ANALYSIS GROUP ECONOMIC, FINANCIAL and STRATEGY CONSULTANTS

FORUM

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FROM THE CEO

This issue of *Forum* showcases a diverse set of matters that our firm has recently worked on, including false advertising claims, class certification, criminal price-fixing, and securities-lending cases. The scope and complexity of these engagements, and the opportunities they provide our teams to work with experts from academia and industry, are a significant part of what attracts top people to our firm. We are committed to providing our professionals with the experiences that will help them stretch and grow. So it is truly validating to receive external recognition of Analysis Group as a top place to work. In 2012, for the third year in a row, we ranked in the top 10 of *Vault.com*'s 50 best consulting firms to work for. Additionally, we were named the best large firm to work at in Massachusetts, in the *Boston Globe*'s 2012 Top Places to Work poll.

We also continue to expand geographically. I am pleased to note that we have opened an office in Beijing, initially focused on assisting multinational pharmaceutical clients in the growing China market.

MARTHA S. SAMUELSON, PRESIDENT AND CEO

When "All Natural" May Not Be

A market research expert and a damages expert explain how to assess false advertising claims

The legal and financial implications of labeling a product "all natural" or "healthful" can be significant. Many companies highlighting this characteristic in their promotional campaigns have found themselves subject to class actions, Lanham Act *claims, and government enforcement activities. Managing Principal* ***Laura Stamm*** *and Analysis Group affiliate* ***Joel Steckel*** *have consulted to companies and legal counsel on a number of false advertising matters, including those involving "all natural" claims. Here they discuss some economic approaches to evaluating and calculating damages in these lawsuits.*

What constitutes a false claim of "all natural" or "healthful"?

Joel Steckel: This is the $64,000 question. To the best of my understanding, there is no real consensus, which is a large part of the problem. Neither the FDA nor the FTC has defined "all natural." And while a product may claim to be natural, it may contain certain component ingredients – say, high-fructose corn syrup – that some consumers may consider less than healthy. Because companies and consumers may interpret "all natural" claims differently, and because no objective definition exists, it is very difficult to assess whether a product justifies such a claim.

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"All Natural" Claims (CONTINUED FROM PREVIOUS PAGE)

How have you defined harm and calculated potential damages in "all natural" *Lanham Act* matters?

Laura Stamm: A common allegation in *Lanham Act* claims is that by falsely advertising its product as "all natural," the defendant made sales that otherwise would have gone to the plaintiff. The plaintiff may seek recovery for its actual harm, typically measured as the profits the plaintiff lost because of allegedly unfair competition on the part of the defendant. If those losses cannot be established, the advertising costs associated with correcting any false statements made by the defendants may be used as an alternate measure of damages. And if the false advertising was willful, the plaintiff may seek to disgorge the portion of the defendant's profits that resulted from its actions. (See related case summary, "Court Affirms Damages Decision in Favor of Musician," page 7.)

WHAT IS CONJOINT (OR TRADE-OFF) ANALYSIS?

- Respondents are offered product-choice sets from which they select their favorite alternative.
- Experts analyze consumer responses to determine the relative value of product features.
- Experts can identify "must have" features and can compare the relative importance and value of various product features.

The key economic questions I am routinely asked to address are: By how much did the defendant increase its sales as a result of the alleged false advertising? How many of those sales would the plaintiff have made? And how much profit would the plaintiff have earned on those additional sales? The answers can be found using a number of tools. Benchmarking, for example, allows us to compare products that are similar in all other ways except for the attributes at issue. And using econometric analysis, we can isolate the portion of the price of the "all natural" product at issue that can be attributed to its claims of being healthful.

Joel Steckel: I view harm or damages as rooted in consumer behavior. As Laura says, a common allegation is that the defendant made sales that otherwise would have gone to the plaintiff. This reflects changes in consumer behavior that are allegedly caused by the claim in question. Given this, I often use consumer surveys to isolate how sales were affected by the alleged false claim. For example, if only 10% of consumers can be shown to have purchased a beverage directly because of its "all natural" labeling, then, at most, 10% of the sales and profits associated with that beverage should be attributed to the allegedly false advertising claim.

How does damages assessment differ for "all natural" class actions?

Joel Steckel: The conceptual starting point does not really differ at all. We still have to examine the claim's impact on consumers – only now we must define harm somewhat differently. Instead of defining harm in terms of lost sales, we would likely define it as the difference between what the consumer paid for a product or service and what she received. We can use a variety of tools to assess this. We can employ hedonic price models, discrete choice analysis, or conjoint analysis to conduct market research that will help determine the economic value of a claim to consumers. (See related box, this page.)

Do "all natural" class actions present any other unique economic or market research questions?

Laura Stamm: There is always an element of uncertainty associated with class action settlements and the amount that will ultimately be paid out, because the process usually requires that the consumer claim the award. And the award itself can depend on some kind of future action, such as the consumer redeeming a coupon for a discount on a future purchase. But a damages expert can model various assumptions associated with "take rates" and can help the defendant understand its potential exposure. ■

JOEL STECKEL is a vice dean and a marketing professor at New York University's Stern School of Business. He has consulted, testified as an expert witness, and conducted modeling and analysis in numerous cases involving antitrust, damages assessment, false advertising, and marketing strategy.

LAURA STAMM is a managing principal at Analysis Group. She has testified on damages in *Lanham Act* matters, general commercial disputes, and intellectual property matters. She has helped to develop economic and financial models to analyze damages and critique opposing experts' analyses.

Intellectual Property Primer

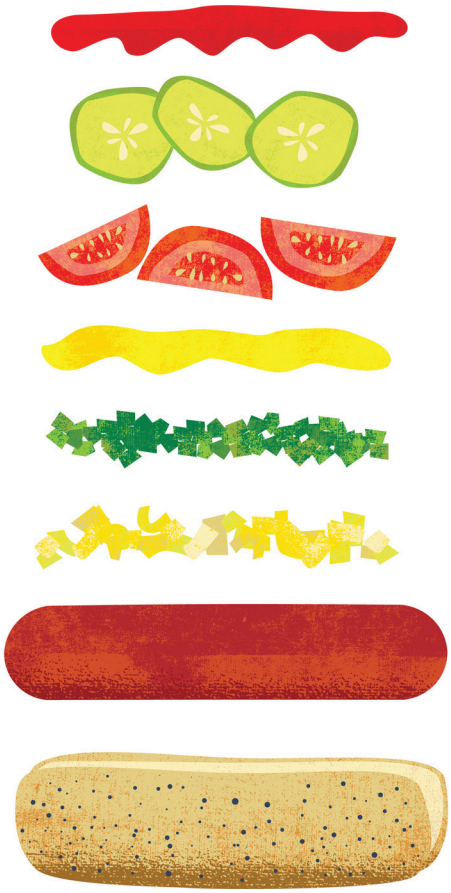
Royalty Payments, Bundled Goods, and Chicago-Style "Red Hots"

THE IDEA: Firms often sell goods in bundles by offering two or more products (or services) as a package deal, usually for a discounted price. Bundles are everywhere: fast food value meals, cable television subscriptions with assorted channels, and even cold and flu medicine with several active ingredients combined into a single product. Customers could select and buy each component separately, but buying the bundled package is often cheaper or more convenient. Companies might also create bundles to compete more intensely with other goods – or with other bundles.

When assessing potential royalty payments in patent infringement matters involving bundled products, economic experts consider the following dynamic: The value of a patented technology included in the bundle will not necessarily increase in proportion to the value of the entire bundle. In fact, there may be cases where the value of the patented feature decreases when bundled with other goods. The importance of the patented feature may be swamped by the larger set of the bundle's features. As a result, demand for the patented feature may become more elastic as consumers develop relatively inelastic demand for the bundle's additional features.

THE EXAMPLE: To illustrate how this might happen, consider the Chicago-style "red hot." This bundle comprises a hot dog; condiments including relish, onions, peppers, tomatoes, celery salt, and mustard; a pickle; and a poppy seed bun. Let us assume that ketchup is a single-ingredient patented invention, that everyone enjoys hot dogs, and that the more condiments added to (or bundled with) a hot dog, the better. Adding ketchup to a plain hot dog creates value, thus increasing profits; adding ketchup to a hot dog already topped with mustard, relish, and onions also adds value. However, as more condiments are added, the incremental profit from the "patented" good (ketchup) declines as a share of the bundle's total profits. In this case, royalty payments to the holder of the patent on ketchup, which are a function of ketchup's incremental profitability, would decline as well.

Royalty payments may also decrease when the patented good interacts negatively with existing goods in the bundle, thereby reducing the incremental profits from the patented good. In the Chicago-style red hot example, what if the value of ketchup decreases when it is added to a hot dog that already includes three other condiments? And suppose one of those condiments was tomatoes – often considered a (superior) substitute for ketchup. Now, we are presented with a scenario in which the value of ketchup declines not only because its share of *total* value decreases, but also because adding ketchup to a hot dog with tomatoes actually reduces the appeal of the entire bundle. In this case, people may still buy the hot dog, but the incremental value of ketchup to a hot dog "bundle" that already contains tomatoes is *reduced*.



THE TAKEAWAY: The economic analysis of bundling in patent matters always returns to the same point: We must parse the incremental value of the patented invention in question from the value that consumers find in the bundle as a whole. The act of bundling has its own economic underpinnings, which may not be ascribed to the inclusion of the patented invention at issue. Indeed, there are cases in which combinations render patented features in bundles less valuable than they were on their own. ■

THIS ARTICLE WAS ADAPTED FROM "SOME ECONOMICS OF ROYALTY BUNDLING," COAUTHORED BY MANAGING PRINCIPAL **JEFFREY COHEN**, MANAGER **DIVYA MATHUR**, AND SIDLEY AUSTIN LLP PARTNER **DAVID GIARDINA**.

THE ARTICLE APPEARED IN THE MAY/JUNE 2012 ISSUE OF *LANDSLIDE*, A PUBLICATION OF THE ABA SECTION OF INTELLECTUAL PROPERTY LAW.

TO READ THE FULL ARTICLE, VISIT ANALYSISGROUP.COM/FORUM.

Assessing FCA Allegations in Mortgage-Lending Suits

The U.S. government recently reached financial settlements with a number of mortgage lenders, servicers, and banks in mortgage insurance suits brought under the *False Claims Act* (FCA). Many of those suits involved the provision of insurance to lenders in the event of default, and they alleged misrepresentation in loan files. In assessing damages in such matters, economists can draw from methods used in the pharmaceutical industry, in which FCA claims are frequently litigated in the context of off-label promotion.

The DOJ has settled FCA suits with four lenders for more than $1 billion; and with five mortgage servicers for $25 billion.

In pharmaceutical off-label cases, legal arguments might support a damages claim in the form of either *government loss* or *corporate gain* realized by the company as a result of the alleged conduct at issue.

"Either damages theory could be applied in mortgage industry FCA matters," explain Managing Principal **Rebecca Kirk Fair** and Vice President **David Mishol** in their recent *Law360* article, "Tools for Handling Mortgage-Based FCA Claims." Depending on the damages theory, economists need to first determine the actual rate and effect of misrepresentation, and then assess the materiality of any misrepresentation for loan performance, corporate gain, or government loss. This analysis is critical, because there are factors other than the alleged fraud that could affect default risk, such as declines in home prices. Under certain theories, any damages in the form of government loss may need to be offset by payments the government would have made had the alleged conduct not occurred. Why? The pharmaceutical analog is useful here: In pharmaceutical cases, the government often claims that it reimbursed for drugs that would not have been prescribed but for the alleged fraud. Often, however, another drug would have been prescribed, and any government loss should be offset by any additional costs of the replacement drug. Similarly, in the mortgage industry, the government may claim to have made insurance payments on defaulted loans it alleges contain misrepresentations. Had it not insured these loans, however, the government likely would have insured a pool of nondefective loans, and some of these loans would also have defaulted during the recession, requiring the government to make insurance payments. Further, as in pharmaceutical off-label matters, assessing damages in the form of corporate gain requires an analysis of the revenues generated by the alleged fraud and the incremental cost structure of the firm. In the mortgage industry, however, the extent of corporate gain will vary depending on the financial institution's role in the securitization process. ■

TO READ THE *LAW360* ARTICLE, VISIT ANALYSISGROUP.COM/FORUM.

Joint DOJ/FTC Workshop Explores Concerns Associated with Most-Favored Nation Clauses

A panel discussion moderated by Analysis Group President and CEO **Martha Samuelson** was cited in the *Law360* article "Attys. Defend Most-Favored Nation Clauses in Health Contracts" (Sept. 10, 2012).

The panel, "MFNs: From Theory to the Real World," was one of several sessions in a public workshop on MFN clauses hosted by the Federal Trade Commission and the U.S. Department of Justice. The *Law360* article highlighted perspectives on MFN agreements from panelists, including Murray Ross from Kaiser Permanente Institute for Health Policy. He noted that, specific to the health care industry, "[w]e're getting a real blurring of the provider role and the insurer role. It will be tricky to discern the nefarious relationships from the desirable relationships." Panelist W. Thomas McGough, Jr., of the University of Pittsburgh Medical Center, said, "I'm not sure, in health care, [that MFNs] add a lot in the places you find them. That has, in my mind, some implications on whether the most-favored nations are a symptom or indicia of a larger inefficiency issue." Yale University professor and Analysis Group affiliate **Judith Chevalier** also participated in the workshop, evaluating economic justifications for MFNs.

To learn more about this event, visit analysisgroup.com/forum.

When Price-Fixing Is Alleged

A look at the early role economic experts can play

Recent investigations by the U.S. Department of Justice into alleged price-fixing in industries such as e-books, air travel, and consumer electronics reflect the agency's increasing scrutiny of companies accused of conspiring with others to alter prices.

The Justice Department is ramping up its monitoring, seeking to impose steeper fines on companies proven to have conspired and reaching beyond corporate liability and damages to prosecute senior executives. Regulatory bodies in the EU nations and other countries are also investigating such claims with more frequency, and follow-on civil suits are adding to the complexity and related expense.

One notable example is the years-long investigation of alleged price-fixing focusing on a number of players in the market for liquid crystal display (LCD) panels. The Justice Department had proposed a $1 billion fine on LCD manufacturer AU Optronics Corporation for its role in allegedly conspiring with competitors to fix prices on its products. It had also proposed that 10-year prison sentences and fines be levied against two AUO executives who were found guilty of playing a large role in the conspiracy.[1] Ultimately, a California federal judge set the fine at $500 million and the sentences at 36 months for each executive.

In high-stakes price-fixing matters, the decisions associated with applying for leniency, negotiating a plea, or going to trial are multifaceted. Given the stakes involved, companies need to make such decisions with the best available information. Economic analysis is needed to help assess the respective positions of both the prosecution and the defense, narrow the topics at issue, and develop estimates of potential financial exposure.

Economic experts can draw on a number of data sources and statistical screens to assist corporations in the investigation stage of the process – for instance, in determining the strength of circumstantial evidence of the alleged conspiratorial behavior. Such circumstantial evidence can fall into a number of categories. One category is communications records – for instance, telephone, dinner, and travel receipts that can place several executives in the same location at the same time, providing a potential venue for discussions of prices of the products or services at issue.

An economic expert can examine the structure of the industry and the indicia of competition, such as prices, price changes, and profit levels during the specific time frames in which the allegedly incriminating discussions took place, and can offer assessments about the potential effectiveness of any alleged conspiracy, given the market context.

Another category of evidence is price-specific company documents – for example, sales transaction data, corporate price lists, price-change notices, bid lists, meeting notes, or other pricing-related memoranda. An economic expert can use this type of information to, for example, assess whether price movements in a particular segment of an industry were statistically unusual – that is, did pricing in the sector change significantly during the time frame in which alleged collusive conversations took place?

Analyses such as those referenced here can clarify the likely scope, reach, and conclusions of an investigation into possible collusion and can help focus counsel on the activities of greatest economic concern. For companies being investigated and their outside counsel, engaging economic experts early in the process can also help to ensure accuracy and consistency in the data being used and in the information being communicated to investigators and opposing parties. ■

MICHAEL BEAUREGARD IS A VICE PRESIDENT IN THE LOS ANGELES OFFICE OF ANALYSIS GROUP.

[1] *Analysis Group teams have assisted in several criminal and civil lawsuits involving the market for LCD panels, led by Managing Principals Bruce Deal and Pierre Cremieux.*

Mobile Broadband: Competition, Spectrum, and Consumers

Policies governing competition and spectrum management are vitally important to multiple stakeholders in the wireless sector by Harold W. Furchtgott-Roth

Consumers are spending more time on smartphones and tablets, downloading more mobile video and data over faster wireless networks. Wireless carriers need additional spectrum to meet the rapidly growing demand for mobile broadband services. However, the supply of spectrum is currently fixed by Federal Communications Commission (FCC) policy. U.S. carriers have historically pursued two strategies to resolve spectrum constraints: consolidation, and advocacy for an increase in supply.

For two decades, the FCC and the U.S. Department of Justice allowed substantial consolidation among wireless carriers. In 2011, however, the agencies opposed the AT&T and T-Mobile merger, rejecting the claimed efficiencies from consolidating the companies' operations and spectrum holdings. More recently, however, regulators approved Verizon Wireless's acquisition of spectrum (*see related case detail at right*), and AT&T moved ahead with a series of smaller spectrum acquisitions. In reviewing these transactions, regulators likely concluded that the consolidation of spectrum would facilitate the deployment of mobile broadband without reducing competition.

Under industry pressure, the government recently proposed to repurpose 500 MHz of underused spectrum for mobile broadband. There has been little progress toward this target, however. The industry has also petitioned the FCC to relax or modify license terms in order to free up spectrum; several carriers recently petitioned the FCC to modify license terms to open up more of the airwaves for terrestrial mobile broadband. However, the regulatory review of license terms is long and costly, and the outcome is far from certain.

Are inconsistent spectrum and competition policies sending mixed signals about how regulators expect the wireless industry to evolve? Allowing carriers to rationalize current spectrum holdings through market transactions and increasing spectrum supply would generally be pro-competitive. Conversely, if substantial new spectrum is not released and secondary market transactions and new entry are not allowed, regulators may end up inadvertently designating the winners and losers in the mobile broadband market – in which case one likely loser will be the consumer. ■

HAROLD W. FURCHTGOTT-ROTH, AN ANALYSIS GROUP AFFILIATE, IS A FORMER COMMISSIONER OF THE FCC AND HAS TESTIFIED IN A NUMBER OF HIGH-PROFILE TELECOMMUNICATIONS MATTERS.

T-Mobile, Verizon Wireless Swap Spectrum Licenses

In December 2011, Verizon Wireless proposed to acquire Advanced Wireless Spectrum (AWS) licenses held by SpectrumCo, a joint venture of several cable TV companies, and Cox TMI Wireless. An Analysis Group team, led by Vice President **David Sosa** and including Vice President **Robert Earle** and Manager **Nino Sitchinava**, supported academic affiliate **Judith Chevalier** in analyzing issues of interest in these transactions to our client T-Mobile USA. Professor Chevalier studied the competitive impact of the proposed transactions and the economics of launching new broadband wireless services.

Working with T-Mobile's outside counsel, Wilson Sonsini Goodrich & Rosati and Bingham McCutchen, Professor Chevalier and the Analysis Group team presented their findings to the U.S. Department of Justice and the Federal Communications Commission (FCC). During the agencies' review of the transactions, T-Mobile and Verizon Wireless agreed to exchange AWS licenses, resulting in a net transfer of spectrum from Verizon Wireless to T-Mobile. In August 2012, the FCC approved the transaction between Verizon and T-Mobile, as well as the Verizon/SpectrumCo and Verizon/Cox transactions.

Court Affirms Damages Decision in Favor of Musician

In *Fishman Transducers, Inc. v. Stephen Paul d/b/a Esteban, et al.,* the U.S. Court of Appeals for the First Circuit, District of Massachusetts, affirmed a lower court's damages decision in favor of Analysis Group client Stephen Paul, a musician doing business as Esteban, along with codefendant resellers of Esteban products.

The plaintiff had filed suit against Esteban and codefendants alleging *Lanham Act* violations, trademark infringement, and false advertising. The plaintiff claimed that the defendants advertised, promoted, and sold Esteban guitars while falsely misrepresenting to the public in infomercials and on websites that Esteban guitars were equipped with Fishman electronic components. Fishman sought an equitable amount of the defendants' profits in damages. Counsel for Esteban et al. retained an Analysis Group team, led by Managing Principal **John Jarosz** and Vice President **Daria Killebrew**, to provide expert testimony and analytical support, and to evaluate the plaintiff's claimed damages.

In March 2011, the defendants were found by a jury to have engaged in unfair competition, trademark infringement, and false advertising by selling and promoting guitars that included Fishman equipment. However, the jury had declined to find that the defendants had acted "willfully," and it found that the damages evidence did not support a theory of unjust enrichment by the defendants. The district judge had found that the plaintiff's expert's report "furnished neither a figure or range for damages suffered by Fishman nor supplied the jury with data from which it could make an intelligent estimate of Fishman's damages, if any, caused by the infringement." Fishman filed an appeal, which was heard in July 2012. The First Circuit Court of Appeals affirmed the previous decision, noting in its decision that the plaintiff's expert's report was "merely a basis for jury speculation and [the] testimony was properly excluded."

Class Certification Denied in Contract Suit Against Nestlé Waters

In the matter of *Peter Claydon v. Nestlé Waters North America, Inc., et al.*, a putative class of customers filed suit against Nestlé Waters alleging the company had intentionally delivered unordered products.

On behalf of Nestlé Waters, the law firm of Farella Braun + Martel LLP retained a team from Analysis Group led by Vice President **Peter Simon** to support academic affiliate UCLA Professor **Randolph Bucklin** in his evaluation of the plaintiffs' experts' claims and proposed methods of analysis, and in his assessment of whether product delivery data were consistent with the plaintiffs' claims. In his report, Dr. Bucklin noted flaws in one expert's sampling and survey methods and in another's analysis of customers' complaint rates. He also analyzed data on product deliveries and found patterns that were inconsistent with the plaintiffs' claims. The plaintiffs' motion for class certification was denied.

Breach of Contract Case Involving MONY Life Insurance

Analysis Group was retained on behalf of the defendant in *Rabin v. MONY Life Insurance Company*, a class action involving allegations of deceptive practices and unjust enrichment. The plaintiff alleged that MONY breached both contract obligations and fiduciary duties and that the plaintiff should have received payment of his cash surrender value in a lump sum check rather than in the form of an interest-bearing checking account. An Analysis Group team, led by Managing Principal **Michael Quinn** and including Vice President **Michael Holland**, supported our academic affiliate **Peter Tufano**. MONY filed for summary judgment, partly on the basis of its assertion that the evidence in the matter showed that the interest paid met the standard of the national average for bank money accounts.

The court entered summary judgment, finding no evidentiary support for the plaintiff's claims regarding the meaning of a "competitive" interest rate. Having granted summary judgment, the court did not address the class certification motion.

Delaware Judge Rules in Favor of Galderma in Patent Litigation Involving Acne Gel

A judge for the U.S. District Court for the District of Delaware ruled in favor of Analysis Group clients Galderma Laboratories, Galderma SA, and Galderma Research and Development in their patent infringement action against Tolmar, Inc.

The defendant had filed an abbreviated new drug application with the U.S. Food and Drug Administration seeking to market a generic version of Galderma's Differin Gel 0.3%, a topical medication used to treat acne. The plaintiffs filed suit claiming that the defendant's Paragraph IV certifications had infringed upon several key patents associated with Differin Gel 0.3%.

On behalf of the plaintiffs, the law firm of Finnegan, Henderson, Farabow, Garrett & Dunner LLP retained a team from Analysis Group,

led by Managing Principal **John Jarosz** and Vice President **Daria Killebrew**, to evaluate the commercial success of the inventions described in the patents-in-suit. Mr. Jarosz testified at deposition and trial, and he filed expert reports on the absolute and relative sales of Differin Gel 0.3% and the nexus between the success of Differin Gel 0.3% and the benefits and advantages made possible by the patented inventions.

In his decision, Judge Leonard P. Stark said that Tolmar had failed to prove "by clear and convincing evidence" that the inventions in the patents-in-suit would have been obvious to and anticipated by those having "ordinary skill in the art at the time of the inventions." He entered judgment in favor of Galderma.

Class Certification Denied in BNY Mellon Securities-Lending Litigation

A judge in the U.S. District Court for the District of Southern New York denied a motion for class certification filed by the board of trustees of the Southern California IBEW-NECA Defined Contribution Plan against The Bank of New York Mellon Corporation, The Bank of New York, and BNY Mellon NA.

The plaintiff had alleged that the defendants had violated the *Employee Retirement Income Security Act* (ERISA) by investing securities-lending cash collateral in allegedly risky notes issued by Lehman Brothers Holdings and by refusing to sell such notes despite alleged warnings about the lack of liquidity in the credit market and declines in the market value of the investments.

A team from Analysis Group, led by Managing Principals **Andrew Wong** and **Keith R. Ugone**, and Vice Presidents **Steven Saeger** and **Na Dawson,** was retained by Boies, Schiller & Flexner LLP on behalf of the defendants to address issues related to class certification. Dr. Ugone filed an expert report, opining on the requirements necessary to certify the class of ERISA-governed plans. "A [c]lass-wide approach would obfuscate (or mask) … important differences" among proposed class members' individual investment expectations and tolerances, Dr. Ugone observed in his report. He noted differences in the plans' maturity guidelines, credit-quality guidelines, prohibited investments, and diversification

"It would seem that the proposed class members would have a strong interest in individually controlling the prosecution of their own actions because they are sophisticated institutional investors with large claims in the 'millions of dollars.' "
– N.Y. District Court Judge Richard Berman

requirements. Citing Dr. Ugone's report in his decision, Judge Richard Berman said the plaintiff's claims failed to meet conditions of numerosity and commonality, because the plaintiff had not established that "common questions of law or fact predominate over individual issues." He denied the plaintiff's motion for class certification.

Testimony on Clinical Trials Data Cited in Patent Decision

Analysis Group client Bone Care International LLC, a subsidiary of Genzyme Corporation, received a favorable decision in a patent infringement matter involving Hectorol, a drug used to control hormone production in patients with kidney disease. At issue were the patent claims in an abbreviated new drug application filed by a group of drug manufacturers seeking approval to produce a generic version of Hectorol. The plaintiff filed a consolidated lawsuit against Anchen Pharmaceuticals, Inc., Roxane Laboratories, Inc., and Sandoz, Inc., seeking to block the firms from making or selling a generic form of Hectorol until its patent expires. A team from Analysis Group, led by Vice President **Lisa Pinheiro** and Managing Principal **Pierre Cremieux**, was retained by counsel on behalf of the plaintiff to evaluate whether a key published study supported the defendants' claims regarding the relative efficacy and safety of Hectorol, and to analyze clinical trials data to specifically address the questions raised by the defendants regarding the patent-at-issue. Dr. Cremieux also testified at trial on his statistical analyses. After considering issues of inducement, prior art, and obviousness, Chief Judge Gregory Sleet of the District of Delaware upheld the validity of Genzyme's patent, rejecting the defendants' counterarguments and clinical evidence. Noting that, unlike plaintiffs' expert, Dr. Cremieux incorporated clinical input and conducted analyses to verify his findings, Judge Sleet said "the court finds Dr. Cremieux's testimony and findings to be reliable."

Consultants Analyze Data Relating to Mass. OUI Cases

Analysis Group consultants provided analytical support to R.J. Cinquegrana, special counsel to the Supreme Judicial Court (SJC) of Massachusetts, in his comprehensive review of 56,966 cases involving allegations of operating under the influence (OUI) of drugs and alcohol (between January 2008 and September 2011). Mr. Cinquegrana, of Choate Hall & Stewart LLP, was asked to explore whether the acquittal rate in jury-waived OUI trials in Massachusetts differs from the national average and from the acquittal rate in other types of criminal cases in the state. He was also asked to explore whether the acquittal rates of certain trial judges were substantially greater than the statistical average and, if so, to identify possible reasons for the disparity.

Managing Principals **Marc Van Audenrode** and **Paul Greenberg** and Senior Economist **Laura O'Laughlin** helped Mr. Cinquegrana to assess the reliability of the data on Massachusetts OUI dispositions and to analyze mean acquittal rates, waiver rates, and number of bench trials to identify statistical outliers. A report filed with the SJC revealed, among other things, that 77% of all OUI cases statewide were resolved against the defendant; that when OUI cases went to trial, judges acquitted defendants in 86% of the cases statewide while juries acquitted about 58% of the time; and that OUI conviction rates in Massachusetts were similar to those found in other states.

Consultants Assist in Review of Finances for Vernon, California

Analysis Group assisted the California State Auditor in conducting a comprehensive review of the management and finances of the city of Vernon and its power department.

The auditor's report, "City of Vernon: Although Reform Is Ongoing, Past Poor Decision Making Threatens Its Financial Stability" (June 2012), contains a number of recommendations, including addressing the structural deficit of the city's general fund and improving transparency in the city's budgeting process and contract oversight.

The Analysis Group team, led by Managing Principal **Mark Egland** and including Principal **Marnie Moore** and Vice Presidents **Kevin Gold** and **Robert Earle,** assisted in the evaluation of the major financial and energy-related transactions that the city had entered into since 2003.

According to the report, the city could not demonstrate that it had assessed the risks of the 15-year, $430 million prepaid purchase of natural gas and various interest-rate swap transactions prior to entering into them. The auditor's report also notes that the city of Vernon has lacked a clear energy strategy. The California State Auditor has recommended that the city establish a debt management policy and "develop an integrated energy strategy that examines all elements of its energy needs, sources, and objectives."

Spotlight on Analysis Group

Analysis Group Announces New Senior Staff and New Affiliates

Gaurav Jetley Promoted to Managing Principal

Mr. Jetley specializes in merger economics and securities valuation. He has worked on several high-profile M&A-related matters that have involved the analysis of bid premiums, arbitrage spreads, deal terms, and disclosures made by bidders and targets – including *Ventas, Inc. v. HCP, Inc.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Company*, and *Air Products & Chemicals, Inc. v. Airgas, Inc*. His securities experience includes analyzing the impact of select disclosures on the stock price of large corporations across a variety of industries, including electric utilities, office equipment, biotechnology, and health care.

Energy Expert Paul Centolella Joins the Firm

Mr. Centolella, a former commissioner of the Public Utilities Commission of Ohio, has joined Analysis Group as a Vice President. He has more than 30 years of experience in regulation, economic and energy consulting, and public utility and environmental law. He has performed economic assessments of energy markets for power systems operators nationwide and has analyzed policies related to energy development, pricing, and security. Mr. Centolella has extensive knowledge about Smart Grid interoperability standards, strategies, and technologies, and market design.

Professors Gordon Liu and Jun S. Liu Become Academic Affiliates

Dr. Gordon Liu is a noted figure in Chinese health reform efforts. He is a professor of economics and the director of the China Center for Health Economics Research at Peking University's Guanghua School of Management. He is an expert on health and development economics, health policy reform, and pharmaceutical economics in China. Dr. Liu serves on the State Council Health Reform Advisory Commission. He is president of the Chinese Society for Pharmacoeconomics and Outcomes Research.

Dr. Jun S. Liu is an expert in statistics. He is a professor in the department of statistics at Harvard University and Harvard School of Public Health. He is a guest professor of mathematics at Tsinghua University and of statistics at Peking University. He has consulted to leading multinational pharmaceutical firms and has served as a principal investigator in numerous National Science Foundation and National Institutes of Health programs. His work in genetic research; on Monte Carlo methods for integration and optimization in complex systems; and on statistical applications in health care, finance, and engineering has had a broad impact on the theoretical understanding and practical application of statistics.

Both professors will work with our consultant teams in the United States and China. Analysis Group recently opened an office in Beijing that will focus initially on providing research and consulting to the firm's multinational pharmaceutical clients.

Firm Ranks First in Large Company Category in *Boston Globe* Top Places to Work Poll

Analysis Group ranked first in the "large company" category in the *Boston Globe* 2012 Top Places to Work in Massachusetts survey, based on input from employees. The firm has been ranked in the survey each of the past five years. In a profile accompanying the survey results, Analysis Group was recognized for providing employees with mentoring, training, and other development opportunities; for its commitment to treating everyone with respect, at all levels of the firm; and for its compensation practices. "This honor accrues to all our employees, across all our offices," said President and CEO **Martha S. Samuelson**. "We have worked hard to create a challenging, supportive environment in which people feel they can do their best work. Year in and year out, we are focused on maintaining a collaborative culture, which is critical to our ability to serve clients effectively." In 2012, Analysis Group was also among *Vault.com*'s top 10 best consulting firms to work for in the country.

The Boston Globe
TOP PLACES TO WORK 2012

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