

## Message from Our Managing Partner

We're delighted that we've recently welcomed experienced trial attorney and labor lawyer **Matthew V. DeIDuca** as a partner in the Princeton office. Read all about Matt in this issue.

In other news, we report on a landmark case Pepper argued (and prevailed in) before the ITC, helping a client assert, then sell, its patent rights. And Kevin Dill examines an interesting case in which a pharmacist's override of dosing restrictions programmed into an electronic pharmaceutical dispensing system allegedly harmed a patient and opened the pharmacy to litigation.

Online, Pepper has partnered with The Deal on a podcast series, and our first edition explores midmarket pharma and health care deals. Our speakers, Pepper partners Chris Miller and John Jones, believe that while pharma deals seem recession-proof, as the economy improves, dealmaking is likely to pick up.

We also note the latest offerings among Pepper's Indian Series, Canadian Series, health care and life sciences webinars, and highlight where Pepper attorneys will be speaking live, on tax and banking topics, in the coming months. As always, we welcome your comments, questions and suggestions.

Michael J. Mann, Partner

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## Pepper Hamilton Enhances Labor and Employment Practice with the Addition of Matthew V. DeIDuca

Matthew V. DeIDuca has joined Pepper Hamilton as a partner in the Labor and Employment Practice Group, resident in the Princeton office.

Mr. DeIDuca is an experienced trial attorney and labor lawyer. His trial experience includes complex commercial and real estate litigation, individual and class employment cases, and product liability litigation. As a labor lawyer, Mr. DeIDuca regularly represents employers in state and federal labor and employment litigation involving claims of discrimination, wrongful discharge and defamation, as well as other related disputes. Mr. DeIDuca also represents employers in litigation to protect confidential information and trade secrets and to enforce restrictive covenants. In addition, he represents management in labor negotiations and unfair labor practice proceedings before the National Labor Relations Board. Mr. DeIDuca has handled labor arbitration proceedings in a variety of industries and counsels employers on employment and business matters.

"Matthew is a highly regarded attorney and a welcome addition to both the Princeton office and the labor and employment practice," said Michael J. Mann, partner in charge of Pepper's Princeton office. "His extensive trial experience greatly increases our commercial litigation strength in New Jersey. We're excited that he has chosen to join Pepper Hamilton."

Jonathan Kane, partner and chairman of the firm's Labor and Employment Group says, "Matt exemplifies the very best of what we do. He's an experienced and excellent labor and employment

This publication may contain attorney advertising.

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counselor, and a great litigator with a wide range of successes in jury trials and class actions. We are delighted he is on board.”

Prior to joining Pepper Hamilton, Mr. DelDuca was a partner with Dechert in Princeton.

Mr. DelDuca noted, “Pepper’s combination of top-quality lawyers and competitive pricing gives me the perfect platform for my client base. I am very excited about the opportunities here.”

Mr. DelDuca is a 1986 *cum laude* graduate of Rutgers University School of Law. He earned his B.A. from Ursinus College in 1983.

## 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 cast 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 interna-

tional 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.”

## Override of Electronic Dispensing System Leads to Costly Litigation

KEVIN J. DILL | [DILLK@PEPPERLAW.COM](mailto:DILLK@PEPPERLAW.COM)

A recent New Jersey case alleges that a pharmacist overrode a warning issued by the pharmacy's electronic dispensing system relating to the proper dose of a drug for a patient.

The plaintiff in the case was prescribed a prescription drug by his physician. The prescription was filled by the pharmacy with the correct medication, but the dosage instructions on the label allegedly indicated a dosage three times higher than the physician had prescribed. The plaintiff alleges that the incorrect dosage resulted in permanent injuries.

The plaintiff alleged that the pharmacist who filled the prescription for the pharmacy was given a warning by the pharmacy computer system because the dosage exceeded the recommended daily dosage for the drug. The computer system would not let the dispensing activity move forward until the pharmacist verified the dosage.

The case raises important issues for all health care providers who use electronic clinical support systems. To begin with, all such

systems are designed with default settings that question entries that appear to be against the best interests of a patient, or are out of compliance with regulations. All such systems create an electronic record of the activity they facilitate (e.g., an electronic dispensing system will record the fact that it generated a warning to verify the dosage, as did the system in this case). Such records can then become the foundation of litigation. Of course, electronic warnings and other system hard-stops will occasionally be seen by individual employees as impediments to efficient operations. Accordingly, in order to protect the best interests of patients and reduce the likelihood of litigation, health care providers need to create a culture that respects the process steps created by their electronic clinical support systems. The following elements of such a culture should be kept in mind:

*Tone at the top.* Employees under pressure to perform will always be tempted to cut corners in order to fulfill the perceived goals of the organization. That being the case, senior leadership needs to clearly and repeatedly describe organizational priorities related



### 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.

#### 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).

to the use of electronic support systems. Employees need to know that the organizational priority is to ensure the accuracy of every clinical decision rather than achieving short-term process goals such as clearing a pharmacy dispensing queue by a certain time.

*Education.* Employees need to be trained and then required to participate in regular continuing education regarding the use of electronic support systems. A key element of such training must be a description of the proper steps to take when a user encounters a system-generated warning. Should the employee contact the physician? Should the employee contact their supervisor? The organizational expectations in these and similar circumstances should be clearly communicated.

*Supervision.* Use of electronic support systems requires appropriate supervision, just like any other clinical process. Employers should ensure that employees using electronic support systems are supervised by an adequate number of senior employees who have the experience and the judgment necessary to make the proper decisions in unusual situations. These supervisors need to be readily available to employees who use the electronic support system.

*Monitoring.* Senior employees should monitor the system and ensure that it is being appropriately used. Such monitoring may include a review of all overrides to system protocols at the end of each shift or day.

*No work-arounds.* If there is an issue with the protocols of an electronic system, talk to the system vendor and have such protocols modified as long as such modification would be in accordance with clinical best practice. Employers should not allow employees to develop work-around solutions to perceived system inefficiencies. Such work-arounds invite lapses in judgment and litigation with potentially costly consequences.

Electronic clinical support systems can enhance patient care and operational efficiency in many ways. Used correctly, they can reduce medical errors and improve patient outcomes. When used incorrectly, such systems also create an electronic record of the misuse, which can further litigation. Accordingly, employers who use electronic clinical support systems must create a culture that supports the proper use of the electronic support system to minimize the potential for misuse. Such a culture has the twin benefits of enhancing patient care and reducing the chance of litigation.

## 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  
Webinar 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  
Webinar 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 webinars, please visit the webinar section of [www.pepperlaw.com](http://www.pepperlaw.com) or contact Brian Dolan at [dolanb@pepperlaw.com](mailto:dolanb@pepperlaw.com) or at 215.981.4568.

## Foreign Intelligence and the FCPA: U.S. Prosecutors Have a New Source for Anti-Corruption Leads

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On March 16, Nexus Technologies, Inc., a Philadelphia-based export company, pleaded guilty in connection with a conspiracy to bribe officials of the Vietnamese government in exchange for lucrative contracts to supply equipment and technology to Vietnamese government agencies, in violation of the Foreign Corrupt Practices Act (FCPA). The company's owner and president, as well as two of his siblings, also pleaded guilty in connection with the conspiracy.

The troubles at Nexus first came to light two years ago, when federal agents conducted a sweeping search at Nexus's Philadelphia offices, located just blocks from the city's famous Italian Market. The agents, including a team from the Commerce Department's Bureau of Industry and Security, seized computers, customer records, and financial data to determine if Nexus violated export control regulations by shipping a remote-controlled submersible vessel for making underwater observations to a company in Vietnam. While the papers supporting the search and the agents' questioning of Nexus employees during the raid made no mention of the FCPA, this law soon came into the picture for Nexus and its executives. Events since the search provide important information about how FCPA cases are investigated and prosecuted, and how the government uncovers FCPA leads.

To Nexus and its executives, a grand jury brought charges invoking the FCPA and related charges soon after the Philadelphia search. The grand jury alleged that Nexus and its executives obtained lucrative supply contracts for a diverse array of items for various Vietnamese government agencies in return for bribes of more than \$200,000. The indictment surprisingly made no mention of export control issues. The government's court filings brought yet another surprise: the government's proof included electronic surveillance and physical searches gathered under the Foreign Intelligence Surveillance Act (FISA).

FISA is a powerful tool used by the U.S. intelligence community to gather foreign intelligence. For many years, FISA information rarely made its way into domestic criminal cases, as the Justice Department built a "wall" between its law enforcement functions and foreign intelligence gathering under FISA. In the wake of the September 11 attacks, however, two factors changed this approach. First, Congress passed the Patriot Act, which amended

### THE JUSTICE DEPARTMENT'S SOURCES FOR FCPA REFERRALS

In addition to self-reporting by corporations who discover a potential FCPA issue in their international operations, the Justice Department receives referrals for new investigations from a wide variety of sources, including:

- anonymous tips and letters
- referrals from other law enforcement agencies
- the Justice Department's Office of International Affairs
- the foreign press, as well as the *New York Times* and *Wall Street Journal*
- FBI legal attaches around the globe
- State Department embassy staffs
- Commerce Department staff
- the U.S. intelligence community.

Self-reporting accounts for about 35 percent of the open FCPA cases, with the other sources accounting for about 65 percent of the open matters. Indeed, Assistant Attorney General Lanny Breuer said last November, "Although many of these cases come to us through voluntary disclosures, which we certainly encourage and will appropriately reward, I want to be clear: the majority of our cases do not come from voluntary disclosures."

*Source: September 10, 2009 speech by Fraud Section Deputy Chief Mark Mendelsohn, American Bar Association FCPA event hosted by Pepper Hamilton LLP*

FISA and provided new standards for the sharing of information between law enforcement and intelligence agencies. Second, a specialized federal review court with jurisdiction over FISA disputes found that the government can seek FISA warrants regardless of whether its primary purpose is gathering pure intelligence or obtaining evidence for criminal prosecutions, as long as the alleged crimes relate to terrorism or espionage. With these developments, the “wall” approach could be abandoned and a new source of evidence in domestic criminal cases emerged.

The defendants in the Nexus case will never know what facts supported the FISA surveillance that became relevant to their case, as only the government and the district judge are likely to ever see the secret FISA application. But the defendants nonetheless faced the prospect of FISA evidence being introduced at their trial. Moreover, companies across America now have an example of how FCPA violations potentially can be detected – and possibly proven – through the far-flung U.S. intelligence web.

The use of FISA in the Nexus case is not an isolated incident. In a speech at Pepper Hamilton’s Washington, D.C. office last fall, Mark Mendelsohn, the head of the U.S. Justice Department’s FCPA enforcement activity, dispelled the myth that most FCPA cases come from self-disclosure by companies. Mendelsohn said that while about a third of the FCPA cases come from self-reporting, other sources, including the U.S. intelligence community, account for almost two-thirds of FCPA cases.

FISA has come up in other FCPA cases, including the trial last summer of handbag maker Frederic Bourke. Prosecutors charged Bourke with FCPA violations, alleging he conspired to pay bribes to officials in Azerbaijan in a bid to purchase its state oil company. Reflecting that internationally gathered evidence is an integral part of FCPA prosecutions, Bourke sought documents from the Central Intelligence Agency, the U.S. State Department and the National Security Agency in trying to bolster his defense.

Another FCPA case has an even closer connection to the U.S. intelligence community. In 2003, James Giffen was charged under the FCPA with making nearly \$80 million in oil company bribes to Kazakhstan’s president, an unindicted co-conspirator in Giffen’s case. Claiming that U.S. intelligence agencies knew of and approved the payments, Giffen asked a federal judge in Manhattan to decide if the agencies were failing to provide information that could exonerate him. Few of the documents

## Upcoming Events

### EUROPEAN AMERICAN CHAMBER OF COMMERCE - NY

April 28, 2010 | New York, NY

Steven D. Bortnick speaking on “President Obama’s International Tax Proposals.”

### FINANCIAL RESEARCH ASSOCIATES’ 11TH ANNUAL TAX PRACTICES FOR PRIVATE EQUITY FUNDS

May 17-18, 2010 | New York, NY

Steven D. Bortnick speaking on “Tax Efficient Private Equity Exit Options: LP Secondary Market Sales/Transfers and Public Market Strategies.”

### INSTITUTE FOR INTERNATIONAL RESEARCH’S 9TH ANNUAL PRIVATE EQUITY TAX & COMPLIANCE PRACTICES

June 23-24, 2010 | Boston, MA

Steven D. Bortnick speaking on “Basics of Private Equity Regulations and Reporting and International Update: Cross Border Issues and Trends.”

### NEW JERSEY BANKERS ASSOCIATION’S 2010 COMPLIANCE UNIVERSITY

June 1, 2010 | Monroe Township, NJ

Travis Nelson speaking on “Federal/State Legislative/Regulatory Update.”

in Giffen’s case, including the original and superseding indictments, are now publicly available. The district court held a closed hearing in Giffen’s case on February 9, 2010, and has scheduled another hearing for March 26, 2010. Observers are left to guess how the case is progressing.

While the outcome of Giffen’s case is unresolved, what can be said with certainty is that U.S. law enforcement’s efforts to detect potential FCPA violations has recently become more robust and sophisticated. Companies around the globe are wise to consider the many ways that their conduct can come under scrutiny and surveillance.