

Small Business Notes

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Securities and Exchange Commission Amends Regulation A+ Rules to Allow Use by Reporting Companies

The Securities and Exchange Commission has adopted rules (effective January 31, 2019, to permit companies reporting under sections 13 or 15(d) of the Securities Exchange Act to offer securities under Regulation A+. Until those rules, offerings under Regulation A were limited to non-reporting companies.

Under the new rules a reporting company making an offer under Regulation A+ will not have any new reporting requirements as long as the company is current with its Exchange Act reports.

Regulation A+ provides two tiers of offerings: Tier 1 with offerings up to \$20 million in a 12 month period, and Tier 2 with offerings up to \$50 million in a 12 month period. State “Blue Sky” regulation is preempted for Tier 2 offerings “Testing the waters” to gauge investor interest is allowed for both tiers.

Federal Court Holds that Mobile Apps Used to Access Company Website Are Subject to the Americans with Disabilities Act

On January 15, 2019 the United States Court of Appeals for the Ninth Circuit handed down its decision in the case of *Guillermo Robles v. Domino’s Pizza, LLC* (No. 17-55504). The decision is the latest in a series of cases nationally (and with differing outcomes) on the applicability of the Americans with Disabilities Act to company websites (especially as regards blind or sight impaired individuals).

Noting that the decision states that the Americans with Disabilities Act applies to services *of* a public accommodation not services *in* a public accommodation, the court held that the American with Disabilities Act applies not only to places of public accommodation (here a pizza restaurant) but also to mobile apps accessed outside the place of public accommodation to enable individuals access to services provided (in this case an app to order pizza for pickup).

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Of equal importance is the court's holding that the continuing absence of U.S. Department of Justice standards for website accessibility under the Americans with Disabilities Act does not eliminate the statutory duty of a place of public accommodation to make its website and mobile apps accessible to individuals with disabilities.

This decision comes from the historically very liberal Ninth Circuit. It remains to be seen if other circuits (e.g., the 8th Circuit which includes Minnesota) will follow suit. At present the use of Web Content Accessibility Guideline 2.0 is probably the best course of action for a business.

Bill Introduced in Minnesota Legislature to Give Primary Jurisdiction to Minnesota District Courts in Public Procurement Actions

Senate File 558 (introduced January 24, 2019) would give Minnesota District Courts primary jurisdiction to hear disputes involving procurement contracting by a Minnesota municipality regardless of whether the municipality involved "is alleged to have acted, or may be held to have acted, in a judicial or quasi-judicial capacity"—effectively replacing agency administrative action with judicial action.

The bill applies to "any action arising under or based upon the alleged violation by a municipality of Minnesota statute, regulation, ordinance, law or equitable doctrine governing or regarding public procurement requirements, public procurement procedures, or the award of any public contract by a municipality..."

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U.S. Supreme Court, In a Unanimous Decision, Addresses When a Commercial Sale Of an Invention To a Party Required by Terms of Sale to Keep the Invention Confidential Can Prevent Inventor from Obtaining a Patent

The Leahy-Smith America Invents Act (AIA) bars an inventor from receiving a patent on an invention that was “in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention. [35 U.S.C. 102(a)]. The patent law in effect before the passage of the AIA had similar language known as the “on-sale bar.”

In its January 22, 2019 decision [*Hellsinn Healthcare S.A. v Teva Pharmaceutical USA, Inc.*, (No. 17-1229)] the U. S. Supreme Court addressed the issue of whether a sale took place for purposes of patentability if the fact of a sale was disclosed to the public but not the details of the invention.

Hellsinn Healthcare was the inventor of palonosetron, the active ingredient in its product Aloxi, which is used for treatment of severe nausea and vomiting. In 2001 Hellsinn entered into agreements with MGI Pharma to market and distribute 25mg and 75mg doses of palonosetron. The agreements required MGI to keep confidential any proprietary information received under the agreements regarding palonosetron. Neither the press release that accompanied the agreements nor the required filings with the Securities and Exchange Commission disclosed the specific dosages covered by the agreements,

Two years after the agreements, Hellsinn filed a provisional patent application. Over the next ten years it filed four applications that claimed priority to the January 2003 date of its provisional application. The patent at issue in this case was issued after an application in May 2013.

In 2011 Teva Pharmaceuticals sought U.S. Food and Drug Administration approval to market a generic palonostron product in 1 25 mg. dose. When Hellsinn then sued for infringement of all its patents, Teva offered the defense that under the terms of the 2001 agreement with MGI the invention was “on sale” more than a year before Hellsinn filed its first patent application and, therefore, its patent was invalid.

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The District Court held that the “on sale” provision did not apply because the disclosure of the agreements between Hellsinn and MGI did not disclose the drug dosage and so the product was not available to the public.

The Federal Circuit Court of Appeals reversed the District Court, holding that “if the existence of the sale is public, the details of the invention need not be publicly disclosed in the terms of sale.”

In upholding the Federal Circuit, the Court noted that the Circuit has “made explicit what was implicit in our precedents.” That is, any sale – even a secret sale – can act as a bar to patentability. When Congress adopted in the AIA the language in the previous law it “adopted the earlier judicial construction” of that language. The language of the holding was that “...an inventor’s sale of an invention to a third party who is obligated to keep the invention confidential can qualify as prior art.”

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