence, giving the claims their broadest reasonable interpretation.

The reduction in the number of inequitable conduct cases per year at the Federal Circuit suggest that *Therasense* may be having the effect sought by the court. Accordingly, at least from the perspective of the Federal Circuit, *Therasense* can be seen as a success. Patent infringement defendants should still consider invoking the doctrine, however, as the increase in success rates at the Federal Circuit suggests that the decline may simply be the winnowing out of the meritless claims.

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1. Jason Rantanen, *Recalibrating Our Empirical Understanding of Inequitable Conduct, IP Theory*, Vol. 3 Iss. 2, Article 3, 110-111 (2013); Lee Petherbridge, Jason Rantanen, Ali Mojibi, *The Federal Circuit and Inequitable Conduct: An Empirical Assessment*, 84 S. Cal. L. Rev. 1293, 1340 (2011).

2. Christopher A. Cotropia, *Modernizing Patent Law's Inequitable Conduct Doctrine*, 24 Berkeley Tech. L. J. 723, 739 (2009) (finding inequitable conduct to have been asserted in about 25 percent of all patent cases filed); Benjamin Brown, *Comment, Inequitable Conduct: A Standard in Motion,* 19 Fordham Intel. Prop. Media & Ent. L.J. 593, 608 (2008) (finding that courts address inequitable conduct in less than 20 percent of reported patent cases); Kevin Mack, Note, *Reforming Inequitable Conduct to Improve Patent Quality: Cleansing Unclean Hands*, 21 Berkeley Tech. L.J. 147, 155056 & tbl. 1 (2006) (determining that, between 2000 and 2004, an inequitable conduct adjudication was found in between 16 percent and 35 percent of reported patent opinions). ■

CHAPTER 93A — CONTINUED FROM P. 4

problems with its ability to respond to the ice storm. It was far behind in trimming tree branches, had failed to comply with Department of Public Utilities' (DPU) planning recommendations, and did not have any plan for a storm as severe as the December 2008 storm.

FG&E incorrectly claimed through public service announcements (PSAs) that power would be restored in "days," when it knew that was not true. Later, FG&E represented through a PSA that there would be "restoration of all primary circuits" by the end of the week of Dec. 16, but failed to explain that did not mean that all its customers would have power.

In a proceeding before the DPU, the DPU found "numerous and systematic" deficiencies in how FG&E prepared for and responded to the storm. It found that each of FG&E's myriad failures was a violation of its statutory obligation to provide safe and reliable service. The Court accepted the factual findings of DPU as offensive collateral estoppel against FG&E.

Seeking class certification under Chapter 93A, which requires a "similar injury," plaintiffs argued that they had suffered two injuries. First, they contended that they suffered a delay in restoration of power. Second, they claimed that they were unable to plan for the impact of the storm. Notably, Chapter 93A's class certification allows class certification where there is a "similar injury," Mass. R. Civ. P. 23(b) imposes additional requirements.

The court found that neither of the injuries plaintiffs alleged to have suffered satisfied Chapter 93A's similar injury requirement. It explained that under that requirement "plaintiffs must show that they can establish causation of such . . . similar injury on a class-wide basis." The claimed delay in restoration in power was not "class-wide" because there were many individualized reasons a customer's power may not have been restored and as to some customers power may have been restored promptly. As to the claimed inability to plan, as well, the causation question was individualized. The court found such an injury would require particularized inquiries into whether the statements of FG&E actually impacted the planning of each putative class member. For the same reasons, the court also upheld the trial court's denial of the motion for class certification as to the class for gross negligence under Mass. R. Civ. P. 23(b).

The decision demonstrates the court's inclination to read into Chapter 93A the class certification requirements of Mass. R. Civ. P. 23(b), which includes the requirement that common questions of fact and law predominate. Chapter 93A does not incorporate such a requirement, but by focusing on the particular manner of causation as part of the "similar injury" query, the Court conducted an analysis similar to that under Mass. R. Civ. P. 23(b). ■

CLAWBACK CLAIMS
CONTINUED FROM P. 2

the Section 546(e) safe harbor to obtain the dismissal of clawback claims asserted under state law statutes that would otherwise provide a reach back period longer than two years. *See In re Bernard L. Madoff Inv. Secs. LLC*, 2014 U.S. App. LEXIS 23032 (2d Cir. 2014). Pursuant to 11 U.S.C. § 546, a suit under Sections 544 or 548 must be filed before the later of two years after the order of relief or one year after the election or appointment of the first trustee.

3. ACTUAL INTENT AND PONZI PRESUMPTION

Actual intent is determined based on the intent of the debtor without reference to whether the transferee was aware of the scheme. In non-Ponzi cases, other than in rare instances where the debtor admits actual intent, a plaintiff has the difficult task of establishing actual intent by demonstrating the presence of certain badges of fraud as circumstantial evidence of actual intent. In a Ponzi case, proof of the existence of a Ponzi scheme is sufficient to demonstrate actual intent to defraud and, as such, transfers made in furtherance of a Ponzi enterprise are presumptively fraudulent. *See Gillman v. Russell (In re Twin Peaks Fin. Servs.)*, 2014 Bankr. LEXIS 4172 at *10 (Bankr. D. Utah Sept. 30, 2014). The reasoning behind the presumption is that the perpetrator must know that the scheme will eventually collapse when issuing payments and that the nature of the scheme will result in investors losing money. *See Ashmore v. Taylor*, 2014 U.S. Dist. LEXIS 162147 at *21 (D.S.C. Nov. 18, 2014). A guilty plea of the operator of the scheme is often sufficient to establish the existence of a Ponzi scheme.

4. GOOD FAITH TRANSFEREE DEFENSE

With the Ponzi presumption establishing the requisite intent for an actual fraudulent transfer, the transferee has the burden of establishing a defense in order to avoid liability. While a party may increase the burden on a trustee by disputing: 1) the existence of a Ponzi scheme; 2) whether property of the debtor was transferred; or 3) whether the court has jurisdiction, investors tend to rely on the good faith defense to protect certain transfers. Pursuant to 11 U.S.C. § 548(c), a transferee may avoid rescission of a transfer to the extent that the transferee can demonstrate that the transfer was for value and in good faith.

A. Value

An investor can generally demonstrate value to the extent of the amount of their principal investment. Payments in excess of the amount of principal invested are deemed fictitious profits since such payments are not the return on a legitimate investment. Accordingly, even though disgorgement of fictitious profits may cause significant hardship for an innocent investor, an investor cannot generally establish value as to amounts received in excess of the principal amount invested. *See Donell v. Kowell*, 533 F.3d 762, 776 (9th Cir. 2008). Courts are divided in their treatment of claims arising from payments for contractual interest, but some courts have indicated that each payment of interest deepens the insolvency of the debtor without any corresponding value to the debtor.

(From left) Judge Janet Sanders, MBA Past President Robert L. Holloway, Judge Christine M. Roach, Chief Justice of the Superior Court Judith Fabricant and retired Judge Margaret Hinkle

B. Good Faith

The Bankruptcy Code does not define good faith and courts interpret the term differently. Good faith is generally demonstrated where an investor withdrew funds for personal reasons rather than concern for the debtor. A clear example of a transferee who does not act in good faith is a party who was aware of and cooperated in the scheme. Good faith has been construed to have an objective component. In determining good faith, courts consider whether the transferee: 1) had information to place the transferee on inquiry notice of the fraudulent purpose of the debtor; and 2) upon being placed on inquiry notice, performed a diligent investigation. *See Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund LLC (In re Bayou Group LLC)*, 439 B.R. 284, 308-317 (S.D.N.Y. 2010). An educated and experienced party is generally held to a higher standard of due diligence. Furthermore, an investor may not be able to establish good faith under circumstances where a reasonable prudent investor should have known of the fraudulent purpose of the debtor.

In the Madoff bankruptcy case proceeding under SIPA, the court: 1) rejected the inquiry notice approach since an investor has no inherent duty to investigate under SIPA; and 2) shifted the burden to the trustee to establish lack of good faith in the form of actual knowledge of the fraud or willful blindness to red flags indicating a high probability of fraud. *See SIPC v. Bernard L. Madoff Inv. Sec. LLC*, 516 B.R. 18 (S.D.N.Y. 2014). Given that Ponzi schemes are often difficult to discover as evidenced by the failure of regulators to identify the Madoff Ponzi scheme for many years, the approach adopted in the Madoff case may provide more equitable treatment to innocent investors.

5. CONCLUSION

While an investor who can demonstrate good faith may only be required to return fictitious profits, an investor who did not act in good faith may be subject to additional liability. Some commentators object to clawbacks on the basis that clawbacks penalize investors who were lucky to withdraw funds prior to the collapse of the scheme. Despite such objections, trustees unwinding Ponzi schemes will continue to pursue clawbacks in order to prohibit certain parties from benefiting at the expense of other creditors. Investors and their counsel are best served by being aware of the potential liability. ■

HOW TO SUBMIT ARTICLES

To inquire about submitting an article to the *ComCom Quarterly*, please contact Brian Bialas (bbialas@beckreed.com) or Jim Harrington (jsharrington@rkmc.com).

IP LICENSE RIGHTS
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cretionary cross-border insolvency framework with the enactment of Chapter 15 to incorporate the Model Law on Cross-Border Insolvency into the Bankruptcy Code and to encourage cooperation with foreign courts and increase legal certainty for parties in interest. Chapter 15 authorizes an "ancillary" U.S. Bankruptcy Court proceeding to reach parties in interest and property in the United States to complement and assist a "foreign main [insolvency] proceeding" in the country where the debtor has "the center of its main interests."

The bankruptcy provisions at issue in *Jaffe* were Sections 1521, 1522 and 1506. Pursuant to Section 1521(a), the Bankruptcy Court may, at the request of the foreign representative, grant any appropriate relief, including "entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative." In turn, Section 1522(a) provides that "[t]he court may grant relief under section … 1521 … only if the interests of the creditors and other interested parties, including the debtor, are sufficiently protected." Finally, Section 1506 allows the Bankruptcy Court to refuse to take any action governed by Chapter 15 if "manifestly contrary to the public policy of the United States."

The Fourth Circuit held that "as a prerequisite to awarding any § 1521 relief, the court was required to ensure sufficient protection of the creditors and debtor" under § 1522. The Fourth Circuit rejected the German administrator's arguments that §1522(a) protection was merely procedural and that Chapter 15 "requires U.S. courts to defer to foreign substantive law" except under the "narrow exception" provided by § 1506. The court reviewed the *Model Law's Guide to Enactment* and concluded that both § 1506 and § 1522 were "safeguards designed to ensure the protection of local interests." Accordingly, the Fourth Circuit joined the Fifth Circuit in *In re Vitro SAB De CV*, 701 F.3d 1031 (5th Cir. 2012) and held that discretionary relief under § 1521 could only be granted after balancing the interests of both the foreign debtor and creditors and parties in interest, including creditors and parties in interest in the U.S., as required by § 1522(a).

The Fourth Circuit affirmed the Bankruptcy Court's balancing analysis and conclusion that affording U.S. licensees the protection of § 365(n) was a necessary condition for granting the foreign representative the power to administer the U.S. patents. The Bankruptcy Court properly considered the immediate holdup threat and the potential future destabilization of the licensing regime in the semiconductor industry, taking into account the substantial investment cost of research and manufacturing facilities made in reliance on the cross-licenses. On the other side, the Bankruptcy Court found that the foreign representative could still realize value (although less) from the U.S. patents by licensing to parties that did not already have a license and would merely be prohibited from bringing infringement actions against those entities that the company had previously promised not to sue.

The Bankruptcy Court relied on Section 1506 as an independent ground for its decision because the potential harm to licensees of U.S. patents would threaten to "slow the pace of innovation" in the United States to the detriment of its economy. Notably, the Fourth Circuit did not similarly rely on Section 1506, but did recognize that its holding furthered Section 365(n)'s purpose to eliminate "a burden on American technological development that was never intended by Congress."

The Fourth Circuit further found that application of § 365(n) was not an impermissible application of U.S. law extraterritorially because it was limited to the administration of Qimonda's assets within the territorial jurisdiction of the United States.

The Fourth Circuit's decision provides comfort and protection to licensees holding U.S. patent licenses from foreign licensors. More certainty would be provided if the "Innovation Act," which would incorporate the results of *Jaffe* and expressly apply Section 365(n) to Chapter 15 proceedings, eventually becomes law; the "Innovation Act" bill passed the United States House of Representatives in 2013, but has not passed the Senate. More broadly, the *Jaffe* and *Vitro* decisions may support limiting the application of foreign insolvency law in future ancillary Chapter 15 proceedings as Bankruptcy Courts strive to balance the interests of foreign debtors against those of parties or property located in the United States. ■

BUSINESS LITIGATION — CONTINUED FROM P. 4

practical remedy on the sometimes metaphysical distinction between an employer's and employee's goodwill and between solicitation and merely answering a client's call. Ultimately, perhaps, *Getman* signals a court neither pro-employer nor pro-employee, but pro-commerce.

5. *Demoulas v. Demoulas Super Markets Inc.*: *Not Every Tragic Drama Requires a Chorus* (No. 03-3741-BLS (Aug. 2., 2004) (van Gestel, J.))

(From left) Damian LaPlaca, Ann Lamport Hammitte and Tom McNulty

Long before Arthur T. became the populist rock star CEO, adored by his employees and envied by every other CEO in America, Arthur T. wanted out of Demoulas. He requested and received permission from Demoulas' Board of Directors to transfer his company stock to his wife so that he could resign from Demoulas, pack up his fiduciary duties, and pursue his "own interests within the same type of business" as Demoulas. His cousin, Arthur S., wasn't thrilled about this arrangement. He sued to preserve his cousin's fiduciary obligations. Arthur S. didn't bother demanding this derivative relief from the Board of Directors. The question before Judge van Gestel was whether the demand requirement of Mass. R. Civ. P. 23.1 had been excused, that is, whether Arthur S. had sufficiently alleged and established the "interestedness" of the five defendant directors.

Each of the five defendant directors took his turn at center stage as Judge van Gestel scrutinized his impartiality. After exhaustive examination, each came away vindicated. Judge van Gestel then reviewed the basic precepts of corporate governance. Chief among them: "the board of directors should set the corporation's policy, including the decision whether to pursue a lawsuit." This is the doctrinal hook Judge van Gestel deftly used

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PATENT LAW — CONTINUED FROM P. 3

"clear and convincing evidence" as previously required by the Federal Circuit. Although the Supreme Court indicated that exceptional cases should still be "rare," this decision substantially relaxes the requirements for finding a case exceptional.

In *Highmark Inc. v. Allcare Health Management System Inc.*, 134 S. Ct. 1744 (2014), decided the same day as Octane Fitness, the Supreme Court loosened the standard for review of a district court's findings of exceptionality under Section 285. Under the Federal Circuit's standard, findings of exceptionality were reviewed *de novo*. The Supreme Court lowered the standard to abuse of discretion. This change in the standard of review complements the holding in *Octane Fitness*, and should give district courts greater confidence to find meritless cases exceptional by making it more difficult for the Federal Circuit to overturn their decisions on this issue. In fact, observers are noting that there indeed has been a noticeable uptick in exceptional case findings, and awards of attorneys' fees, since *Highmark* and *Octane Fitness* issued.

2. Indirect Infringement

35 U.S.C. §§ 271(b) proscribes "indirect infringement" of a method patent by "inducing" others to practice its claims with knowledge of the patent. It has been long established that a finding of indirect infringement requires, among other things, a single direct infringer in the first instance. That is, there can be no indirect infringement without a finding of direct infringement. In August 2012, the Federal Circuit abrogated this rule, finding *en banc* that liability for induced infringement under Section 271(b) may be found even if a single actor does not perform all of the steps of a claimed method, so long as all of the steps are performed by *someone*. *Akamai Technologies Inc. v. Limelight Networks Inc.*, 692 F.3d 1301 (Fed. Cir. 2012). Limelight Networks filed a petition for Certiorari with the Supreme Court, which was subsequently granted. In June, the Court decided the case of *Limelight Networks Inc. v. Akamai Technologies Inc.*, 133 S. Ct. 2879 (2014), unanimously reiterating the rule that direct infringement of method claims can only be accomplished by a single party. In doing so, it also reinstated the principle that liability for induced infringement must be predicated on direct infringement — all of the infringing acts being performed by a single person or entity. As a result, patent asserters again must first prove that a single party practices each and every limitation (or step) of a method claim before it can go on to show that an alleged infringer indirectly infringes, such as by inducing infringement. This will be problematic for many network software claims, which often require functionality on both a client computer and a server computer, which are often under the control of different parties.

3. Indefiniteness

35 U.S.C. § 112 requires that a patent specification "conclude with one or more claims particularly pointing out and distinctly claiming" the invention. Claims that fail to meet this requirement are said to be indefinite, and therefore invalid. The Federal Circuit formulated a strict test for indefiniteness that requires a finding, by clear and convincing evidence, that such claims be "insolubly ambiguous," such that they are not amenable to any reasonable construction. In June, the Supreme Court soundly rejected this formulation of the test for patent indefiniteness. In *Nautilus Inc. v. Biosig Instruments Inc.*, 134 S. Ct. 2120 (2014), the Court held that the Federal Circuit's test, at least as stated, was too lenient toward patent owners and created a "zone of uncertainty" around ambiguous claims that threatened to stifle competition. As a result of this case, a patent's claims are not indefinite unless "its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." The Supreme Court remanded the case back to the Federal Circuit for a factual determination of whether the patent claims at issue are invalid as indefinite under the new standard.

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BUSINESS LITIGATION — CONTINUED FROM P. 8

to avoid another judicial foray into the Demoulas saga. In matters of business judgment, the proper role of the court — "whose total knowledge of what makes good business sense is enormously limited" — is to remain silent. *Demoulas* pays tribute to the business judgment rule. It therefore also pays tribute to those poor directors "who struggle to act in [Demoulas'] best interest in the midst of a familial rugby scrum." Judge van Gestel's jurisprudential contribution is remaining on the sidelines.

* * *

The major jurisprudential contribution of the Business Litigation Session over the past 15 years has been proving itself up to the task of its times, and doing so in impressive fashion. The mortgage crisis is still working itself out in litigation and in ever-evolving doctrine. Electronic discovery continues to thump its chest as the ultimate example of meta-litigation — litigation over litigation — that begs for reasonable restraint. And while Arthur T.'s recent purchase of Demoulas may serve as the epilogue to a long business drama, businesses with complex relationships between the personalities running them will continue to rise and fall, prosper and deteriorate, and generate new disputes. As these seasons of change usher in the next 15 years, the Business Litigation Session will undoubtedly continue to leave its mark on the business landscape in Massachusetts. ■

ComCom Kick-off Reception

PATENT LAW — CONTINUED FROM P. 9

4. Patentable Subject Matter

35 U.S.C. § 101 provides that anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor…." Longstanding judicial precedent finds three exceptions to this rule: laws of nature, natural phenomena and abstract ideas are not patentable. In June, the Supreme Court issued perhaps its most pivotal patent decision of the year in *Alice Corporation Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014), a case testing the breadth of the exceptions to Section 101. Although the language of that statute seemingly reads broadly to allow almost any type of invention, previous Supreme Court decisions have generally, but narrowly, expanded their scope. In this case, the Court applied its previous reasoning from *Mayo Collaborative Services v. Prometheus Laboratories Inc.*, 132 S. Ct. 1289 (2014), which involved the issue of the patentability of natural phenomena, to the question of the patentability of abstract ideas. Using the approach set forth in *Mayo*, the Court prescribed a two-part test that requires something more than implementation of an abstract idea on a generic computer. Although the "something more" element of the test is ambiguous and seemingly difficult to apply, district courts have subsequently used *Alice* to invalidate numerous software patents.

THE FIRST MAJOR SUPREME COURT DECISION OF 2015

5. Patent Claim Construction / Standard of Review

On January 20, the Supreme Court decided the case of *Teva Pharmaceuticals USA Inc. v. Sandoz Inc.*, 574 U.S. — (2015), which presented the question of the proper standard of review for factual findings by district courts during patent claim construction. The Federal Circuit, the Nation's sole appellate court for cases arising under the patent statute (Chapter 35 of the United States Code), has long held that claim construction rulings, including underlying factual findings, are reviewed *de novo* (that is, without deference to the district court). The Supreme Court has now partly upended that rule, holding that determinations of fact made by district courts must be reviewed for abuse of discretion. The Court left alone, however, the existing *de novo* standard of review for the ultimate legal determination of patent claims' meanings.

While the Court noted that "[i]n some instances, a factual finding will play only a small role in a judge's ultimate legal conclusion about the meaning of [a term in a patent claim]," in other cases "a factual finding may be close to dispositive of the ultimate legal question of the proper meaning of the term in the context of the patent." In either case, "the ultimate question of construction will remain a legal question."

Because the case before it presented a potentially dispositive factual dispute regarding the meaning of a particular term to persons skilled in the art, and because the Federal Circuit overturned the district court's determination of that dispute under the de novo standard, the Court has remanded the case back to the Federal Circuit with the instruction to apply the less stringent abuse of discretion standard to the district court's factual finding.

These cases have altered the legal landscape for patent owners and practitioners. With at least one significant case decided this year, this trend may continue. ■

UPCOMING EVENT: IP MEDIATION PANEL

THURSDAY, FEB. 19
2–5 P.M.
MBA, 20 WEST ST., BOSTON

The ComCom Section, IP Litigation Committee and JAMS Boston are delighted to host a panel discussion on mediation for a delegation of 18 South Korean attorneys, mediators and arbitrators. The panel discussion will focus on mediation in the intellectual property context.

We are delighted that JAMS asked ComCom and the IP Litigation Committee to lend its expertise in the alternative resolution of intellectual property disputes to bring this program to fruition.

A wine and cheese reception will immediately follow.

All MBA members are invited to attend.

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