

## Message from Our Managing Partner

In this edition of *Detroit Update*, we turn to business and financial matters.

First, Robert Ludolph and Mary Deon explore how “whistleblower” laws affect the workplace, touching both on how the burden of proof is on the employee and ways employees are protected from retaliation from employers.

We spotlight a novel intellectual property case Pepper argued (and prevailed in) before the ITC, helping a client assert, then sell, its patent rights.

Also, David Stratton and Deborah Kovsky-Apap caution “buyer beware,” as they report on a court ruling that denied a break-up fee for a stalking-horse buyer in a bankruptcy sale.

Online, Pepper has partnered with The Deal on a podcast series and our first edition explores midmarket pharma and health care deals, and we note the latest offerings among Pepper’s Indian Series, Canadian Series, health care and life sciences webinars.

As always, we welcome comments, questions and suggestions from our readers.

Thomas P. Wilczak, Managing Partner

The material in this publication was created as of the date set forth above and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship. Please send address corrections to [phinfo@pepperlaw.com](mailto:phinfo@pepperlaw.com). © 2010 Pepper Hamilton LLP. All Rights Reserved.

## Understand How Whistleblower Laws Affect Employers, Employees

ROBERT C. LUDOLPH | [LUDOLPHR@PEPPERLAW.COM](mailto:LUDOLPHR@PEPPERLAW.COM)

MARY K. DEON | [DEONM@PEPPERLAW.COM](mailto:DEONM@PEPPERLAW.COM)

THIS ARTICLE FIRST APPEARED IN THE FEBRUARY 2010 ISSUE OF *HR SPECIALIST: PENNSYLVANIA EMPLOYMENT LAW* ([HTTP://WWW.THEHR SPECIALIST.COM/HRS/LEARNMOREHRPA/](http://www.thehrspecialist.com/HRS/LEARNMOREHRPA/)). IT IS REPRINTED HERE WITH PERMISSION.

Whistleblower statutes are designed to protect employees who report their employers for violating civil regulations or criminal laws. But that can seem like a risky proposition for employees, who may fear that reporting their employer to the authorities could cost them their jobs.

That’s why whistleblower laws exist: To protect the public from unlawful or fraudulent conduct, they prohibit retaliation against employees who complain to public agencies about employer actions that may create a significant danger to the public health or safety or that otherwise may be a crime or regulatory violation.

Those laws also provide monetary damages for people who have lost their jobs after having “blown the whistle.”

Some states, such as Pennsylvania, only protect public employees from retaliation for complaining about their employer violations. Pennsylvania courts, however, have reasoned that the protections of its whistleblower law extend to employees of health care providers and other private organizations that receive public monies administered by the Commonwealth. Other states, like California and New Jersey, extend those protections to both public and private employees who step forward to report their employers.

This publication may contain attorney advertising.

### in this issue...

- 1 Understand How Whistleblower Laws Affect Employers, Employees
- 2 The Deal and Pepper Hamilton’s Legal Roadmap to Success - Midmarket Pharma, Health Care Deals
- 3 Patent Owners Find Protection in Landmark Case Argued Before ITC by Pepper Hamilton
- 4 Buyer Beware: Third Circuit Denies \$15 Million Break-Up Fee for Failure to Meet O’Brien Standard
- 5 The Deal and Pepper Hamilton’s Legal Roadmap to Success - Midmarket Pharma, Health Care Deals
- 6 Upcoming Seminars and Webinars

## WHAT IS WHISTLEBLOWING?

Most whistleblower statutes define protected activity to include:

- reporting to a public body a violation of a law, regulation or rule
- being asked by a public body to participate in an investigation.

Violations of whistleblower laws can only occur if the employer takes some disciplinary or other employment action after it learns an employee has blown the whistle. When an employee has made a report to a public authority or participated in an investigation, the whistleblower's case often will turn on whether the employer knew about the employee's alleged protected activity.

An employee must do more than merely state that he or she is going to complain about the employer's actions.

In some states, such as Michigan, plaintiffs can establish engagement in protected activity by demonstrating that they were *about to* report a suspected violation. Those laws, however, do not create a cause of action for private employees who only internally report issues of public concern to supervisors or upper-level management.

## BURDEN ON EMPLOYEE

A whistleblower doesn't have to demonstrate an actual violation of the law as long as the employee has a reasonable and good faith belief that a violation of the law has occurred or will occur in the future.

The whistleblower always bears the burden of establishing that he or she was justified in believing that a report was necessary. Accordingly, it's not protected whistleblowing when:

- the employee has no evidence of a violation of the law
- the employee's suspicions were not reasonable at the time he or she reported or made a threat to report.

In most states, including Pennsylvania, an employee whose subjective belief that wrongdoing has occurred is motivated solely by personal interests (not public concerns) generally won't be successful in establishing a whistleblower claim. A good faith report of wrongdoing would involve a report of violations of statutes or regulations that are not merely technical or minimal in nature.

## PROTECTION FROM RETALIATION

Each state has its own unique interpretation of its specific whistleblower statutes. However, most state courts have interpreted whistleblower laws using retaliation standards set by state civil rights acts.

As many employers have discovered, whistleblowers don't have to meet particularly onerous legal standards to make retaliation claims. Under retaliation standards, the employee must establish that he or she

1. engaged in a protected activity and
2. suffered an adverse employment action and
3. can show a causal connection between the protected activity and any adverse employment action.

To win a whistleblowing retaliation case, an employer must articulate a legitimate business reason for the adverse employment action. If the employer offers a legitimate reason for the employment action, the employee has the opportunity to prove that it wasn't the true reason, but only a pretext for retaliatory action.

Because retaliation claims are often fact intensive, many judges are quick to order trials.

Whistleblower statutes offer powerful protection for employees who attempt to expose their employers' wrongdoing. Public and private employers increasingly face lawsuits filed by former employees claiming to be victims of retaliation for reporting violations of the law.

The state law remedies to which a successful whistleblower may be entitled include a full range of damages, such as back pay and front pay, damages for emotional distress, legal costs and reasonable attorney fees. By protecting whistleblowers, these acts also serve as another weapon to police employer conduct and thereby protect the public.

## Patent Owners Find Protection in Landmark Case Argued Before ITC by Pepper Hamilton

### *Legal Victory Accelerated the Sale of Saxon Innovations LLC*

Pepper Hamilton LLP has prevailed in a case that led to a recent ruling by the International Trade Commission (ITC) that will have major implications for companies that license their patent portfolios to U.S. businesses.

“This is an important ruling that significantly impacts technology companies who license their patent portfolios, as well as venture capital and private equity firms with portfolio companies that hold valuable patents,” said William D. Belanger, a partner in Pepper’s Boston office. “The ruling gives patent owners greater flexibility to enforce their intellectual property and may result in more case filings at the ITC.”

The ITC has become an important venue for patent disputes because of its power to issue orders barring the importation of goods that infringe on U.S. patents. A 2006 Supreme Court ruling made it much more difficult to obtain broad injunctions against infringing goods in federal court, so increasingly patent holders are turning to the ITC for relief. However, very few practitioners are experienced in the rules and requirements of litigation before the ITC. Pepper is one of those few firms.

To win a patent dispute before the ITC, the plaintiff must establish a domestic industry related to the patent at issue. The ruling in *Certain Electronic Devices Including Handheld Communications Devices*, (Inv. 337-TA-673 and 337-TA-674), which caused ripples in the intellectual property field, held that patent owners can fulfill the domestic industry requirement based exclusively on the activities of their domestic licensees.

Pepper attorneys, representing Saxon Innovations LLC, filed a complaint for patent infringement against prominent international technology companies, including Samsung, Nokia, HTC, Palm and Sharp.

“One key issue in this case centered on establishing a domestic industry related to the patent. Typically, parties satisfy the domestic industry requirement by pointing to an existing factory or R&D facility that employs the patented technology,” said Aaron Levangie, an associate in Pepper’s Boston office. “In Saxon’s case, we focused on domestic companies who licensed the asserted patents, and those licensee’s activities exploiting the patented

technology in the United States.” The ITC ultimately ruled in favor of Saxon, creating an opportunity for patent owners who have licensed their portfolios to domestic companies.

“Pepper Hamilton helped manage this opportunity for us from the initial acquisition through the sale of the asset. This was a complex IP monetization program, and required a truly sophisticated partner, which they proved to be,” said Bill Marino, CEO of Saxon Innovations. “Pepper’s ITC expertise, combined with their industry knowledge and ability to manage this program on an alternate fee basis, was critical to our company’s success.”

“Our success at the ITC ratified the value of Saxon’s patent assets and Pepper’s work in obtaining this ruling and at trial was key in driving the sale,” said Marino. “For such a major transaction, this deal was finalized in a remarkably short timeframe. The value of the patent sale was increased by Pepper’s seamless representation on litigation and transaction matters, as well as the ITC’s willingness to protect Saxon’s domestic licenses.”

RSS on [www.pepperlaw.com](http://www.pepperlaw.com)

SUBSCRIBE TO THE LATEST PEPPER ARTICLES  
VIA RSS FEEDS. VISIT [WWW.PEPPERLAW.COM](http://WWW.PEPPERLAW.COM)  
TODAY AND CLICK ON THE RSS BUTTON ON  
THE PUBLICATIONS PAGE TO SUBSCRIBE TO  
OUR LATEST ARTICLES IN YOUR NEWS READER.

## Buyer Beware: Third Circuit Denies \$15 Million Break-Up Fee for Failure to Meet O'Brien Standard

DAVID B. STRATTON | STRATTOND@PEPPERLAW.COM

DEBORAH KOVSKY-APAP | KOVSKYD@PEPPERLAW.COM

Stalking horse bidders are a common feature of Section 363 asset sales in bankruptcy. A “stalking horse” is the first bidder for the debtor’s assets, who performs the initial due diligence, sets the minimum purchase price and jump-starts the bidding process, often attracting higher and better offers. In exchange for the work and risks undertaken by the stalking horse, it is typically given certain protections: Any overbids must exceed the stalking horse’s bid by a certain minimum amount, and in the event that the stalking horse is outbid, it will usually be entitled to reimbursement of its expenses and payment of a break-up fee.

These “bid protections” are not guaranteed, however, since they must be approved by the bankruptcy court. In the Third Circuit, expense reimbursements and break-up fees will not be granted unless the stalking horse bidder can demonstrate that the reimbursement and fee were “*actually necessary to preserve the value of the estate.*” *Calpine Corp. v. O'Brien Env't Energy, Inc. (In re O'Brien Env't Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999) (emphasis added).

The Third Circuit recently applied the *O'Brien* test to deny a \$15 million break-up fee to a stalking horse bidder, even though the motion to approve the fee was supported by both the debtors and the Creditors' Committee, and despite the fact that, even after payment of the fee, the debtors' estates still would have been solvent and able to pay all creditors in full. *Kelson Channelview LLC v. Reliant Energy Channelview LP (In re Reliant Energy Channel LP)*, No. 09-2074 (3d Cir. Jan. 15, 2010).

In *Reliant*, the debtors decided to sell their largest asset, a power plant in Channelview, Texas. The plant was marketed extensively; more than 100 potential purchasers were contacted, more than three dozen signed confidentiality agreements, and 12 ultimately submitted bids. Many of the bids, however, were contingent on the bidder's obtaining financing – an uncertain undertaking in the prevailing business environment. Kelson, on the other hand, submitted a complete and non-contingent bid for \$468 million and was selected as the winning bidder.

A BIDDER CONSIDERING ACTING AS A STALKING HORSE SHOULD BE AWARE THAT PREVIOUSLY-REJECTED BIDDERS WHO ANNOUNCE AN INTEREST IN BIDDING AT AUCTION MAY BE GRANTED STANDING TO OBJECT TO BREAK-UP FEES AND OTHER BID PROCEDURES.

Kelson and the debtors entered into an asset purchase agreement (APA) for the plant. Since the debtors were in bankruptcy, the APA provided that the debtors would immediately seek an order from the bankruptcy court approving the sale. Moreover, the APA required the debtors to seek an order approving certain bid protections for Kelson's benefit in the event the bankruptcy court determined there should be an auction for the plant before the sale. The proposed bid protections provided that the debtors could not accept a competing bid unless it exceeded Kelson's bid by \$5 million, and that Kelson would be entitled to a break-up fee of \$15 million and expense reimbursement of up to \$2 million if a competing bid were accepted.

While the bankruptcy court was considering the debtors' motion to approve the sale without an auction, the debtors – with the support of the Creditors' Committee – asked the court to approve the bid protection measures. Fortistar LLC, which had submitted one of the contingent bids, objected to the motion.<sup>1</sup> Fortistar asserted that it was willing to submit a “higher and better” bid at an auction, but was deterred by the proposed \$15 million break-up fee and \$2 million reimbursement.

Following an evidentiary hearing, the bankruptcy court denied the debtors' request to sell the assets without an auction, approved the \$5 million overbid requirement and allowed the reimbursement of Kelson's expenses up to \$2 million,<sup>2</sup> but denied the \$15 million break-up fee. The bankruptcy court concluded that the break-up fee was not "actually necessary to preserve the value of the estate" based primarily on two factors: (1) Kelson's bid was not expressly conditioned on *approval* of the break-up fee, so that it would be bound by the APA even if it weren't approved; and (2) there was another willing bidder waiting in the wings, ready to bid at auction.

As it turned out, Kelson did not participate in the subsequent auction and asserted that its offer was no longer available. Fortistar submitted the winning, fully-financed auction bid, which topped Kelson's bid by \$32 million. Kelson appealed the order denying its break-up fee. The district court, and eventually the Third Circuit, affirmed the bankruptcy court's order. The Third Circuit, while recognizing the risks incurred and benefits provided by stalking-horse bidders, reiterated *O'Brien's* position that a break-up fee isn't always necessary to induce a stalking horse to

take those risks and provide those benefits. On the facts present in *Reliant*, where Kelson's bid was conditioned on the debtors' *seeking* (but not actually obtaining) approval of the break-up fee, the Third Circuit found that it was clear that the break-up fee was not required to induce Kelson to bid.

The Third Circuit conceded that the break-up fee could have benefited the estate in another way, by keeping Kelson committed to the purchase after the court ordered an auction. However, the Third Circuit found that the bankruptcy court had appropriately weighed that potential benefit against the detriment of deterring other bids in deciding that the break-up fee was not necessary for the protection of the estate. Fortunately, the bankruptcy court's decision benefited the estates because Fortistar outbid Kelson by \$32 million. Of course, if the bankruptcy court's gamble had been wrong, and another suitable bid did not materialize while Kelson walked away permanently from its offer, the estates would have been severely harmed.

The *Reliant* saga has important lessons for potential stalking-horse bidders in bankruptcy. First and foremost, a stalking-horse bidder should ensure that its bid is expressly conditioned on



## The Deal and Pepper Hamilton's Legal Roadmap to Success - Midmarket Pharma, Health Care Deals

There are a number of hot-button legal topics interesting to dealmakers at the moment. What key legal issues should you be thinking about in the coming months? Hear thoughtful perspectives in this series of incisive podcasts from The Deal and Pepper Hamilton LLP.

# The Deal

### EPISODE 1: PEPPER HAMILTON ON MIDMARKET PHARMA, HEALTH CARE DEALS

Pharma and health care deals seem to have remained recession-proof. As the economic environment improves, Pepper Hamilton partners Christopher S. Miller and John W. Jones, Jr. believe dealmaking in the sector is likely to pick up. In this podcast sponsored by Pepper Hamilton, the two discuss the larger issues facing the industry and how they will affect dealmaking.

Listen today by visiting

[www.thedeal.com/knowledge/podcasts/pepper-hamilton-on-midmarket-pharma-healthcare-deals.php](http://www.thedeal.com/knowledge/podcasts/pepper-hamilton-on-midmarket-pharma-healthcare-deals.php).

## Upcoming Seminars

### 2010 MICHIGAN WIND ENERGY CONFERENCE

April 20-21, 2010

Tom Wilczak, Vicki Harding and AnnMarie Sanford speaking.

### 2ND ANNUAL CLIMATE CHANGE AND SUSTAINABILITY CONFERENCE

State Bar of Michigan | Thursday, May 6, 2010

AnnMarie Sanford speaking.

## Upcoming Webinars

### INDIAN WEBINAR SERIES: HIDDEN EMPLOYMENT LAW RISKS IN DOING BUSINESS IN THE UNITED STATES

Wednesday, March 24, 2010

11:00 A.M. - 12:00 P.M. Eastern

### DUMPING PHARMA

Health Care Legal Issues for 2010 and Beyond Series

Thursday, March 25, 2010

12:00 - 1:00 P.M. Eastern

### CRITICAL CONSIDERATIONS IN DISTRESSED M&A TRANSACTIONS: EXPLORING RISKS AND OPPORTUNITIES

Wednesday, April 7, 2010

12:00 - 1:00 P.M. Eastern

### HEALTH CARE PRIVACY AND SECURITY AFTER HITECH

Health Care Legal Issues for 2010 and Beyond Series

Thursday, April 22, 2010

12:00 - 1:00 P.M. Eastern

### CANADA-U.S. TRADE UPDATE LUNCHEON

Canadian Webinar Series

Thursday, April 29, 2010

12:00 - 1:00 P.M. Eastern

### SOLAR POWER FOR END USERS - WHERE TO STORE?

Thursday, May 6, 2010

12:00 - 1:00 P.M. Eastern

### LEASE CONSIDERATIONS FOR GREEN BUILDING

Wednesday, May 19, 2010

12:00 - 1:00 P.M. Eastern

### GREEN BUILDING FOR OWNERS AND DEVELOPERS

Wednesday, June 9, 2010

12:00 - 1:00 P.M. Eastern

To register or for more information about these events, please contact Brian Dolan at [dolanb@pepperlaw.com](mailto:dolanb@pepperlaw.com).

*approval* of a break-up fee. Furthermore, stalking horses should understand that where there is another party willing to bid at auction, it is highly possible that the court will deny a break-up fee. (Although the Third Circuit insisted that the bankruptcy court had not announced a *per se* rule against break-up fees where there is another bidder, it noted with approval the bankruptcy court's position that "as a factual matter break-up fees often are not needed when there are bidders for an asset other than the initial bidder." In light of that position, it is hard to imagine a factual scenario involving another bidder where a break-up fee *would* be approved.) Finally, a bidder considering acting as a stalking horse should be aware that previously-rejected bidders who announce an interest in bidding at auction may be granted standing to object to break-up fees and other bid procedures, even though such rejected bidders have no existing

stake in the proceedings. In short, stalking-horse bidders must exercise greater caution and be cognizant of the increased risk that – despite promises of reimbursement and break-up fees – they may not walk away whole from attempted asset purchases in bankruptcy.

## ENDNOTES

- 1 Over the objections of the debtors and the Creditors' Committee, the bankruptcy court determined that Fortistar, as a potential bidder, had standing to be heard on bid procedures.
- 2 The bankruptcy court found that the reimbursement of expenses was warranted as an administrative claim against the estates; Kelson had benefited the estates by assisting in the creation of the asset purchase agreement against which other potential purchasers would be required to bid.