

**Eliot I. Bernstein**

**From:** Garber, Marc [Marc.Garber@flastergreenberg.com]  
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**To:** Eliot I. Bernstein; iviewit@iviewit.tv  
**Subject:** FW: The Am Law Litigation Daily -- March 2, 2009 -- UBS WINS IN ALABAMA BUT PLAINTIFFS DON'T MIND  
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**From:** The American Lawyer [mailto:TheAmericanLawyer@incisivemedia.com]  
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# THE AM LAW LITIGATION DAILY

*Edited by Ben Hallman*

TOP STORY

March 2, 2009

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## SECURITIES

### Alabama Federal Judge Dismisses HealthSouth-Related Case Against UBS, but Plaintiffs Lawyers Aren't Complaining

The courtroom of Alabama federal district court judge Karen Bowdre hasn't been a very hospitable place for those seeking to hold HealthSouth executives and advisers responsible for the company's \$2.2 billion accounting fraud. In 2005, the alleged architect of the fraud, former chief executive Richard Scrusby, was acquitted, shocking everyone who didn't witness the prosecution's mishandling of the trial and what many perceived as an inexperienced judge being steamrolled. (That's our informed view, anyway, based on our [American Lawyer story](#) of a few years back.)

And last week, [Bowdre ruled in favor of another party alleged to have been aware of the fraud: UBS Financial Services Inc.](#), HealthSouth's primary outside financial adviser. Bowdre granted UBS's motion for summary judgment in a securities class action led by the Retirement Systems of Alabama, the pension fund for state employees.

The plaintiffs had argued that UBS "participated" in the distribution of bonds sold by the company from 2000 to 2002 because the bank's lawyers at Pillsbury Winthrop reviewed the bond registration documents. Not so, ruled Bowdre. Noting that UBS "conveniently bowed out" as an underwriter at the point when liability attached, Judge Bowdre wrote that she nevertheless couldn't stretch the definition of "underwrite" to include "everyone in a given encounter."

Though this counts as a victory for UBS and its legal team, led by Robert Giuffra of Sullivan & Cromwell, there's a pretty big catch. Plaintiffs have a separate securities fraud class

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action against UBS pending in Bowdre's courtroom--and Bowdre slammed UBS in her opinion. "The evidence...reflects that UBS bankers were heavily involved in HealthSouth's nefarious schemes to defraud the investing public," she wrote. She even called the result of her own ruling in the underwriting case "distasteful."

"I've never felt so good about a loss," Sean Coffey, a partner at Bernstein Litowitz Berger & Grossmann, told The Birmingham News. "While we respect Judge Bowdre's ruling, we are particularly gratified with her findings with respect to UBS's conduct."

HealthSouth settled shareholders' claims for \$445 million in 2006.

## IP

### Sullivan & Cromwell Files Mega Infringement Suit for GE Tech and Samsung

One of our favorite things about IP litigation is that it can flip defense lawyers to the plaintiffs side of the aisle. And so it is in what could be one of the highest-stakes patent fights of the year--Friday's [complaint in Manhattan federal district court against Lenovo Group Limited](#), one of the biggest computer manufacturers in the world. Representing a group of electronic companies, including Samsung Electronics Co., GE Technology Development, Inc., and Thomson Licensing is none other than Sullivan & Cromwell. Sullivan's team is led by partner Garrard Beene.

Beene's clients claim that Lenovo knowingly violated their patent on a type of compression technology called MPEG-2, which is used in everything from DVDs to satellite television. (MPEG-2 compresses data into a more manageable form. Without it, an analog movie converted to DVD, for instance, would require dozens of disks.) The complaint notes that Lenovo's competitors, such as Hewlett-Packard Company, Apple Inc., and Sony Corporation, have licensed the technology, while Lenovo--which has a 40 percent market share in China and about 25 percent in the United States--has not. The plaintiffs are expected to seek eye-popping damages.

Proskauer Rose is also on the complaint for the plaintiffs. No word yet on who might represent Lenovo, but we'll let you know when we hear who it is.

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## SECURITIES

### More Shock Waves for Auditors as Judge Kaplan Permits Another Parmalat Accounting Suit to Proceed

For the second time in a month, a Manhattan federal district court judge has ruled that a shareholder case against a Parmalat auditor can proceed, despite the auditor's claims that it should not be held responsible for the failings of one affiliated office.

In [an order issued Thursday](#), Judge Lewis Kaplan denied summary judgment motions by Grant Thornton International and its U.S. business, Grant Thornton LLP. The principal question, the judge said, was whether Grant Thornton Italy is controlled by the U.S. operation to a degree that the latter could be held vicariously liable for the Italian division's alleged misconduct in auditing the Italian dairy, which collapsed in 2003.

Kaplan, who's known for his piercing intelligence, impressed us with this erudite explanation for his ruling: "The beauty of the Bayeaux tapestry or the genius of a Bach

concerto cannot be appreciated by looking only at individual stitches on the fabric or by listening only to the B flats. Just so here. The question whether GT US controlled GTI cannot or, at least, need not be resolved by looking at each individual piece of evidence."

In January, the same judge ruled that [a similar shareholder lawsuit against Deloitte & Touche Tohmatsu and Deloitte & Touche LLP could go forward](#). Stuart Grant of Grant & Eisenhofer told us then that the decision was "sending shock waves throughout the auditor community."

Cohen Milstein Sellers & Toll is cocounsel for the plaintiffs with Grant & Eisenhofer. Bruce Braun and Linda Coberly of Winston & Strawn represent Grant Thornton LLP. David Cheifetz and Jamie Wasserstrom of Stroock & Stroock & Lavan represent Grant Thornton International.

## APPELLATE / IP


### Bartlit Beck, Paul Hastings Win Affirmance of Defense Verdict for Covidien in Patent Case

The third time was the charm for United States Surgical Corporation, a division of Covidien (formerly Tyco Healthcare), in a patent dispute involving a laproscopic surgery device called a trocar. After losing two jury trials and paying Applied Medical nearly \$100 million in damages, Covidien finally won a defense ruling in April 2008 from a California federal jury. (Check out David Bario's [Best Litigation Boutique profile of Bartlit Beck](#) for details.) Last week the [U.S. Court of Appeals for the Federal Circuit upheld the verdict](#). Paul, Hastings, Janofsky & Walker partner Donald Morrow, who along with the legendary Fred Bartlit represented U.S. Surgical, tells us that to the best of his knowledge, this is the first time a company that had lost two patent infringement cases for the same device won on a third attempt.

A quick medical science break: Trocars are hollow cylinders used during surgery in lieu of major incisions. The tubes serve as channels for surgical instruments, and are also used to inflate a patient's abdomen with gas to make room for such operations as gall bladder removal. U.S. Surgical sells about 2 million trocars a year. The patent dispute involved a valve that allows instruments to be inserted through the trocars without allowing the gas to escape.

In its third assault on U.S. Surgical, Applied was looking for \$98 million, treble damages, and an order forbidding U.S. Surgical from selling the device. U.S. Surgical won an early summary judgment ruling but the Federal Circuit reversed and remanded the case for trial. On the case's second trip to the appeals court, the Federal Circuit upheld the jury's conclusion that the valve in U.S. Surgical's device was materially different from the patent held by Applied. The court also dismissed Applied's claim that U.S. Surgical had improperly described the patented valve in relation to the way in which the valve performs.

Joseph Re of Knobbe, Martens, Olson & Bear argued the appeal for Applied.

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## LAW FIRMS

### McKool Smith Hires a Pair of Veteran White-Collar Litigators--Who Are Also Best Friends

All the news about law firm layoffs has gotten the Litigation Daily a bit down lately. But on Friday we heard a lateral story that brought a smile to our face, so we thought we'd share it with you.

McKool Smith, best known as a Texas IP shop, is expected to announce Monday that Howrey partner Thomas Engel and retired Davis Polk & Wardwell partner John Cooney, Jr., have joined its New York office. The two litigators go way back. They've been friends since they met in the 1970s as prosecutors in the Southern District of New York, where they took on organized crime.

Engel is the godfather of Cooney's oldest daughter, and Cooney is the godfather of Engel's youngest daughter. And when Cooney remarried about 15 years ago, Engel was his best man.

Although the two had discussed working together in the past, the opportunity never came up. But last summer both were considering their next professional move. On a Tuesday night in July, Engel interviewed at McKool Smith, which was looking for a commercial/white-collar litigator for its New York office. He liked what he heard from name partner Mike McKool.

Two days later, Engel had lunch with Cooney at the Harvard Club in New York. Cooney told Engel about an interview he'd had with a firm called McKool Smith. The only catch, Cooney told Engel, was that the firm told him it was also considering another candidate with a resume just like his.

"I said to Jack, 'That other guy is me!'" Engel told us.

Happily for Cooney and Engel, McKool eventually decided that two was better than one. Cooney and Engel now join a growing list of white-collar defense lawyers on the move. In December, [Skadden, Arps, Slate, Meagher & Flom](#) picked up a white-collar group from [Clifford Chance](#), including partners John Carroll, David Meister, and Warren Feldman. And in January, [Freshfields Bruckhaus Deringer](#) hired three lawyers--Aaron Marcu and Adam Siegel from Covington & Burling and Benito Romano from Willkie Farr & Gallagher--to form its new complex litigation and white-collar defense and investigations practice.

Looks like we're not the only ones expecting a surge in white-collar work.

--Andrew Longstreth

#### **CORRECTION**

In an item last Friday about [the government's False Claims Act case against Forest Laboratories](#), we reported that whistle-blower Joseph Piacentile was represented by two firms in addition to Boies, Schiller & Flexner. This information was based on the Massachusetts federal district court electronic docket. Boies Schiller has informed us, however, that it is Piacentile's only counsel in the case. We regret the error.

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