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Holland & Knight
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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,400 professionals in 27 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

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We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 27 个办公室的 1400 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

A Primer on Attorney-Client Privilege: Part 3

By Charles A. Weiss

This article is the third and last of our series on attorney-client privilege. In the first article, we presented the basic rule of attorney-client privilege as generally applied in the United States, and addressed two problems seen commonly in the case of corporate clients. (See Holland & Knight's China Practice Newsletter: January-February 2021.) In the second article, we examined the issue of cross-border privilege, such as how a U.S. court applies attorney-client privilege when the communications at issue are between a non-U.S. lawyer and his or her client. (See Holland & Knight's China Practice Newsletter: March-April 2021.)

This article addresses the common-interest doctrine. As explained below, the common-interest doctrine is an exception to the usual rule that disclosure of an attorney-client communication to a third party waives privilege as to that communication. The usual rule of waiver grows out of the requirement that attorney-client privilege attaches only to communications between the lawyer and client that are "in confidence." Just as attorney-client discussions held in the presence of a third party (i.e., a person who is not the lawyer, the client, or one of their agents or representatives) will not be protected by privilege because they are not held "in confidence," an after-the-fact disclosure to a third party of a privileged communication generally destroys privilege because the communication is no longer held "in confidence."

Under the common-interest doctrine, certain categories of third parties who share a common legal interest with the client may be parties to, or subsequently receive, attorney-client communications without destroying or waiving the privilege. However, this doctrine is often misunderstood as providing a broader exception than what actually exists to the default rule that disclosure of attorney-client communications to a third party waives privilege. Because clients (and lawyers) may divulge attorney-client communications with third parties under the mistaken belief that the common-interest doctrine applies to avoid waiver of privilege when the circumstances mean that it does not apply, the primary theme of this article is to explain that the common-interest doctrine is narrower than often thought.

ORIGINS IN THE "JOINT-DEFENSE" DOCTRINE APPLICABLE TO LITIGATION

It is generally held that the common-interest doctrine grew out of a rule applied in criminal cases involving multiple defendants each represented by separate counsel. For example, in *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871), three persons charged with fraud and forgery met in a group with their separate counsel to discuss the case and their defense. At trial, defendant Chahoon sought to compel the testimony of the lawyer representing Sanxay as to what Sanxay had said at the meeting, in order to show that Sanxay had changed his story, and that his allegedly inconsistent trial testimony against Chahoon should not be believed. Sanxay's lawyer declined to answer question posed by Chahoon's lawyer on the grounds of privilege, and the trial judge declined to order the lawyer to answer the questions.

On appeal, Chahoon argued that the trial judge erred in declining to compel the testimony because privilege did not apply. Given that others (the co-defendants and lawyers) were present at the meeting and also heard what Sanxay had said, there was no privilege because his statement had not been made "in confidence." The Virginia Supreme Court rejected this argument and affirmed the conviction, holding that the co-defendants' ability to prepare an effective defense would have been impaired if they could not all freely discuss their defense at a meeting with their respective lawyers:

> The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such

> communication. They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client. They had a right, all the accused and their counsel, to consult together about the case and the defence, and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them. Otherwise what would such right of consultation be worth?
>
> *Id.* at 841-42.

From its origins in criminal law, this rule of nonwaiver migrated to civil litigation and under the name "joint defense" doctrine. As the name suggest, the core application of the joint-defense doctrine is when co-defendants represented by separate counsel put forward a common defense to a plaintiff's claims. For example, *Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942), concerned a traffic accident involving two cars and a bus. The bus driver had given a statement to the company's attorney shortly after the accident that the plaintiff sought to use at trial. The company's attorney objected that the statement need not be produced because it was privileged. The trial judge tentatively agreed with the plaintiff that the statement was not privileged, but changed his mind over the weekend. Meanwhile, the company's lawyer had given a copy of the statement to the lawyer representing the co-defendants (the driver and owner of the second car) to discuss with him how best to respond. The plaintiff argued that this waived privilege because the two defense lawyers represented different clients, which meant that the statement was no longer held by the bus company's lawyer "in confidence." The trial judge held that privilege had not been waived, and ruled that the statement need not be given to the plaintiff.

On appeal by the plaintiff from a jury verdict in favor of the defendants, the Minnesota Supreme Court held that the trial judge had correctly ruled that the statement was still protected by privilege notwithstanding its provision by the bus company's lawyer to the lawyer for the other defendants:

> Where an attorney furnishes a copy of a document entrusted to him by his client to an attorney who is engaged in maintaining substantially the same cause on behalf of other parties in the same litigation, without an express understanding that the recipient shall not communicate the contents thereof to others, the communication is made not for the purpose of allowing unlimited publication and use, but in confidence, for the limited and restricted purpose to assist in asserting their common claims. The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.
>
> *Id.* at 417.

EXTENSION TO NON-LITIGATION MATTERS, AND EVOLUTION OF THE "COMMON-INTEREST" DOCTRINE

For many years, the joint-defense doctrine was assumed to apply principally, if not exclusively, in the context of existing or contemplated litigation. For example, the meeting among the co-defendants in the *Chahoon* case was held after litigation commenced (they had already been charged), and the statement by the bus driver in *Schmitt* was given in anticipation of litigation. As time went by, however, many courts extended the doctrine to communications among counsel for separately represented parties that shared a common legal interest even if litigation was neither ongoing nor contemplated, reasoning that rule of non-waiver made as much sense in, e.g., commercial matters as it did in adversarial matters.

The *In re Regents of the University of California* case, 101 F.3d 1386 (Fed. Cir. 1996), addressed when and how the common-interest doctrine applied to communications between a patent owner (University of California or UC) and its licensee. In that case, UC granted an option to license certain patent applications to the pharmaceutical company Eli Lilly (Lilly). During prosecution of those applications, patent counsel for Lilly communicated with UC, which had separate prosecution counsel. Subsequently, Lilly exercised its option, became an exclusive licensee, and together with UC sued Genentech for infringement. The trial court held that the communications between Lilly's patent counsel and UC in the course of prosecution were discoverable because there was, at the time, neither litigation nor anticipated litigation. The U.S. Court of Appeals for the Federal Circuit reversed, holding that privilege was preserved because Lilly and UC nevertheless shared a common legal interest in obtaining valid and enforceable patents:

> UC is a university seeking valid and enforceable patents to support royalty income. Lilly is an industrial enterprise seeking valid and enforceable patents to support commercial activity. Valid and enforceable patents on the UC inventions are in the interest of both parties.

Id. at 1390. Thus, the common-interest doctrine applied to protect privileged communications shared between the university and licensee because they had a common legal interest in obtaining valid and enforceable patents, even though litigation was neither in process nor contemplated at the time.

This extension of the common-interest doctrine outside the litigation context is not universally accepted. Readers of our previous articles on attorney-client privilege know that the rules and contours of privilege vary from state to state. So to with respect to the common-interest doctrine. For example, New York limits its application to communications that occur in connection with pending or contemplated litigation, which means that it usually will not apply in the context of business transactions. Delaware, by contrast, has eliminated the litigation requirement. Given the frequency of corporate transactions governed by Delaware law that are handled in large part by New York law firms, the question of whether the common-interest doctrine will apply to a given matter cannot always be answered with confidence.

THE NEED FOR IDENTITY OF LEGAL INTEREST, NOT JUST BUSINESS INTEREST

Although the common-interest doctrine can apply outside the litigation context, it can be challenging to determine if parties' truly share a common legal interest, as opposed to a common business interest. The distinction is important, because those courts that apply the common-interest doctrine in the absence of existing or contemplated litigation still limit its reach by requiring a commonality of legal interests. Sharing a common business interest is not sufficient.

Potential acquisitions of a company or business unit illustrate the difference between a common legal interest and a common business interest. For example, if company B is considering the purchase of company S, it will engage in due diligence to determine the value of B's assets and the risks of B's potential liabilities. S may have any combination of real property, intellectual property and customer contracts that are central to the value of its business. S may also have exposure to environmental liabilities arising from the discharge of chemical wastes, claims by former employees of wrongful discharge and face allegations that its products infringe a competitor's patents.

If S shares with B the privileged legal advice that S has obtained from its counsel on these issues, does such disclosure waive privilege because B is a third party, or does the common-interest doctrine apply to avoid waiver? The answer lies in the distinction between a common legal interest and a common business interest. To be sure, S and B have a common business interest in the efficient completion of due diligence and consummation of the deal. But unless and until a deal is reached, S and B are across the table from each other, i.e., they do not have a common legal interest.

An example that follows this hypothetical can be found in *Waymo LLC v. Uber Technologies, Inc.,* 2017 WL 2694191 (N.D. Cal. June 21, 2017). In that case, Uber and Ottomotto signed a term sheet which set forth a process under which Uber might acquire Ottomotto. Part of the process included retaining an investigator to investigate potential claims of misappropriation of trade secrets by an Ottomotto employee. The investigator's report was provided to both companies, and in a subsequent lawsuit the trade-secret claimant demanded its production. Uber's reliance on the common-interest doctrine was rejected because the interests of Uber and Ottomotto had not been aligned at the relevant time. To the contrary, the report was created to help Uber decide whether to acquire Ottomotto, and the two companies were adversaries in the sense that they were on opposite sides of a potential transaction.

The difference between this situation and the facts of the *Regents* case discussed above is primarily one of timing. If a deal has been completed, it is more likely for the parties to have a common legal interest, e.g., the relationship between a patent owner and its licensee in *Regents*. If a deal is pending or still in the process of due diligence, as in the *Uber* case, it is more likely that the parties lack a common legal interest and at best have only a common business interest, which is insufficient to trigger the common-interest doctrine.

CONCLUSION AND TAKEAWAYS

As can be seen from the above discussion, the protections afforded by the common-interest doctrine are less robust than is believed by many lawyers, especially outside the litigation context. Accordingly, counsel should take great care in sharing (or advising their clients to share) privileged information in the transactional context based on a belief that privilege will be protected by the common-interest doctrine.

At the same time, the waiver of privilege may be a reasonable price to pay for the benefit of disclosure. For example, if a company needs to convince a potential counterparty that its products do not infringe a competitor's patent, it can be reasonable to share an opinion provided to the company by its patent counsel that explains why this is the case. The assumption must be that sharing the opinion is a waiver of privilege, but if the opinion is well-crafted, convincing and favorable, there may be little of no downside if privilege for the opinion is waived to help consummate a profitable business deal.

This is the last of our planned article concerning attorney-client privilege. Please feel free to contact the author with ideas and suggestions for topics concerning privilege that may be of general interest for possible inclusion in future editions of Holland & Knight's China Practice Newsletter.

律师-客户特权保护问题入门：第三部分

原文作者：**Charles A. Weiss**

本文是关于律师-客户特权保护问题系列文章的第三篇也是最后一篇。在第一篇文章中，我们介绍了在美国普遍适用的律师-客户特权保护问题的基本规则，并讨论了在公司客户案例中常见的两个问题（请参见 2021 年 1、2 月份 Holland & Knight's China Practice Newsletter）。在第二篇文章中，我们探讨了跨境特权保护的问题，例如当非美国律师与其客户之间的沟通成为争议点时，美国法院如何适用律师-客户特权保护规则（请参见 2021 年 3、4 月份 Holland & Knight's China Practice Newsletter）。

本文将论述共同利益原则。如下文所述，共同利益原则是向第三方披露律师-客户沟通时会被视为放弃了对该沟通的特权保护的通常规则的一个例外。一般的弃权规则源于律师-客户特权保护只适用于律师和客户之间“保密”的沟通这一规定。就像在第三方（即该人并非律师、客户或他们的代理人或代表）在场时进行的律师-客户沟通将不受特权的保护，因为他们不被“保密”，事后向第三方披露受特权保护的沟通通常也破坏了特权的保护，因为该沟通将不再被“保密”。

根据共同利益原则，某些类别的第三方如与客户有共同法律利益时，当他们参与律师及客户的沟通或随后收到该沟通时可不破坏或放弃特权的保护。然而，这一原则往往被误解为提供了一个比实际上向第三方披露律师-客户沟通应视为放弃了特权保护的这个默认原则更宽泛的例外。因为客户（和律师）可能会在错误的情况下认为共同利益原则适用而造成在放弃特权保护的的情况下泄露客户与第三方的沟通（但在该情况下是不适用的）。本文的主旨是解释说明共同利益原则比通常认为的来的狭隘。

起源于适用于诉讼的“共同抗辩”原则

一般认为，共同利益原则源自于一项适用于涉及有多名被告且每个被告由单独的律师代理的刑事案件的规则。例如，在 *Chahoon 诉大英国协*一案 62 Va.（21 Gratt.）822（1871 年）中，三名被控欺诈和伪造的人与他们各自的律师在一个小组中会面，讨论案件和他们的辩护。在庭审中，被告 Chahoon 试图强迫 Sanxay 的代理律师就 Sanxay 在会上所说的话作证，以表明 Sanxay 改变了自己的说法，且他所称的针对 Chahoon 的前后矛盾的庭审证词不应被相信。Sanxay 的律师以特权保护为由拒绝回答 Chahoon 的律师提出的问题，初审法官也拒绝命令律师回答这些问题。

在上诉中，Chahoon 辩称审判法官拒绝强迫作证是错误的，因为特权保护不适用。鉴于其他人（共同的被告和律师）出席了会议，也听到了 Sanxay 所说的话，没有任何特权保护，因为他的陈述不是“秘密”作出的。维吉尼亚州最高法院驳回了这一论点，并确认了定罪，认为如果共同的被告不能在与各自律师的会议上自由讨论其辩护，则共同的被告准备有效辩护的能力将受到损害：

> 各方当事人因共谋犯下特定罪行而被一起起诉，且因伪造和发表同一份文件而被各别起诉。他们可能雇佣了相同的律师，也可能雇佣了不同的律师。但无论他们做了这一件事还是那一件事，就他们与每一位或全部律师进行沟通的权利而言，以及就这种沟通所享的特权保护而言其效果是相同的。他们有同样的辩护理由，一个人的行为助长了共谋，这是所有人的行为，每个人的律师实际上是所有人的律师，虽然为方便起见，他是由各自的当事人雇用和支付报酬的。所有被告和他们的律师有权就本案及其辩护方法进行共同协商，因此，任何一名律师从这种协商中获得的所有信息都是受特权保护的，而且这种特权保护属于每一位客户，未经全部的人同意不得放弃。否则这样的协商权值将有何价值呢？
>
> *同上*。第 841-42 页。

不弃权的原则起源于刑法，并以“共同抗辩”原则的名义延申到民事诉讼中。顾名思义，共同抗辩原则的核心适用是由个别律师代表的共同的被告对原告的诉讼请求提出共同抗辩。

例如，在 *Schmidt 诉 Emery* 一案 2 N.W.2d 413（明尼苏达州，1942 年）中，涉及两辆汽车和一辆巴士的交通事故。巴士司机在事故发生后不久向公司的律师提供了一份陈述，而原告希望在庭审中使用该陈述。该公司的律师提出反对要求不需出示该陈述，主张它受到特权保护。初审法官暂时同意了原告的说法，认为这项陈述没有受到特权保护，但在周末改变了主意。与此同时，该公司的律师已将一份陈述副本交给共同的被告（第二辆车的司机和车主）的代表律师，与他讨论如何最好地作出回应。原告主张这一保护特权的放弃是因为两名辩护律师代表了不同的当事人，这意味着巴士公司的律师不再“秘密”持有这一陈述。初审法官认为没有放弃这一特权保护，并裁定无需将陈述交给原告。

在原告对陪审团做出有利于被告的裁决提出上诉时，明尼苏达州最高法院认为，初审法官所做的裁定（即尽管巴士公司的律师将陈述提供给其他被告的律师，该陈述仍然受到特权的保护）是正确的：

> 律师将客户委托的文件副本提供给在同一诉讼中代表其他当事人并大致上主张相同理由的律师，但未明确约定接受人不得将文件内容告知他人时，该沟通的目的不是为了允许无限制的发布和使用，而是为了有限制地和为限制目的而加以保密，以协助提出他们的共同主张。该律师提供副本给他的客户受到特权的保护。在这种情况下，由于文件受到特权保护的特性，接受人与提供文件的律师受到同样的特权保护限制权利，因此他也不能被强迫要求出示或披露文件的内容。
>
> *同上*。第 417 页。

被延伸适用于非诉讼事项，及“共同利益”原则的演变

多年来，共同抗辩原则被认为主要（如果不是唯一的话）适用于现有的或预期的诉讼的情况下。例如，*Chahoon 案*的共同的被告之间的会议是在诉讼开始后举行的（他们已经被起诉），巴士司机在 *Schmitt 案*中的陈述是在预期诉讼将发生的情况下作出的。然而，随着时间的推移，许多法院将这一原则扩大适用到分别代表分享共同法律利益的不同当事人的律师之间的沟通，即使没有进行中的诉讼也没有预期诉讼将发生，理由是不弃权规则的适用在商业事项等方面与在对抗性事项一样有道理。

在*加州大学校长*一案 101 F.3d 1386（Fed. Cir. 1996 年）中，处理了共同利益原则何时以及如何适用于专利所有人（加州大学）与其被许可人之间的沟通。在该案中，加州大学向礼来制药公司授予了许可某些专利申请的选择权。在进行这些专利申请的过程中，礼来的专利律师与具有个别的专利申请律师的加州大学进行了沟通。随后，礼来行使其选择权，成为独家被许可人，并与加州大学一起起诉 Genentech 公司侵权。初审法院认为，在专利申请过程中，礼来的专利律师与加州大学之间的沟通是可以被强制揭露的，因为当时既没有诉讼，也没有预期诉讼的发生。美国联邦巡回上诉法院推翻了这一说法，认为这一特权保护得以保留，因为礼来和加州大学在获得有效和可执行的专利方面有着共同的法律利益：

> 加州大学是一所寻求有效和可执行专利以支持专利权使用费收入的大学。礼来是一家寻求有效和可执行专利以支持商业活动的工业企业。加州大学的发明取得有效和可执行的专利符合双方的利益。

同上。第 1390 页。因此，共同利益原则适用于保护加州大学和被许可人之间共享的受特权保护的沟通，因为他们在获得有效和可执行的专利方面享有共同的法律利益，即使当时既没有进行诉讼，也没有预期诉讼将发生。这种将共同利益原则扩展到诉讼范围之外的做法并没有得到普遍接受。我们之前关于律师-客户特权保护的文章的读者都知道，特权保护的规则和范围因州而异。关于共同利益原则也是如此。例如，纽约将其适用范围限于与

进行中或预期发生的诉讼有关的沟通，这意味着它通常不适用于商业交易的情况下。相比之下，特拉华州排除了诉讼的要求。鉴于受特拉华州法律管辖的公司交易在很大程度上是由纽约律师事务所所处理，共同利益原则是否适用于某一特定事项的问题将不能总是有把握地回答。

需共同的法律利益，而非仅仅是共同的商业利益

虽然共同利益原则可以适用于诉讼以外的情况，但要确定当事人是否真正享有共同的法律利益，而不是共同的商业利益可能是一件具有挑战性的事。这种区分很重要，因为那些在没有现有或预期诉讼的情况下适用共同利益原则的法院仍然通过要求法律利益的共同性来限制其适用范围。仅仅分享共同的商业利益是不够的。

公司或业务部门的潜在收购项目说明了共同法律利益和共同商业利益之间的区别。例如，如果 B 公司正在考虑收购 S 公司，它将进行尽职调查，以确定 B 公司资产的价值和 B 公司潜在负债的风险。S 可能拥有对其业务价值至关重要的不动产、知识产权和客户合同的任何组合。S 还可能面临因排放化学废物而产生的环境责任、前雇员提出的不当解雇索赔、以及面临其产品侵犯竞争对手专利的指控。

如果 S 与 B 共享 S 从其法律顾问处获得的有关这些问题的受到特权保护的法律意见，那么这种披露是否因为 B 是第三方而放弃了特权保护，或者共同利益原则是否适用以免特权保护被视为放弃？答案在于共同法律利益和共同商业利益之间的区别。诚然，S 和 B 在高效完成尽职调查和完成交易方面有着共同的商业利益。但除非达成协议，否则 S 和 B 是坐在桌子两端进行谈判的，也就是说，他们没有共同的法律利益。

Waymo LLC 诉 Uber Technologies, Inc.案 2017 WL 2694191（加州北区，2017 年 6 月 21 日）中可以看到套用这个假设情况的例子。在该案中，Uber 和 Ottomotto 签署了一份意向书，其中列出了 Uber 可能收购 Ottomotto 的流程。这一过程的一部分包括聘请一名调查员调查 Ottomotto 员工可能盗用商业机密的指控。调查员的报告被提供给了这两家公司，在随后的一场诉讼中，商业秘密原告要求出示报告。Uber 所依赖的共同利益原则被法院拒绝，因为 Uber 和 Ottomotto 的利益在相关时间没有达成一致。相反的，这份报告的目的是帮助 Uber 决定是否收购 Ottomotto，因此这两家公司是对手，因为它们在潜在交易中处于对立的立场。

这种情况与上述*加州大学校长*一案事实之间的区别主要在于时间点。如果一项交易已经完成，双方更有可能拥有共同的法律利益，例如，专利所有人与其在*加州大学校长案*的被许可人之间的关系。如果交易悬而未决或仍在尽职调查过程中，比如 *Uber 案*的情况，那么双方更有可能缺乏共同的法律利益，充其量只有共同的商业利益，这不足以触发共同利益原则的适用。

结论及重点

从上述讨论可以看出，共同利益原则所提供的保护不如许多律师所认为的那么有力，特别是在诉讼之外的情况下。因此，律师应非常谨慎地在交易情况中分享（或建议其客户分享）他们认为因为共同利益原则的适用而受到特权保护的信息。

同时，放弃特权保护可能是为换取披露所产生的利益所需付出的合理代价。例如，如果一家公司需要说服潜在的交易对手接受其产品没有侵犯竞争对手的专利的看法，那么可以合理地分享其专利律师向该公司提供的意见，解释为什么是这种情况。将意见分享将被认为是对特权保护的放弃，但是如果意见是精心设计的、令人信服的和有利的，那么如果放弃意见的特权保护来帮助完成有利可图的商业交易，可能没有什么坏处。

这是我们计划的最后一篇关于律师-客户特权保护的文章。欢迎读者向作者提供希望可能在日后的 Holland & Knight's China Practice Newsletter 中读到的有关特权保护的议题的意见和建议。

Session Replay Technology Puts Websites in Crosshairs of New Wave of Class Action Lawsuits Under State Wiretap Laws

By Ashley L. Shively and William F. Farley

Plaintiffs' class action lawyers routinely seek out new liability theories to apply to existing statutes. One of the latest trends is the use of state anti-wiretap laws as a vehicle to sue retailers and software developers for the use of ubiquitous cookies, pixels and other website software that track and monitor user activity online.

WHAT THE LAWS SAY

Early wiretap cases dealt primarily with businesses' undisclosed recording or monitoring of customer service telephone calls. These new cases, by contrast, are brought under electronic interception provisions of state wiretap laws. The California Invasion of Privacy Act (CIPA), California Penal Code §§ 630 *et seq.*, for example, imposes liability on "[a]ny person who … willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within [California]…" Cal. Penal Code § 631(a). Likewise, the Florida Security of Communications Act (FSCA) prohibits any person from intentionally intercepting, or endeavoring to intercept, any wire, oral or electronic communication, or disclosing or using the contents of such communications without the consent of all parties. Fla. Stat. § 934.03(1); 934.03(2)(d).

HOW THE LAW IS BEING APPLIED TO NEW TECHNOLOGIES

Businesses that maintain a significant online presence or process a large number of retail transactions online are increasingly implementing third-party analytics tools to evaluate the efficiency and performance of their sites. The software enables retailers to better understand visitors' use of their websites and troubleshoot issues that prevent successful transactions. In other cases, the software serves a compliance function; for instance, to reduce risk and prove consent under the Telephone Consumer Protection Act (TCPA). Plaintiffs have reframed the use of this technology as a privacy violation by retailers and developers.

More than 50 putative class action suits have been filed since fall 2020 in California and Florida based on retailers' alleged use of software that captures customers' keystrokes, scrolling, mouse movements and clicks on websites in real time, thus allegedly creating a recording of users' browsing history as well as personal and financial information entered (but perhaps not submitted) on website forms. Plaintiffs claim that businesses' use of such software constitutes an interception and impermissible disclosure to a third party (i.e., the software developer) in violation of state laws. Other digital wiretap cases pending around the country involve (at least arguably) less intrusive and more commonplace website activity tools, such as the use of third-party cookies that track the pages visited or search terms entered on a business' site. These cases all represent a risk to a vast number of companies currently using such tools on their websites.

At least 15 states require consent ***from all parties*** when a communication is recorded or intercepted, including California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Oregon, Pennsylvania, Vermont and Washington. The laws protect residents of the state, regardless of where the business or, its servers, are located. Penalties can range from $1,000 to $50,000 per violation.[1] In the context of user website activity, potential risk therefore can quickly climb to hundreds of millions of dollars.

HOW ARE COURTS REACTING?

These cases turn on a variety of evolving legal issues that seem easy to apply in the context of traditional eavesdropping but awkward, if not bizarre, in the context of the internet. These issues include 1) whether clicks and the like are "communications," 2) whether the party exception to eavesdropping claims (the notion that parties to a communication cannot eavesdrop on it) applies here and to what extent and 3) whether the statute covers the technology at issue.

WHAT CAN A BUSINESS DO?

Most of the cases filed so far are still in the early stages. Nevertheless there are many lessons from call recording and other consumer class action trends that businesses can apply in this new context to protect against electronic wiretap claims and defend themselves in the event that a lawsuit is filed. For example, before implementing session replay and similar tools, businesses should substantively review and, if appropriate, negotiate vendor contracts, with particular attention to data usage restrictions on the vendor, limitations of liability, insurance coverage and contractual indemnification. Companies may also need to augment website privacy policies to provide more substantive disclosures about how user information is collected and shared with service providers. In addition, businesses may consider whether any update is needed to website terms of use, particularly arbitration, class waiver, limitation of liability, choice of law and venue provisions, which serve important roles in limiting exposure to class litigation and damages.

Legal disclosures are only useful if they are enforceable, and businesses should proactively assess whether their website terms of use and privacy policies are communicated in a sufficiently conspicuous way to create the best case for enforceability. Where practicable, it is generally beneficial to obtain express consent from website visitors; for instance, by requiring users to check a box agreeing to the terms and privacy policy as part of the email sign-up or checkout process. Business will also typically inform users about material changes to practices and policies; this is often done via email or a banner / pop-up on the website and in the app.

If facing a lawsuit under state wiretap statutes, businesses should first look to any available indemnity rights under the contract with the software vendor as well as potential insurance coverage under cyber liability or other policies. It is also important to quickly identify and enforce arbitration and/or choice of law and venue provisions against the consumer; delay risks potentially waiving those protections. Other available defenses may include:

- showing that the plaintiff implicitly consented to the collection and disclosure by providing the information as part of the transaction or expressly consented under the applicable website terms and privacy policy. At least one court has found that a user's consent to the privacy policy – which disclosed website monitoring – obtained during the checkout process applied retroactively to all of the user's preceding activity on the site.
- demonstrating that the website activity at issue was not a protected communication. Some state wiretap laws protect only "confidential" communications from interception. In these states, a business may argue that a user's shopping or other online activity does not qualify for protection.
- establishing that the business was a party to the communication and thus cannot be liable as the alleged "eavesdropper."
- proving that the technology at issue is not a "device" within scope of the relevant state statute.

WE CAN HELP

Holland & Knight's Data Strategy, Security & Privacy Team has decades of experience defending lawsuits involving the loss, theft or misuse of personal information. If you have any questions regarding best practices for handling customer information or defending data privacy litigation, contact the authors or Holland & Knight's Data Strategy, Security & Privacy Team.

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[1] What constitutes a violation varies by state.

会话重播技术使网站成为州窃听法下新一轮集体诉讼的焦点

原文作者：**Ashley L. Shively 及 William F. Farley**

原告的集体诉讼律师通常会寻找新的责任理论来适套用现有的法律。最新的趋势之一是利用州的反窃听法作为手段，起诉使用无处不在的 cookie、像素和其他跟踪和监控用户在线活动的网站软件的零售商和软件开发商。

法律怎么规定

早期的窃听案件主要涉及企业对客户服务电话的秘密录音或监控。相比之下，这些新案件则是依据州窃听法下的电子拦截条款提出。例如《加州侵犯隐私法》（CIPA）及《加州刑法典》第 630 条及其后各条对“任何人故意且在未经通信各方同意的情况下、或以任何未经授权的方式阅读、或试图阅读或了解任何在运输途中或通过[加州]的任何电线、线路或电缆或在[加州]境内任何地方发送或接收的信息、报告或通信的内容或含义……”加诸责任。 加州刑法第 631（a）条。同样地，《佛罗里达通信安全法》（FSCA）禁止任何人未经各方同意，故意拦截或试图拦截任何有线、口头或电子通信，或披露或使用此类通信的内容。佛罗里达州法律第 934.03（1）条；第 934.03（2）（d）条。

法律如何被应用于新技术

那些维持大量在线业务或在线处理大量零售交易的企业越来越多地采用第三方分析工具来评估其网站的效率和性能。该软件使零售商能够更好地了解访问者对其网站的使用情况，并解决妨碍交易成功的问题。在其他情况下，该软件具有合规功能；例如，根据《电话消费者保护法》（TCPA）降低风险并证明同意。原告将这种技术的使用重新塑造为零售商和开发商侵犯隐私的行为。

自 2020 年秋季以来，加州和佛罗里达州已经有超过 50 起集体诉讼被提起，理由是零售商涉嫌使用软件实时捕捉顾客在网站上的按键、滚动、鼠标移动和点击，因此，被控记录了用户的浏览历史以及输入及（可能未在网站表格中提交的）个人和财务信息。原告声称企业使用此类软件构成了对第三方（即软件开发商）的违反了州法律的拦截和不受允许的披露。全国其他进行中的数字窃听案件涉及（至少可以说）侵入性较小且更为常见的网站活动工具，例如使用第三方 cookie 跟踪在访问页面或在企业网站上输入的搜索词。这些案件都对目前在其网站上使用此类工具的大量公司构成了风险。

至少有 15 个州规定记录或截获通信时***需要各方***的同意，包括加州、康涅狄格州、特拉华州、佛罗里达州、伊利诺伊州、马里兰州、马萨诸塞州、密歇根州、蒙大拿州、内华达州、新罕布什尔州、俄勒冈州、宾夕法尼亚州、佛蒙特州和华盛顿州。这些法律保护州内的居民，无论企业或其服务器位于何处。每次违反的处罚金额从 1,000 美元到 50,000 美元不等。[1] 就用户网站活动而言，潜在风险因此可以迅速攀升至数亿美元。

法院如何反应？

这些案件涉及各种在传统窃听的背景下似乎很容易适用、但在互联网的背景下即使不奇怪也很尴尬的法律问题的不断演化。这些问题包括 1）点击等是否是“通信”，2）窃听主张的当事人例外原则（即通信当事人不能窃听的概念）是否适用于此处及其适用程度；以及 3）法规是否涵盖了系争的技术。

企业能做什么？

到目前为止，大多数案件仍处于早期阶段。尽管如此，从通话记录和其他消费者集体诉讼趋势中可以得到许多教训，企业可以在这种新的背景下应用这些经验来防范电子窃听索赔请求，并在被提起诉讼时为自己辩护。例如，

在实施会话重播和类似工具之前，业务部门应实质性地审查供应商合同，并在适当的情况下进行谈判，特别注意对供应商的数据使用限制、责任限制、保险范围和合同赔偿。公司可能还需要增强网站隐私政策，以提供更多关于如何收集用户信息并与服务提供商共享的实质性披露。此外，企业可能会考虑是否需要更新网站使用条款，特别是仲裁、集体诉讼豁免、责任限制、法律选择和法庭地规定，这些条款在限制集团诉讼和损害方面起着重要作用。

法律披露只有在其具有执行力的情况下才有用，企业应主动评估其网站使用条款和隐私政策是否以足够明显的方式传达，以创造使其具有执行力的最佳情况。当可行时，通常从网站访问者那里获得明确的同意是有益的；例如，作为电子邮件注册或结帐过程的一部分，要求用户勾选同意条款和隐私政策的栏。业务部门通常也会告知用户有关实践和政策的重大变化；这通常是通过电子邮件或网站和应用程序上的横幅/弹出窗口来完成的。

如果面临州窃听法规下的诉讼，企业应首先查看与软件供应商签订的合同下的任何可用的赔偿权利，以及网络责任或其他政策下的潜在保险范围。快速确定和执行针对消费者的仲裁和/或法律和地点选择条款也很重要；延迟可能会导致放弃这些保护。其他可用的抗辩可能包括：

- 表明原告通过提供信息作为交易的一部分而默示同意收集和披露，或根据适用的网站条款和隐私政策明确同意。至少有一个法院认定，用户在结帐过程中获得的对隐私政策的同意（该隐私政策披露了网站监控）追溯适用于用户之前在网站上的所有活动。
- 证明有争议的网站活动不是受保护的通信。一些州的窃听法只保护“机密”通信不被窃听。在这些州，企业可能会辩称用户的购物或其他在线活动不符合保护条件。
- 证明企业是通信的一方，因此不能作为所谓的“窃听者”承担责任
- 证明有争议的技术不是相关州法规范围内的“装置”。

我们可以协助

Holland & Knight 的数据策略、安全和隐私团队拥有数十年的经验，为涉及个人信息丢失、盗窃或滥用的诉讼辩护。如果您对处理客户信息或保护数据隐私诉讼的最佳做法有任何疑问，请联系作者或 Holland & Knight 的数据策略、安全和隐私团队。

[1] 构成违反行为的内容因州而异。

Supreme Court Changes Gears on Specific Personal Jurisdiction

WHEN DOES A CLAIM RELATE TO A DEFENDANT'S CONTACTS IN THE FORUM?

By Rebecca M. Plasencia and Nicole S. Alvarez

HIGHLIGHTS

- The U.S. Supreme Court in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.* held that when a company "serves a market for a product in a state and that product causes injury in the state to one of its residents," the state's courts have specific personal jurisdiction to hear the case.
- The main legal issue was whether state courts have specific personal jurisdiction over a corporate defendant that has purposefully availed itself of doing business in a forum state but has not directly caused the plaintiff's injuries in that state through its forum conduct.
- Before *Ford Motor Co*., plaintiffs had not prevailed in a personal jurisdiction case before the Supreme Court since the 1980s.

The U.S. Supreme Court on March 25, 2021, ruled in an 8-0 decision that the connection between the plaintiffs' claims and Ford Motor Co.'s activities in the forum states supported the exercise of specific jurisdiction over Ford.[1] The plaintiffs were injured by the defendant Ford's cars, and they subsequently sued in Montana and Minnesota state courts. Ford moved to dismiss both product liability lawsuits, asserting that personal jurisdiction did not exist where the company's conduct in the forum state had *not caused* the plaintiffs' injuries.[2] Importantly, the vehicles at issue had not been designed, manufactured nor sold to the plaintiffs in Montana and Minnesota, the forum states. Thus, argued Ford, its activities in those states did not give rise to the plaintiffs' claims.[3]

SUPREME COURT DECISION

The Supreme Court rejected what it dubbed Ford's "causation-only approach" to specific personal jurisdiction.[4] Instead, Justice Elena Kagan in her majority opinion stated that none of the Court's precedents required "a strict causal relationship between the defendant's in-state activity and the litigation" for specific personal jurisdiction.[5]

Previously, the Supreme Court had ruled in *Bristol-Myers Squibb Co. v. Superior Court of California* that there must be a connection between the plaintiffs' claims and the defendant's activities in the forum state to support specific personal jurisdiction.[6] Specifically, the Court (and thus all courts) must determine whether the claims "arise out of or relate to the defendant's contacts with the forum."[7] If so, then the Fourteenth Amendment's Due Process Clause is satisfied as exercising jurisdiction over the defendant is fair.

The defendant Ford argued that a causal link was required to exercise specific jurisdiction in accordance with the Court's decision in *Bristol-Myers*. However, the majority opinion explained that Ford's interpretation of *Bristol-Myers* was too narrow.[8] In arguing that a causal link was required for the exercise of specific personal jurisdiction, the Court noted that Ford was ignoring the second half of the phrase "arise out of *or relate to* the defendant's contacts with the forum" and that *Bristol-Myers* did not require a causal link between the defendant's contacts with the forum and the cause of action.[9]

Although the Court did not adopt Ford's narrow view of *Bristol-Myers*, the Court noted that *Bristol-Myers* still effectively shuts the door on forum-shopping plaintiffs. Indeed, in that case, the litigants were not residents of

nor had sustained injuries in the forum state. The Court in *Ford Motor Co.* distinguished that example from the instant case where the facts were completely distinguishable. In contrast to the plaintiffs in *Bristol-Myers*, the plaintiffs in *Ford Motor Co.* were residents of the forum states, used the allegedly defective products in the forum states, and suffered injuries when those products malfunctioned in the forum states.[10] "In sum, each of the plaintiffs brought suit in the most natural State."[11]

Important to the Court's analysis was Ford's admission that it had engaged in substantial business in both forum states, including advertising by billboard, TV, radio, print ads and direct mail, maintaining 36 dealerships in Montana and 84 in Minnesota, and distributing replacement parts to its own dealers and independent auto shops throughout both states.[12] Given the substantial amount of contacts that Ford has within the forum states, including selling replacement parts and providing facilities for the maintenance and repair of older Ford vehicles such as the ones involved in the accidents at issue in the case, it is clear that the plaintiffs' causes of action "relate to" Ford's contacts with the forum.

TAKEAWAYS AND CONSIDERATIONS

This decision further clarifies the law on specific personal jurisdiction and the requirement that a claim "arise out of or relate to a defendant's contacts with the forum" as established in *Bristol-Myers*. To establish specific personal jurisdiction, a plaintiff must allege either that 1) the cause of action arises out of some action or contact by the defendant in the forum state, or 2) that the cause of action relates to the defendant's contacts with the forum state, which, as *Bristol-Myers* and *Ford Motor Co.* make clear, cannot be an illusory connection. Rather, the defendant must have engaged in certain contacts in the forum state that truly have some relation to the cause of action, such as serving a market in the forum state for the defective product.

For practitioners in the product liability context, the recent Supreme Court decision is significant because the specific products involved in the cause of action do not need to have been designed, manufactured or sold within the forum state in order for a state court to exercise jurisdiction. For general commercial litigators, *Ford Motor Co.* is instructive as it clarifies that there is no requirement for a direct causal link between the defendant's contacts in the forum state and the cause of action; it is sufficient that the cause of action *relates to* the defendant's forum activities such that it appears that the plaintiff is suing in "the most natural State."

At first glance, it appears that the Supreme Court removed another potential obstacle to jurisdiction, and the result may be that fewer lawsuits are dismissed for lack of personal jurisdiction. On the other hand, defense attorneys can argue that the Court in *Ford Motor Co.* still sets a high bar to maintaining specific personal jurisdiction, requiring a sufficient amount of contacts with the forum state to create more than an illusory connection to the cause of action; the plaintiffs' claim must still relate to the defendant's contacts in the forum.

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[1] 592 U. S. ____, No. 19-368, 2021 WL 1132515, at *1 (U.S. March 25, 2021).
[2] *Id*. at *3 (emphasis added).
[3] *Id*. at *5.
[4] *Id*.
[5] *Id*.
[6] 137 S. Ct. 1773, 1776 (2017).
[7] *Id*. at 1780 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).
[8] No. 19-368, 2021 WL 1132515, at *8.
[9] *Id*. at *4.
[10] *Id*. at *8.
[11] *Id*.
[12] *Id*. at *6.

美国联邦最高法院改变其对特定对人管辖权问题的观点

什么情况下诉讼请求会被视为与被告和法院所在地的联系有关？

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重点摘要

- 美国联邦最高法院在*福特汽车公司诉蒙大拿州第八司法区法院*一案中，判决当一家公司在某一个州的市场提供其产品服务、而该产品在该州对其居民造成损害时，该州的法院具有特定的对人管辖权来审理此案。
- 主要的法律问题是，州法院是否对特意在一法院所在地州进行商业活动、但其在该法院所在州的活动没有直接造成原告在该州的损害的公司被告具有特定的对人管辖权。
- 在*福特汽车公司案*之前，自 1980 年代以来，原告在美国联邦最高法院审理的对人管辖权案件中一直没有胜诉。

2021 年 3 月 25 日，美国联邦最高法院以 8 比 0 的判决，判定原告的诉讼请求与福特汽车公司在法院所在州的活动之间的联系足以支持对福特公司行使特定对人管辖权。[1] 原告被被告福特公司的汽车所伤害，随后，他们在蒙大拿州和明尼苏达州法院提起诉讼。福特公司申请驳回这两起产品责任诉讼，声称公司在法院所在州的活动没有造成原告的伤害，所以该等州对被告不具对人管辖权。[2] 重要的是，争议车辆没有在法院所在州蒙大拿州和明尼苏达州设计、制造、或出售给原告。因此，福特公司主张它在这些州的活动并没有引起原告的索赔请求。[3]

最高法院判决

美国联邦最高法院驳回福特公司所称具有有特定对人管辖权与否需“单视是否存在因果关系的方法”。[4] 相反地，Elena Kagan 大法官在她的多数意见中指出，法院的任何判例都不要求对特定的对人管辖权需具有“被告在州内的活动和诉讼之间存在严格的因果关系”。[5]

此前，美国联邦最高法院曾在 *Bristol-Myers Squibb Co. v. Superior Court of California* 案中判决，原告的诉讼请求与被告在法院地州的活动之间必须存在联系，以支持特定的对人管辖权。[6] 具体而言，美国联邦最高法院（以及所有法院）必须决定诉讼请求是否“因被告与法院地的接触引起或与之有关。”[7] 如是的话，则符合宪法第十四修正案的正当程序条款的规定，因为对被告行使管辖权是公平的。

被告福特公司主张根据法院在 *Bristol-Myers* 案中的判决，行使特定对人管辖权需要具备因果关系。然而，多数意见认为，福特公司对 *Bristol-Myers* 案的判决的解释过于狭隘。[8] 美国联邦最高法院指出，在主张行使特定对人管辖权需要因果关系时，福特公司忽略了“因被告与法院的接触*引起或与之有关*”这一短语的后半部分，而且 *Bristol-Myers* 案的判决不要求被告与法院所在地州的接触与诉因之间存在因果关系。[9]

尽管美国联邦最高法院没有采纳福特公司对 *Bristol-Myers* 案的狭隘看法，但法院指出，*Bristol-Myers* 案仍然有效地关闭了法院对原告的大门。事实上，在该案中，诉讼当事人不是法院所在地州的居民、也没有在法院所在地州受到损害。法院在*福特汽车公司案*将本案与事实完全可区分的该案做出区分。与 *Bristol-Myers* 案的原告不同，*福特汽车公司案*的原告是法院所在地州的居民、据称有瑕疵的产品是在法院所在地州使用、并在这些产品在法院所在地州出现故障时遭受损害。[10]“总之，每个原告都在最自然的州提起诉讼。”[11]

对美国联邦最高法院的分析很重要的是，福特公司承认它在两个州都有大量的业务，包括设立广告招牌、电视、广播、平面广告和直邮广告、在蒙大拿州及明尼苏达州各有 36 家及 84 家经销商、并在两个州向自己的经销商和独立的汽车店分销替换零件。[12] 鉴于福特公司在法院所在地州内有大量的联系，包括出售替换零件以及为福特公司的旧车（如本案所涉事故中的旧车）的提供保养和维修设施，显然原告的诉因与福特公司与法院所在地的联系“有关”。

总结和注意事项

这个判决进一步澄清了关于特定对人管辖权的法律以及 *Bristol-Myers 案*中所建立的“因被告与法院的接触引起或与之有关”的要求。为了确立特定的对人管辖权，原告必须主张 1）诉因是由被告在法院所在地州的某些活动或接触引起的，或 2）诉因与被告与法院所在地州的的接触有关，正如 *Bristol-Myers 案*和*福特汽车案*所表明的，不能是虚幻的联系。相反地，被告必须在法院所在地州从事某些确实与诉因有某种关系的接触，例如在法院所在地州的市场为瑕疵的产品提供服务。

对于产品责任领域的律师而言，美国联邦最高法院最近的判决意义重大，因为诉讼事由中涉及的具体产品不需要在法院所在地州内设计、制造或销售，该州法院才能行使管辖权。对于一般的商业诉讼律师来说，*福特汽车公司案*很有启发性，因为它澄清了被告在法院所在地的联系与诉因之间不需存在直接因果关系的要求；只要诉因与被告在法院所在地州的活动*有关*，而显示原告在“最自然的州”提出诉讼。

初看时，美国联邦最高法院似乎移除了管辖权的另一个潜在障碍，其结果可能是，因缺乏对人管辖权而被驳回的诉讼将减少。但另一方面，辩护律师可以主张，美国联邦最高法院在*福特汽车公司案*院仍然对维持特定的对人管辖权设置了很高的门槛，要求与法院所在地州进行足够数量的接触，以建立与诉因之间的超过虚幻程度的联系；原告的诉讼请求必须仍然与被告与法院所在地州的接触有关。

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[1] 592 U.S.____，19-368，2021 WL 1132515，在* 1（U.S. 2021 年 3 月 25 日）。
[2] *同上*。在* 3（加重）。
[3] *同上*。在* 5。
[4] *同上*。
[5] *同上*。
[6] 137 S. Ct。1773，1776（2017）。
[7] *同上*。1780 年（引用 *Daimler AG v. Bauman*，571 US 117，127（2014））。
[8] No. 19-368，2021 WL 1132515，在* 8。
[9] *同上*。在* 4。
[10] *同上*。在* 8。
[11] *同上*。
[12] *同上*。* 6。

Environmental Due Diligence Checklist for Construction Lenders

By Dianne R. Phillips

Environmental due diligence is a familiar part of underwriting for most lenders, but it takes on added importance when construction loans are implicated, especially if the project involves demolition or renovation of structures. Unanticipated construction costs, delays and/or environmental enforcement arising from noncompliance have the potential to negatively impact a borrower's project development and loan repayment. This checklist identifies topics for consideration by construction lenders.

PHASE I ENVIRONMENTAL SITE ASSESSMENT

The most common environmental due diligence report requested by lenders is a Phase I Environmental Site Assessment report prepared pursuant to American Society for Testing and Materials (ASTM and now known as ASTM International) Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process, E1527-13 (known as a Phase I or ESA). A properly prepared and timely Phase I can be used to satisfy the U.S. Environmental Protection Agency's (EPA) "All Appropriate Inquiry" rule, 40 C.F.R. Part 312, positioning a property owner (borrower) to claim eligibility under the Landowner Liability Protections enacted as part of the 2002 Small Business Liability Relief and Brownfields Revitalization Act, the "Brownfields Amendments" to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Although lenders typically avoid direct CERCLA liability through application of the lender liability protections, underwriting due diligence evaluating the borrower's potential risk is critical. Accordingly, since at least 2005 when the "All Appropriate Inquiry" rule was first promulgated in response to the Brownfields Amendments, lenders have typically required a timely and proper Phase I as part of its underwriting process. Where the Phase I identifies the borrower as "user" most lenders also request a reliance letter.

ASBESTOS

A visual survey for suspect asbestos-containing materials (ACM), followed by sampling by a licensed contractor for buildings subject to renovation or demolition activities, and an Asbestos Operations and Maintenance Plan prepared for any structures with suspect or confirmed ACM that may remain post-development. Disturbance of ACM during renovation or demolition requires special handling, permitting, disposal, inspection and monitoring under state and federal law. Both owners (borrowers) and contractors can be liable for noncompliance under applicable circumstances.

LEAD-BASED PAINT

A lead-based paint (LPB) survey, followed by sampling if appropriate, for buildings constructed prior to 1979, and consideration of a Lead-Based Paint Maintenance/Abatement Plan for any structures with suspect or identified lead-based paint materials depending upon construction plans. Disturbance of LBP during demolition or renovation may require special handling, permitting, disposal, inspection and monitoring under state and federal law depending on the specifics of the project. Both owners (borrowers) and contractors can be liable for noncompliance under applicable circumstances.

HAZARDOUS BUILDING MATERIALS

Where demolition or renovation is anticipated, a survey to identify all potentially hazardous building materials (mercury switches, hydraulic equipment, fluorescent lights, PCB-containing equipment, etc.) that may require special handling during demolition, including universal waste and hazardous waste requirements. Although typically a contractor requirement, owners can be liable in certain circumstances.

RADON

Radon testing for 1) projects located in a U.S. EPA-designated Radon Zone 1 (average radon levels above 4 pico curies per liter or pCi/L, the EPA recommended action level), and 2) where properties have subsurface occupied structures in Radon Zone 2 (average radon levels between 2pCi/L and 4pCi/L). Although radon mitigation systems can be installed, anticipating these design requirements during due diligence is typically preferred.

WETLANDS

Evaluation of the presence or absence of wetlands for areas subject to new development. Depending upon the project, federal, state or local permitting may be required to address wetlands. Both owners (borrowers) and contractors can be liable for noncompliance under applicable circumstances.

ARCHEOLOGICAL SURVEY

An Archeological Survey conducted by a qualified surveyor for new construction projects in areas of known concern. Depending upon the project, federal, state or local permitting may be required to address discovery of artifacts or other impacts. Both owners (borrowers) and contractors can be liable for noncompliance under applicable circumstances.

ENDANGERED SPECIES SURVEY

An Endangered Species Survey conducted by a qualified surveyor for new construction projects in areas of known concern. Depending upon the project, federal or state permitting may be required to address areas of protected habitat and species (both plant and animal). Both owners (borrowers) and contractors can be liable for noncompliance under applicable circumstances.

MOLD

Documentation issued by a qualified person of a visual-based opinion on the presence or absence of mold for properties undergoing rehabilitation. Depending on the project, historic mold contamination and/or ongoing concerns may impact development, especially housing projects.

STORMWATER MANAGEMENT

Construction sites often require stormwater permits and development of a Stormwater Pollution Prevention Plan (SWPPP) under federal or state law. Although typically a contractor requirement, owners can be liable in certain circumstances.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)

For projects involving HUD (loans or grants), HUD environmental due diligence requirements including compliance with the HUD Multifamily Accelerated Processing (MAP) Guide and HUD Environmental Review Online System (HEROS).

CONCLUSION AND TAKEAWAYS

Although each construction loan and project will have project-specific requirements, keeping these categories in mind will aid in underwriting due diligence.

建筑贷款人环境尽职调查清单

原文作者：**Dianne R. Phillips**

环境尽职调查对大多数贷款人而言是其所熟悉的贷款流程一部，而当涉及建筑贷款时环境尽职调查就显得更为重要，尤其是当项目涉及建筑结构的拆除或翻新时。由于不遵守规定而产生的意外施工成本、延误和/或环境处罚可能会对借款人的项目开发和贷款偿还产生负面影响。本清单表列出建筑贷款人应考虑的尽职调查事项。

第一阶段环境现场评估

贷款人要求的最常见的环境尽职调查报告是根据美国测试及材料协会（ASTM，现称为 ASTM 国际）环境评估标准规范：第一阶段环境现场评估流程 E1527-13（称为第一阶段或 ESA）准备的第一阶段环境现场评估报告。适当准备和及时提出的第一阶段环境现场评估可用于满足美国环境保护署（EPA）的“所有适当的调查”规则（40 C.F.R. 第 312 部分）的规定，使业主（借款人）能有立场主张符合根据修订《综合环境反应、赔偿和责任法》（CERCLA）的《2002 年小企业责任救济和布朗菲尔德振兴法》（“布朗菲尔德修正案”）中规定的《土地所有者责任保护》的资格。尽管贷款人通常通过贷款人责任保护的适用来避免直接的 CERCLA 责任，但评估借款人的潜在风险的贷款尽职调查至关重要。因此，至少自 2005 年“所有适当的调查”规则首次针对布朗菲尔德修正案颁布以来，贷款人通常要求及时和适当的第一阶段环境现场评估作为其贷款过程的一部分。在第一阶段环境现场评估确定借款人为“用户”的情况下，大多数贷款人也要求提供一份信赖书。

石棉

目视检查可疑的含石棉材料（ACM），然后由有执照的承包商对进行翻新或拆除活动的建筑物进行取样，并为开发后可能仍存在可疑或确认含石棉材料的任何结构编制石棉操作和维护计划。根据州和联邦法律，在翻修或拆除过程中对 ACM 的干扰需要特殊处理、许可、处置、检查和监控。在适用的情况下，业主（借款人）和承包商都可能对不合规行为负责。

铅基涂料

对 1979 年之前建造的建筑物进行铅基涂料（LPB）调查，然后在适当情况下进行抽样，并根据施工计划考虑对任何具有可疑或确定的铅基涂料材料的结构进行铅基涂料维护/减少计划。拆除或翻修过程中对 LBP 的干扰可能需要根据州和联邦法律进行特殊处理、许可、处置、检查和监控，具体取决于项目的具体情况。在适用的情况下，业主（借款人）和承包商都可能对不合规行为负责。

危险建筑材料

如果预计进行拆除或翻新，则应进行为确定拆除期间可能需要特殊处理的所有潜在危险建筑材料（水银开关、液压设备、荧光灯、含 PCB 设备等）的调查，包括通用废物和危险废物要求。虽然通常是对承包商的要求，但业主在某些情况下可能要承担责任。

氡气

1）位于美国环境保护局指定的氡气 1 区（平均氡水平高于 4 皮居里/升或 pCi/L，环境保护局建议的行动水平）的项目，以及 2）在氡气 2 区（平均氡水平在 2pCi/L 和 4pCi/L 之间）有地下结构的地产的项目。尽管可以安装氡气缓解系统，但在尽职调查期间预测这些设计要求通常是优先建议的。

湿地

评估新开发区域是否存在湿地。根据项目的不同，可能需要联邦、州或当地的许可来处理湿地。在适用的情况下，业主（借款人）和承包商都可能对不合规行为负责。

考古调查

考古调查由合格的测量员对已知有相关顾虑的地区的新建筑项目进行的考古调查。根据项目的不同，可能需要获得联邦、州或地方的许可，以解决发现文物或其他影响的问题。在适用的情况下，业主（借款人）和承包商都可能对不合规行为负责。

濒危物种调查

由合资格验船师为已知有相关顾虑的地区的新建筑工程进行的濒危物种调查。根据项目的不同，可能需要获得联邦或州的许可才能处理受保护栖息地和物种（植物和动物）的区域。在适用的情况下，业主（借款人）和承包商都可能对不合规行为负责。

霉菌

由合格人员出具一根据对正在进行修复的财产是否存在霉菌的目视检查文件。根据项目的不同，之前的霉菌污染和/或持续存在的问题可能会影响开发，尤其是住房项目。

雨水管理

根据联邦或州法律，施工现场通常需要雨水许可证和制定雨水污染预防计划（SWPPP）。虽然通常是对承包商的要求，但业主在某些情况下可能要承担责任。

美国住房和城市发展部（HUD）

对于涉及 HUD（贷款或拨款）的项目，HUD 环境尽职调查要求包括遵守 HUD 多户加速处理（MAP）指南和 HUD 环境审查在线系统（HEROS）。

结论和总结

尽管每个建设贷款和项目都有项目特定的要求，但记住这些类别将有助于贷款尽职调查的进行。

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Dianne R. Phillips concentrates her practice in litigation, regulatory, energy and environmental law. As former assistant general counsel for Suez LNG North America LLC and its wholly owned subsidiary, Distrigas of Massachusetts LLC, she was involved in all aspects of regulatory compliance for the nation's oldest, continuously operating liquefied natural gas (LNG) import terminal located in Everett, Mass., including safety and security. Her LNG experience includes advising clients with respect to specialized regulatory compliance under 49 C.F.R. Part 193 and NFPA 59A. Her environmental practice focuses on brownfields redevelopment and remediation, including former military installations, former manufactured gas plants (MGPs) and vapor intrusion sites.

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Charles A. Weiss concentrates his practice on technology-driven litigation and transactions, primarily in pharmaceutical, biotechnology and adjacent fields. He also counsels clients on questions of patent validity and infringement, provides a litigator's perspective on prosecution matters, and assists with regulatory and compliance matters. He litigates patent, trade secret, license and false advertising cases in diverse technical areas. He has handled cases over the years involving expression of recombinant proteins and antibodies, controlled release pharmaceuticals, medical diagnostic agents, endocrine and hormone products, nutritional supplements, industrial control systems, food chemistry, nucleic acid diagnostic assays and commercial detergents. He also has extensive experience in the investigation of product counterfeiting and pursuit of those responsible.

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