DORNBUSH SCHAEFFER STRONGIN & VENAGLIA, LLP

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NEWSLETTER

To our clients and colleagues:

Welcome to DSSV's Fall 2013 Newsletter. In this issue, we examine recent developments in the areas of pharmaceutical licensing transactions, employment arbitration and intern hiring practices.

The Federal Trade Commission and the U.S. Department of Justice recently proposed amendments to pre-merger notification rules under the Hart Scott Rodino Act that would extend reporting requirements to certain pharmaceutical patent licenses. DSSV associate Leo Bronfman discusses the impact of these proposed rule changes in our opening article.

Recent months have seen court decisions of significance in the employment context. DSSV associate Jessica Jablon Rubin discusses two recent Second Circuit decisions enforcing arbitration agreements providing for waivers of employees' rights to pursue class and collective actions against their employers. In our final article, DSSV associate Adler Bernard discusses the increased scrutiny by the courts and the U.S. Department of Labor with respect to the hiring of unpaid and low wage interns.

All of us at DSSV wish our friends, clients and colleagues a pleasant and prosperous autumn.

Myron Cohen
Partner

Proposed Rule Changes Would Increase the Scope of Reportability of Patent Licensing Transactions Under the Hart Scott Rodino Act

By Leo Bronfman

The Hart Scott Rodino Antitrust Improvement Act (the "HSR Act") requires transaction parties to report information about certain potential mergers and acquisitions to the Federal Trade Commission (the "FTC") and the Antitrust Division of the U.S. Department of Justice (the "DOJ"). The HSR Act, and the premerger notification rules promulgated thereunder, afford these regulatory agencies an opportunity to determine if the proposed transaction would violate antitrust laws. This article provides a brief overview of the impact of the proposed changes to the premerger notification rules on licensing transactions in the pharmaceutical industry.

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Proposed Rule Changes Would Increase the Scope of Reportability of Patent Licensing Transactions Under the Hart Scott Rodino Act

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A pharmaceutical patent license may be considered to be an acquisition subject to the HSR Act. Historically, however, the FTC and the DOJ required a pharmaceutical patent license number to be reported only if it included the "exclusive" right to "make, use and sell" the underlying product and if the transaction met all other HSR Act jurisdictional requirements. The FTC, in conjunction with the DOJ, has recently proposed amendments to the applicable premerger notification rules that would extend the reporting requirements to pharmaceutical patent licenses which transfer "all commercially significant rights" in the underlying product.

One significant impact of this proposed rule change would be that the retention of manufacturing rights by the licensor may no longer be sufficient to exclude a patent license from the reporting requirements of the HSR Act. Specifically, the retention of manufacturing rights may be considered commercially insignificant if the licensee has been granted exclusive rights to commercialize the product in the applicable jurisdiction or for a particular therapeutic indication. The new approach reflects the FTC's view that manufacturing rights may be of less significance than other commercial rights, such as the right to promote and sell a product.

The FTC and the DOJ limited the reach of the proposed amendments to the pharmaceutical industry (NAICS Industry Group 3254) because of unique incentives that pharmaceutical companies have to structure transactions as exclusive licenses as opposed to asset acquisitions. The high costs of commercialization and the uncertainty of ultimate regulatory approval encourage parties to seek complex risk sharing arrangements which are more easily and efficiently reflected in licensing agreements than in more traditional acquisition structures. Nonetheless, the license agreements may give to the licensee the same degree of control over the development, distribution, pricing and sale of the product as to any other acquirer.

Even though, by the FTC's estimation, the new rule will result in only a small number of additional HSR filings, the proposed amendments are nonetheless important to pharmaceutical companies considering potential licensing transactions. If the proposed amendments become effective, certain types of licensing transactions, collaborations and other forms of joint venture and partnering transactions, which would have not previously been subject to the premerger notification rules, may now be subject to the HSR Act notification and waiting requirements. Companies should consider the impact of such compliance on the timing, cost and conditionality of such potential transactions and should consult with competent HSR counsel in order to navigate the increased ambiguity of the regulatory environment.

The firm will provide updates on the implementation of the proposed HSR Act rule amendments and invites you to discuss with us any upcoming patent licenses or inquire about antitrust regulation compliance.

The Second Circuit Holds That Class And Collective Action Waivers Are Not Barred By The Fair Labor Standards Act

By Jessica Jablon Rubin

In August 2013, the United States Court of Appeals for the Second Circuit issued two decisions enforcing arbitration agreements providing for waivers of the right to pursue class and collective actions -- the *Sutherland* case and the *Raniere* case. These decisions, hailed as victories for employers, further the judicial trend of enforcing arbitration agreements with class and collective action waivers in accordance with their terms.

The Sutherland Case

On August 9, in *Sutherland v. Ernst & Young LLP*, No. 12-304-cv, 2013 WL 4033844 (2d Cir. Aug. 9, 2013), the Second Circuit applied the U.S. Supreme Court's recent decision in *American Express* Co. v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (wherein the Court enforced a class action waiver in an arbitration agreement to compel the claimants to arbitrate their antitrust claims) and reversed the district court's denial of Ernst & Young's motion to compel arbitration. In reversing the district court, the Second Circuit held that an employee

may be compelled to arbitrate her individual claims under the Fair Labor Standards Act ("FLSA") if the employee had executed a class action waiver, even if it is "prohibitively expensive" for the employee to pursue her remedies via a mandatory arbitration process.

In reaching its decision, the court rejected two of the arguments relied on by the lower courts to invalidate class waivers in the wage and hour context: first, that the FLSA confers an unwaivable substantive right to pursue a collective action; and second, that a collective action is the only means by which plaintiffs can effectively vindicate their rights given the low potential for recovery in individual cases.

With respect to the first argument, the court applied Supreme Court precedent holding that the Federal Arbitration Act ("FAA") establishes "a liberal policy favoring arbitration agreements" and that such agreements should be enforced according to their terms "unless the FAA's mandate has been 'overridden by a contrary congressional command . . . .'" *Sutherland*, slip. op. at 8 (internal citations omitted). The court concluded that the FLSA does not contain a "contrary congressional command" that would require rejection of class action waivers. *Id.* at 9. With respect to the second argument, the court applied *American Express*, admonishing lower courts not to apply their own version of the "effective vindication doctrine". The court stated: "[The] class-action waiver is not rendered invalid by virtue of the fact that [the] claim is not economically worth pursuing individually." *Sutherland*, slip. op. at 12.[1]

The Raniere Case

On August 12, in *Raniere v. Citigroup Inc.*, No. 11-5213-cv (2d Cir. Aug. 12, 2013), the Second Circuit reaffirmed its holding in *Sutherland*. In *Raniere*, the court reversed the district court's holdings that: "(1) 'a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law,' and (2) 'if any one of potential class members meets the burden of proving that his costs preclude him from effectively vindicating his statutory rights in arbitration, the clause is unenforceable as to that class or collective[.]'" *Raniere*, No. 11-5213-cv, slip op. at 5 (quoting *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 314, 317 (S.D.N.Y. 2011)). Notably, also on August 21, in *Richards v. Ernst & Young, LLP*, No. 11-17530 (9th Cir. Aug. 21, 2013), the U.S. Court of Appeals for the Ninth Circuit ruled that Ernst & Young's arbitration agreement, which contained a class waiver, should be given effect in a wage and hour suit against the firm.

Sutherland and *Raniere* reaffirm that employment-related arbitration agreements containing class and collective action waivers are to be enforced in accordance with their terms in the Second Circuit. Although such decisions are not strictly binding on courts in other jurisdictions -- and the NLRB appears to be at odds with this outcome -- these rulings reflect the growing trend among circuit courts in rejecting the argument that the FLSA does not allow class and collective action waivers. Both *Sutherland* and *Raniere* will likely have a significant impact on future litigation involving FLSA class and collective actions waivers.

The Increasing Scrutiny of Employers' Intern Hiring Practices

By Adler Bernard

For generations of college students, landing an internship at a prestigious institution has been a rite of passage of the collegiate experience. Historically, paid and unpaid internships have provided college students with invaluable access to and experience with various employers in the public and private sectors. According to the National Association of Colleges and Employers, 63 percent of the class of 2013 had an internship during college, almost half of which were unpaid. *See Class of 2013: Majority of Seniors Participated in Internships or Co-ops*, http://www.naceweb.org/about-us/press/class-of-2013-internships-co-ops.aspx.

Recently, the economic compensation provided to interns, and the employment relationship between interns and their employers, has come under intense scrutiny as interns and intern advocacy groups have, at times successfully, argued in federal and state courts that employers who hire unpaid or low paid interns do so in violation of the Fair Labor Standards Act ("FLSA") and various state labor laws. For example, on June 11, 2013, a United District Court Judge in the Southern District of New York ruled that Fox Searchlight Pictures had violated the FLSA and New York Labor Law by not paying its production interns the appropriate minimum wage. *Glatt, et. al, v. Fox Searchlight Pictures, Inc., et. anno*, 2013 U.S. Dist. Lexis 82079 (S.D.N.Y. 2013). On June 28, 2013, talk show host Charlie Rose and his production company agreed to settle a purported class action lawsuit filed by a former intern who claimed that Rose and his production company violated the New York Labor Law by failing to pay interns wages required under the law. *Bickerton v. Charlie Rose, et al.*, 2013 N.Y. Misc. LEXIS 2762 (N.Y. Sup. Ct. June 28, 2013).

At least nine intern-wage related lawsuits have been filed

[1] In *D.R. Horton* v. NLRB, 357 N.L.R.B. No. 184 (Jan. 3, 2012), the National Labor Relations Board ("NLRB") took the position that class waivers violate employees' rights under the National Labor Relations Act ("NLRA") to engage in protected concerted activity. *D.R. Horton* is currently pending before the Fifth Circuit Court of Appeals.

against employers since the *Glatt* decision. Although the majority of these lawsuits have involved unpaid internships, as set forth in greater detail below, employers with internship programs that provide compensation that is below what is required under the FLSA and applicable state minimum wage laws also should review their procedures to make sure that they are in compliance with such laws.

Summary Of Legal Tests For Determining The Applicability Of The Intern Exemption From Federal and State Minimum Wage Laws

The FLSA generally defines an employee as "any individual employed by an employer." 29 U.S.C. 203(e)(1). The FLSA defines the term "employ" as "to suffer or permit to work." 29 U.S.C. 203(g). Covered and non-exempt individuals hired to perform services for an employer must be paid wages in accordance with the FLSA, and any applicable state laws.

Under the FLSA, interns are generally viewed as covered employees. However, the United States Department of Labor ("DOL") employs a six-factor test for determining whether an intern may be viewed as a trainee, and therefore, not as a covered FLSA employee:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. [See U.S. Dep't of Labor Fact Sheet #71 (April 2010)]

The DOL acknowledges that "[t]his exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad." *Id.* In the *Glatt* case, the Court held that "[n]o single factor is controlling; the test 'requires consideration of all the circumstances.'"

In addition to the DOL's six-factor test, individual states have their own laws governing the relationship between interns and employers. For example, in a December 21, 2010 opinion letter, the New York State Department of Labor set forth its 11-factor test for determining whether interns/trainees may qualify for an exception to the Act's requirements (the "December 2010 Opinion Letter"). The New York test adopts the aforementioned DOL six-factor test, and adds the following five factors:

1. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed;

2. The trainees or students do not receive employment benefits;

3. The training is general, so as to qualify the trainees or students to work in any similar business rather than designed specifically for a job with the employer offering the program;

4. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program; and

5. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

Best Practices For Ensuring Compliance With Federal And State Labor Laws

In light of the recent *Glatt* decision and the spate of class actions that followed, employers should assess their internship programs and take steps to ensure that such programs are in compliance with federal and state labor laws. To reduce potential liability, employers may wish to consider the following in structuring their internship programs:

Provide Interns With A Great Amount Of Formal Educational And Industry-Specific Training, And Non-Employee Related Educational Benefits

According to the *Glatt* decision and the DOL Intern Fact Sheet, employers can satisfy the first and second factors of the DOL's test by structuring their internship program around some level of classroom instruction, and offering interns training that the interns can apply to various industries. For example, a program may seek to provide interns with training similar to that which would be given in school and is related to an intern's course of study. "While classroom training is not a prerequisite, internships must provide something beyond on-the-job training that [salaried or wage] employees receive." *Glatt*, 2013 U.S. Dist. Lexis 82079, at *35. Undoubtedly, interns receive benefits from their internships, such as resume listings, job references and an understanding of how a particular office works. However, such benefits are incidental to working in any office and are similar to that received by an employer's regular employees. Internship programs that offer interns academic credit, require interns to attend weekly classroom sessions, provide interns with a great degree supervision, or involve extensive job shadowing, may also aid in satisfying the first two factors of the DOL's test.

Ensure That Interns Are Not Displacing Regular Employees, And Provide Interns With Close Supervision

Interns should not be confined to performing routine tasks that would otherwise be performed by regular employees. As part of an employer's internship program, the employer should have its regular employees closely supervise the work performed by interns. As long as interns are closely supervised and do not assume the duties of an employer's regular employees, the DOL may view any advantage that an employer may receive from the intern's work as incidental to the training and supervision provided to the interns.

Set Clear Rules On The Compensation Provided To Interns And Limits On The Duration Of The Program

Although the FLSA does not allow employees to waive their entitlement to wages, employers should provide their interns with a clear written statement prior to the commencement of the internship advising them that interns will not be receiving wages in connection with their internship. In addition, an employer's internship should be of a fixed duration. Interns also should be advised that completion of the internship program

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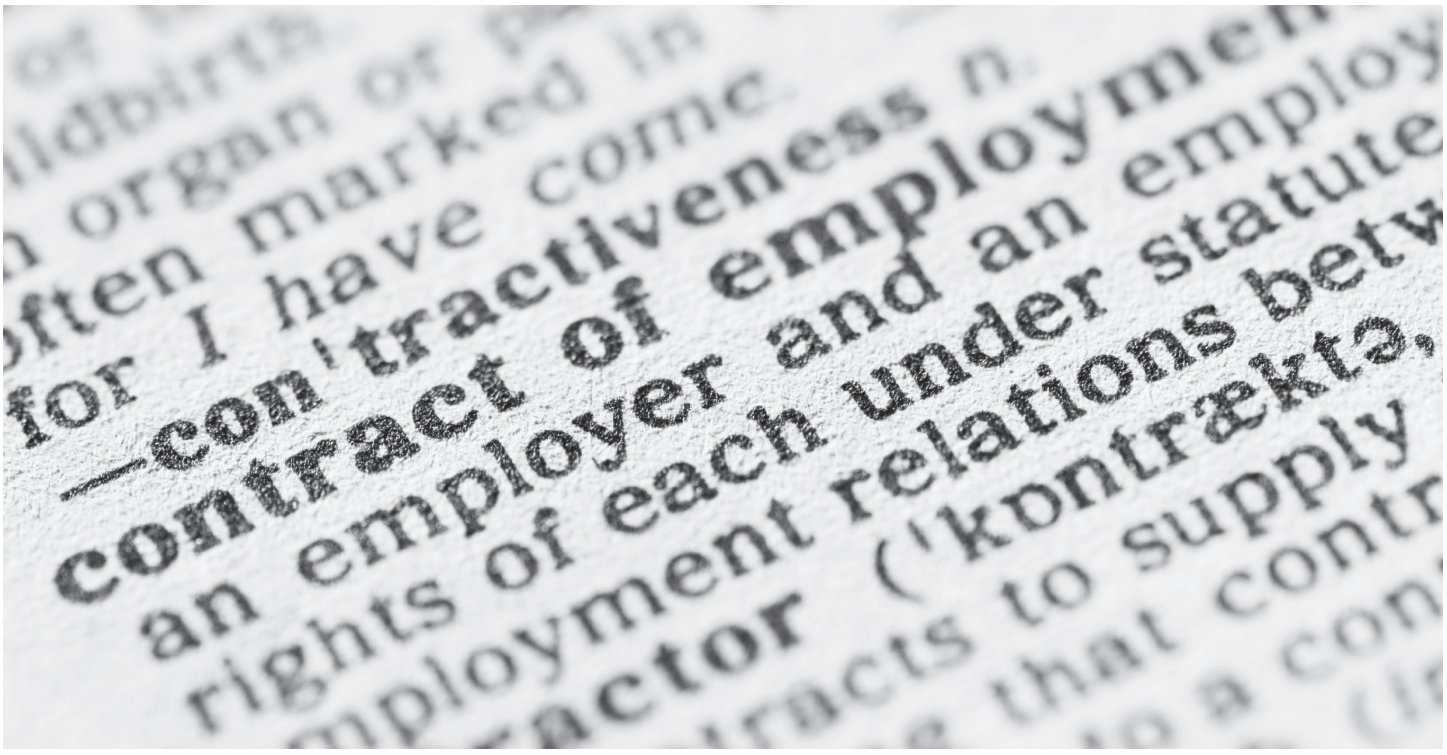

does not automatically lead to an offer of employment or promise of a permanent position with the employer. These limits may help to meet the requirements of the fifth and sixth factors of the DOL test.

In addition to establishing a program that complies with the FLSA, companies should structure their program with an eye towards meeting any requirements set forth under their state's respective wage and hour laws. Under the applicable New York law, employers should ensure that any industry-specific clinical training employers provide to their interns is from an individual who "is proficient in the area and in all activities to be performed by the trainee, and has adequate background, education, and experience to fulfill the educational goals and requirements of the training program." December 2010 Opinion Letter. New York state companies should ensure that the training provided to, and skills acquired by, interns during the course of the internship program are useful and transferrable to any employer in the relevant field. The New York test also prohibits employers from providing exempt interns with any employee benefits, such as health and dental insurance, pension or retirement credit, employer sponsored trips or parties, and discounted or free employer goods and services. In addition, the New York test requires employers to implement a separate and distinct selection process for interns from that used by employers in their recruitment and screening of employees.

In order to avoid potential liability under the FLSA and state wage and hour laws, companies are well advised to structure carefully any internship programs to ensure that the program offers more of an educational benefit to the intern than it does a utilitarian benefit to the company. Conversely, if interns are clearly used as substitutes for regular employees, or their presence at the company provides the employer with an advantage augmenting the employer's workforce, the interns should be compensated in accordance with federal and state wage and hour laws.