

**Failure To Get FDA Approval Is Evidence Of “Failure Of Others” For Obviousness Analysis. (Robinson, J.)**

*In re: Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation*

*In In re: Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation*, 2010 U.S. Dist. LEXIS 99600 (D. Del. Sept. 21, 2010), Judge Robinson denied defendants’ motion to exclude evidence of defendants’ inability to obtain FDA approval. In doing so, the Court held that the inability to obtain FDA approval is relevant evidence of “failure of others” for purposes of nonobviousness. The Court rejected defendants’ argument that only failures preceding the patent issue date are relevant. In this regard, the Court characterized evidence of failures after the patent’s issue date as “highly relevant,” as these “may be more persuasive than failures that occur before.” According to the Court, “[i]f others continue to fail despite having the patent as prior art, such failures may illustrate just how radically different the patent was from past discoveries. This would be highly relevant to a finding of non-obviousness.”