

**Weil**

# **Litigation** Trends 2019



### Dear esteemed colleagues and friends,

It is our pleasure to present the 2019 edition of Weil's Litigation Trends Report, in which we offer our cross-practice assessments and predictions for the coming year.

As in past years, we survey the changing regulatory landscape from a variety of perspectives. We assess the Department of Justice's (DOJ) continuing efforts to refine key aspects of corporate enforcement, such as coordination with domestic and foreign regulators to avoid so-called "piling on" of penalties, and the factors prosecutors should consider when determining whether to appoint a corporate monitor. We also prognosticate about the future of merger reviews and cartel enforcement under the newly established leadership both at the DOJ's Antitrust Division and at the Federal Trade Commission (FTC), as well as what to expect from the DOJ's shift of enforcement priorities towards new areas of anticompetitive behavior, such as algorithmic pricing. Further, we reflect on the potential ramifications of the DOJ's "China Initiative," in which the National Security Division is focusing on curtailing theft by Chinese companies of U.S. trade secrets through stepped-up criminal prosecutions.

Our litigators also analyze the impressive and ambitious agendas of local, state, and federal legislatures, which have resulted in significant bills that could affect our clients in a number of ways. For example, we investigate the federal Music Modernization Act, which has been widely hailed as the most significant copyright legislation in decades, and will dramatically alter both the music licensing process and music-industry litigation over the coming years. At the state level, we review the passage of significant legislation limiting the use by employers of restrictive covenants in employment agreements, including the Massachusetts Noncompetition Agreement Act, which goes further than nearly any other state law and likely signals the continuation of state-level scrutiny of post-employment covenants not to compete. And, importantly, we take stock of the more than 125 bills introduced (and in some cases, passed) in legislatures across the country in the wake of the #MeToo movement that address everything from corporate anti-sexual harassment policies and training programs to the use of mandatory arbitration of sexual harassment claims.

Moving from legislative chambers to courtrooms, we turn our attention to the impact – and potential ramifications – of recent and pending appellate decisions. We assess the growing body of rulings that impacts the contours and application of various provisions in arbitration agreements, as well as the Federal Arbitration Act itself, including a number of recently decided (or soon-to-be decided) U.S. Supreme Court cases. We also examine the Supreme Court's coming decision in *Apple v. Pepper*, which could dramatically reshape more than 40 years of antitrust precedent established in *Illinois Brick*, and bring about a flood of federal antitrust suits brought by indirect purchasers. Likewise, we address the most recent impactful patent appeals, including the Supreme Court's opinions in *SAS Institute*, which we anticipate will change litigants' evaluation of IPR proceedings as part of overall patent litigation strategy, and *WesternGeco*, which, depending on how the Federal Circuit

rules in a subsequent case, could open the door for patent owners to broadly recover for foreign sales. Finally, we focus on circuit splits that may draw Supreme Court interest, including: a more acute division regarding the admissibility of evidence at the class certification stage, which was furthered by the Ninth Circuit's 2018 *Sali* decision; and a potential split between the Second and Ninth Circuits that threatens to upend more than a decade of accepted authority regarding copyright liability – and cause uncertainty for any online media stakeholder.

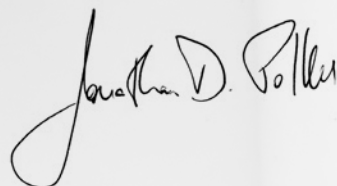
Lastly, we turn our attention to changes in judicial policy and practice. For example, we explore the combined impact on class action litigation strategy of the Supreme Court's recently approved amendments to Rule 23, and the Northern District of California's November 2018 updates to its procedural guidance for class action settlements. We also review the advent of digital transformation in a number of international arbitration fora – including e-filing systems, e-briefs, videoconferencing capabilities, and, perhaps in the future, artificial intelligence – all of which have the potential to make arbitration faster, more cost-effective, and easier to administer.

As always, please do not hesitate to reach out to either of us, our practice group leaders (listed on the inside back cover), or your usual Weil contact if you would like further information on any of the enclosed topics.

We look forward to the opportunity to work with you this year.



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# Antitrust

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## **New Leadership and Potential Divisions at the U.S. Antitrust Agencies on Merger Enforcement**

On the merger front, the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) continue to thoroughly investigate M&A transactions raising competition concerns and aggressively challenge deals where they believe enforcement action is warranted. In line with recent years, the average duration of significant merger investigations continues to exceed 10 months. Despite some renewed discussion at the DOJ about efforts to streamline the U.S. merger review process, we do not expect a sea change or major reduction in the review timeline or depth of investigation for difficult cases any time soon.

Nevertheless, there have been significant changes in the leadership at the FTC, with last year marking the first time an entire new slate of Commissioners was nominated at the same time by the same President. These five Commissioners, comprising three Republicans and two Democrats, have been in place for several months, and already we see signs of division among the new slate on certain merger-related issues. As perhaps the most prominent examples, in January 2019, the FTC voted to accept a proposed settlement to allow a combination of office supply companies, Staples and Essendant, to proceed with certain behavioral commitments. The transaction raised vertical merger concerns, and the parties narrowly obtained clearance after a divided FTC vote in favor of the proposed settlement, 3-to-2, split along party lines. The proposed settlement included a firewall to limit Staples' access to competitively sensitive information of competing office supply resellers that use Essendant for wholesaling services. In a rare occurrence, four separate statements were issued by the majority or individual Commissioners, highlighting their divergent viewpoints concerning the treatment of vertical mergers and antitrust enforcement more generally. Although the substance of the statements was largely unsurprising, we expect the next year to be a period of continued uncertainty with a



greater prospect for split decisions or contentious matters at the FTC level relative to prior years. Beyond individual merger review outcomes, all eyes remain on the FTC's ongoing series of public Hearings on Competition and Consumer Protection in the 21st Century. This series of hearings, temporarily delayed by the recent government shutdown, is part of the FTC's effort to examine whether to "adjust" competition or consumer protection law, policy, or enforcement priorities. Stay tuned.

The DOJ, meanwhile, also has been busy under the leadership of Assistant Attorney General Makan Delrahim. As widely publicized in the press, the DOJ challenged AT&T's proposed acquisition of Time Warner in federal district court. After a lengthy trial in early 2018, the trial judge was unpersuaded and issued a decision rejecting the DOJ's theory that the vertical merger would enhance the bargaining leverage of AT&T and enable it to raise costs of or otherwise deprive its rivals' access to critical Time Warner content, such as CNN. The DOJ then appealed the decision to the D.C. Circuit Court of Appeals, which affirmed the lower court decision, while offering little new guidance regarding the legal standard for evaluating vertical mergers. The DOJ has already indicated that it does not intend to appeal to the U.S. Supreme Court. Another major matter at the DOJ involved its recent clearance of Bayer's \$66 billion acquisition of Monsanto, a potentially transformative acquisition in the agricultural industry. Following a lengthy investigation, the DOJ ultimately allowed the deal to proceed after accepting the largest divestiture package in history to a third-party, BASF, with a number of related commitments by the parties. Overall, these matters show that the DOJ is not afraid to take its chances in court (in the case of AT&T/Time Warner) while also maintaining the flexibility to resolve transformative cases with significant remedies (in the case of Bayer/Monsanto).

## **Cartel Enforcement Has Slowed But Remains Active**

While the Trump Administration has continued aggressive criminal enforcement of antitrust laws, as with 2017, 2018 continued the trend of lower rates of enforcement and fewer overall fines assessed as compared to the recent high-water mark in 2015. For example, in 2018, the DOJ filed a total of 18 criminal cases against 33 corporations and individuals, compared with 60 criminal cases filed in 2015 against 86 corporations and individuals. Similarly, only \$172 million in fines and penalties were assessed in 2018 compared with \$3.6 billion in 2015, though this number is up from \$67 million in 2017. This may partially be explained by the winding down of recent major cases, including Auto Parts and LIBOR. However, observers have also noted that lower enforcement rates may be a result of the DOJ's reliance on its amnesty program, which has seen fewer applicants in recent years, possibly due to the complications involved in coordinating amnesty applications across multiple international jurisdictions, as well as the high cost of civil litigation that inevitably follows DOJ investigations. The DOJ also suffered two high-profile trial losses in late 2017 and 2018, with the acquittal of Tokai Kogyo on conspiring to fix prices for automotive body sealing products in December 2017, followed by the acquittal of three London-based foreign exchange traders on price-fixing charges in October 2018.

Possibly as a result, the DOJ is shifting its sights to new sectors and theories of anticompetitive behavior. The DOJ is expected to increase its focus on unfair competition practices by technology companies, particularly regarding the use of algorithms companies use to engage in alleged anticompetitive coordination. Additionally, the DOJ has indicated its intent to move forward with criminal prosecutions of certain so-called "no poach" and wage-fixing agreements.

### DOJ Has Shifted Its Policy on the Application of Antitrust to Licensing of Standard Essential Patents

Over the past year, Assistant Attorney General Makan Delrahim has made a number of speeches implementing a shift towards support of patentees in the balance between patent rights and antitrust enforcement. Under the Obama administration, the DOJ had scrutinized owners of standard essential patents (SEPs) for failing to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms (so-called “hold up”). Delrahim has stated that “hold-up” is fundamentally not an antitrust problem. Rather, Delrahim views “hold-out,” or the ability of SEP licensees to threaten to under-invest or not take a license until their royalty demands are met, as a greater antitrust concern. Accordingly, Delrahim announced that the DOJ would withdraw its 2013 guidance on remedies for SEPs subject to FRAND commitments, out of concern that the guidance may unduly discourage courts from issuing injunctions sought by patent holders.

Additionally, Delrahim has expressed concern regarding potential anticompetitive effects due to the activities of standard setting organizations (SSOs). Delrahim has announced that the DOJ will investigate and bring enforcement actions against anticompetitive SSO practices, such as when a group of product manufacturers within a SSO comes together to dictate licensing terms to a patentee as a condition for adopting the standard. Furthermore, he announced that the DOJ will encourage competition among SSOs by, for example, scrutinizing group boycotts of SSOs for patent policies that are unfavorable to licensees' commercial interests. As a result, SSOs and their members should expect greater oversight into their joint activities.

### The Supreme Court Will Decide the Fate and Scope of Indirect Purchaser Federal Antitrust Enforcement

For more than 40 years, the U.S. Supreme Court's landmark ruling in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), has shaped antitrust standing and civil antitrust litigation in the United States. There, the Court held that the State of Illinois, as an indirect purchaser, was not harmed in its business or property within the meaning of the Sherman and Clayton Acts, regardless of whether any unlawful overcharges were passed on by direct purchasers. Only the overcharged direct purchasers had standing to sue under the federal antitrust laws; indirect purchasers did not.

In November 2018, the Supreme Court heard argument in *Apple v. Pepper* (No. 17–204), an antitrust case that may materially affect the application – or even the continued vitality – of *Illinois Brick*. In *Pepper*, a purported class of iPhone owners sued Apple under the Sherman Act for monopolizing or attempting to monopolize the market for iPhone applications by prohibiting app developers from selling iPhone apps anywhere other than through the Apple App Store. Apple collects the payment from the app purchasers, gives 70% of the purchase price to app developers, and retains 30% of the purchase price as a commission. The plaintiff class claims that iPhone users purchase apps directly from the App Store. Apple argues that it acts as an agent that facilitates sales between app purchasers and developers at developer-set prices, and that the plaintiffs are indirect purchasers whose claims are barred by *Illinois Brick*.

A decision in *Pepper* is expected before the Supreme Court term ends in June 2019. Apple and its supporters, which include the Trump Administration, argue that a decision in plaintiffs' favor would set a dangerous precedent for the e-commerce industry, whose sales platforms increasingly rely on agency models. At oral argument, one justice expressed concern that such a decision could lead to duplicative recoveries. Other

justices appeared to side with plaintiffs. A ruling for plaintiffs would almost certainly lead to increased antitrust suits against e-commerce companies whose platforms rely on agency models.

Justice Gorsuch even raised the possibility of overturning *Illinois Brick*. While this outcome is unlikely given that neither party made such a request, it could signal the beginning of the end of more than 40 years of Supreme Court precedent and open the floodgates to federal antitrust suits by indirect purchasers – a fundamental expansion of civil antitrust exposure.

### Trends in Private Antitrust Civil Litigation in the Lower Courts

We are following several legal developments in the federal trial and appeals courts that touch on important areas of procedure and substantive antitrust law. First, we are monitoring the reach of the U.S. Supreme Court's 5-4 "two-sided market" decision at the end of last year's Term in *Ohio, et al. v. American Express*, 138 S.Ct. 2274 (2018). In the context of a regulatory Sherman Act Section 1 challenge to "anti-steering" rules used by American Express, which were alleged to harm consumers at the point of sale by preventing merchants from encouraging the use of less expensive payment cards, a majority of the Supreme Court held that the relevant market for assessing any anticompetitive effects from those rules must include both merchants and consumers. Numerous defendants are now seeking to extend the Supreme Court's decision to cases of all types, including those challenging restraints of trade where the network effects are far less obvious than in an instantaneous payment card transaction where all the stakeholders (cardholders, banks, merchants, and network) interact with one another.

Second, the U.S. Circuit Courts of Appeal continue to debate whether classes can be certified under Federal Rule of Civil Procedure 23 that are so broad that they encompass a not insignificant amount of uninjured class

members. In *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), the First Circuit reversed certification where 10% of class members would not have switched from the branded drug at issue to a generic copy and, thus, they were not injured by the alleged anticompetitive conduct to delay generic drug entry. The D.C. Circuit's second interlocutory review – this time of the denial of class certification – is pending in the *In re Rail Freight Fuel Surcharge* litigation, where defendant-railroad companies maintain class certification is inappropriate because there are too many uninjured class members.

Third, more than five years later, we continue to follow the impact of the Supreme Court's ruling in *FTC v. Actavis*, 133 S.Ct. 2233 (2013), where so-called "reverse payment" settlements of patent infringement litigation were not held *per se* lawful or unlawful under Sherman Act Section 1. The plaintiff class action bar and pharmacies continue to challenge settlements of patent infringement litigation claiming that one or more of their terms embody a "large" and "unjustified" payment by the brand drug firm to keep one or more generic drug firms out of the market for the drug at issue. The post-*Actavis* rulings to date have focused on the pleading stage and what forms of settlement "compensation" are subject to scrutiny under the *Actavis* framework. It remains to be seen whether defendants can rebut the presumption that their challenged patent infringement settlements contain "large" and "unjustified" payments to achieve an anticompetitive end versus a commonplace settlement of litigation.

Fourth, in the area of single-firm conduct and the circumscribed duty to deal or license others, observers are closely monitoring the FTC's bench trial against Qualcomm for allegedly monopolizing modem chips for communicating over standardized cellular networks in violation of Sherman Act Section 2. The trial has put at issue Qualcomm's licensing practices with large customers, like Apple, and the impact on competition in the wireless chip marketplace.

Fifth, alleged anticompetitive agreements impacting labor markets are continuing to generate regulatory scrutiny and now civil class action lawsuits. In the wake of the 2016 DOJ/FTC policy statement that “naked” agreements to fix wages or not to hire employees will be subject to potential criminal enforcement under Sherman Act Section 1 (discussed above), as well as active state Attorneys General civil antitrust enforcement actions, numerous industries have been hit with putative nationwide class action lawsuits claiming per se violations of Sherman Act Section 1 and seeking treble damages for artificially suppressed wages. The focus of these proceedings has now extended to various franchises. But the DOJ has now formally appeared in several pending private antitrust litigations to make clear restraints of trade in the franchise context should be analyzed under the “rule of reason” balancing test weighing the pro-competitive effects against any anticompetitive impact, not the per se rule or the “quick look” rule of reason test. It will remain to be seen how the courts analyze the particular restraints at issue and how these cases fare at the pleading, class certification, and merits stages.



# Complex Commercial Litigation

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## Ninth Circuit Holds that Class Certification Evidence Need Not be Admissible

On May 3, 2018, in *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. May 3, 2018), the Ninth Circuit reversed a district court's denial of class certification in a putative employment class action, in part because the district court abused its discretion in refusing to consider evidence proffered in support of certification on inadmissibility grounds. Although the U.S. Supreme Court has made clear that a district court must conduct a "rigorous analysis" to confirm that the requirements of Fed. R. Civ. P. Rule 23 are met and that a plaintiff seeking class certification must "affirmatively demonstrate" compliance with the Rule, the Ninth Circuit lowered the bar for the type of evidence that a plaintiff may rely upon to support a class certification motion.

The *Sali* decision deepened the existing circuit split regarding the admissibility of evidence at the class-certification stage. The Fifth, Sixth, Seventh and Eleventh Circuits have all previously held that evidence submitted in support of a class certification motion must be admissible, while the Ninth Circuit now joins the Eighth Circuit on the other side of the split. *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. Feb. 17, 2005); *In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636, (6th Cir. Sept. 29, 2014); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. Jan. 13, 2012); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. Jul. 6, 2011); *Sher v. Raytheon Co.*, 419 F. App'x 887 (11th Cir. Oct. 31, 2011). Similarly, the Third Circuit requires that expert evidence submitted in support of a class certification motion must satisfy Federal Rule of Evidence Rule 702 – the federal standard expert witnesses must meet – when introducing experts at the class-certification stage. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015). *Sali* may ultimately prompt the Supreme Court to grant certiorari and resolve the split regarding the proper evidentiary standard for class certification.

### Article III Standing Distracts the Supreme Court from Providing Clarity on Class Action *Cy Pres* Settlements

Practitioners have long waited for the U.S. Supreme Court to weigh in on the propriety of *cy pres* class action settlements. But while the Court granted certiorari in *Frank v. Gaos*, 2018 U.S. LEXIS 2658, 138 S. Ct. 1697 (U.S. Apr. 30, 2018), which teed up the issue, from the Justices' questions during oral argument, it appears the Court may decide the case on Article III standing grounds instead.

The *cy pres* doctrine, commonly used in trust law, permits the redirection of funds when the intent of a trust is no longer possible to fulfill (e.g., the named charity no longer exists). In this manner, parties to class actions sometimes agree to *cy pres* settlements where the defendant pays funds to a charity or non-profit whose mission relates to the subject matter of the lawsuit when it is administratively infeasible, impractical to pay class members directly, or the per-member award would be de minimis. This type of settlement is often approved by courts by reference to the *cy pres* doctrine. However, the Supreme Court has never addressed the issue of whether these types of settlements can comport with Fed. R. Civ. P. Rule 23(e)(2), which requires class action settlements be "fair, reasonable, and adequate."

In *Frank v. Gaos*, the Court granted certiorari on the question of whether *cy pres* settlements support class certification and comport with the requirement of Rule 23(e)(2), and if so, in what circumstances. *Frank v. Gaos* involved a class of plaintiffs alleging that Google violated the Stored Communications Act by disclosing information about their internet searches to third-party websites without their consent. The district court approved a settlement proposal provided that \$5.3 million be given to several privacy groups under the *cy pres* doctrine due to the cost of administering small awards to an estimated 129 million unnamed class members (each would receive about four cents). The Ninth Circuit affirmed the settlement order as fair and adequate.

At oral argument, the Court turned the tables and asked targeted questions regarding whether plaintiffs had been injured by Google disclosing information regarding their search history sufficient for Article III standing – without it, the Court could not decide the *cy pres* issue. Indeed, the Court later directed the parties to submit supplemental briefing addressing whether any named plaintiff has Article III standing in this case. If the Court does choose to endorse *cy pres* remedies, it may incentivize class counsel to initiate more lawsuits that would be administratively infeasible to litigate. Although it seems the Court may not use *Frank v. Gaos* for the opportunity of articulating a test for analyzing those settlements, the Court may ultimately provide guidance on another case in 2019.

### Amendments to Rule 23 and New Procedural Guidance from N.D. Cal. May Impact Class Action Settlements

On April 26, 2018, the U.S. Supreme Court approved amendments to Fed. R. Civ. P. Rule 23, which went into effect on December 1, 2018. Moreover, on November 1, 2018, the Northern District of California (N.D. Cal.) updated its own procedural guidance for class action settlements (the Guidelines). These two changes together could discourage the filing of abusive class action settlements by evening the playing field of information access and creating a more uniform system of settlement evaluation.

The amendments to Rule 23 specifically identify factors a court *must* consider in approving a proposed settlement as "fair, reasonable, and adequate." Under the new rule, these factors include the adequacy of representation, the negotiation process behind the settlement, and the adequacy of the relief, including whether the method of damages distribution takes into account the differences among claimants. Building on the new Rule 23, the Guidelines now require parties in the N.D. Cal. to provide the court with additional information pertinent to those new enumerated factors.

These disclosures include information that should be included in the parties' motion for preliminary approval of any proposed settlement, more detailed information in the motion for final approval, and the filing of a "Post-Distribution Accounting" in an easy-to-read chart 21 days after the distribution of settlement funds.

The new Rule 23 amendments, coupled with the Guidelines, provide much needed clarity on how courts will evaluate the fairness, reasonableness, and adequacy of proposed settlements, and are likely to have a significant impact on the terms on which class action cases are litigated and settled.

### **The Supreme Court Revisits Class Arbitration Yet Again – *New Prime Inc. v. Oliveira* and *Varela v. Lamps Plus, Inc.***

The U.S. Supreme Court has devoted a tremendous amount of attention to Federal Arbitration Act (FAA) and class-waiver issues over the past decade. That trend continued in 2018, in which the Supreme Court considered two more cases posing important arbitration issues: *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019), 2019 WL 189342 (U.S. Jan. 15, 2019) and *Lamps Plus, Inc. v. Varela*, 2018 U.S. LEXIS 2729, 138 S. Ct. 1697, (U.S. Apr. 30, 2018) (both of which we also discuss in the [Employment segment](#) below).

*New Prime Inc. v. Oliveira* involved questions related to Section 1 of the FAA, which states that "nothing" in the FAA applies to "employment" contracts for workers engaged in foreign or interstate commerce. The plaintiff in *New Prime*, a truck driver engaged in foreign or interstate commerce, argued his claims against his employer could not be arbitrated under Section 1; the employer argued that Section 1 did not apply because plaintiff was an independent contractor and not an employee. The questions presented to the Supreme Court were: (1) whether a dispute over the applicability of the FAA's Section 1 exemption must be resolved by an arbitrator or a court when a contract delegates the

question of arbitrability to the arbitrator; and (2) whether the FAA's Section 1 exemption is inapplicable to independent contractor agreements. In a unanimous decision – and the first to reject a claim for arbitration in over a dozen arbitration cases – the Supreme Court held that whether the FAA Section 1's exclusion for contracts of employment applies is an issue of statutory interpretation for the trial court to decide, not the arbitrator. The Court also held that, as a matter of statutory interpretation, independent contractors are subject to the Section 1 exemption. The Supreme Court's decision in *New Prime* has obvious direct implications for the transportation industry, and more broadly for the balance of power between courts and arbitrators.

In *Lamps Plus*, the Court will decide whether the FAA forecloses state-law interpretations of arbitration agreements which authorize class arbitration solely on common language used in arbitration agreements. *Lamps Plus* involved a putative class action asserting violations of consumer protection statutes related to a data breach in which personal information of Lamps Plus employees was compromised. Lamps Plus moved to compel individual arbitration pursuant to the terms of the named-plaintiff's employment agreement. However, the arbitration agreement at issue was silent on the issue of class arbitration. The district court denied the motion to compel arbitration, holding that the agreement was "at least ambiguous as to class claims" and, pursuant to California state law, construed the supposedly ambiguous agreement against the drafter. The Ninth Circuit affirmed. The Supreme Court granted certiorari on the issue of whether federal arbitration law forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Either way, the Supreme Court's decision may have broad implications for how courts interpret arbitration provisions in determining whether they provide for class arbitration

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procedures. In addition to resolution of the issues in *Lamps Plus*, it is likely the Court will continue to grapple with other, yet-to-be-determined, arbitration issues in 2019 as well.

### Continued Rise in Civil and Criminal Trade Secret Litigation, With an Increased Focus on Theft Involving Chinese Entities

Since the enactment of the federal Defend Trade Secrets Act (DTSA) in May 2016, trade secret litigation has been on the rise. Indeed, according to a report issued in July 2018 by legal data analytics firm Lex Machina, the number of trade secret cases filed in the U.S. increased 30% during calendar year 2017, and was on pace to exceed 2017's tally of 1,134 cases during the 2018 calendar year. We expect this trend will continue in 2019, not only because we anticipate employers will continue to take advantage of the easier access to federal court and the broader panoply of remedies provided under the DTSA than was previously available, but also because of the ongoing U.S.-China "trade war" and the heightened potential for, and focus on, trade secret theft by Chinese companies and state-sponsored actors.

Following a months-long investigation into China's trade practices, former U.S. Attorney General Jeff Sessions declared on November 1, 2018, that Chinese economic espionage against the United States has been "increasing rapidly," and he thus announced a new Department of Justice (DOJ) initiative – dubbed the "China Initiative" – specifically focused on curtailing Chinese theft of U.S. trade secrets, including by "identify[ing] priority Chinese theft cases, ensur[ing] ... enough resources are dedicated to them, and mak[ing] sure [the DOJ] brings them to an appropriate conclusion quickly and effectively." And in both the latter stages of 2018 and the early days of 2019, the DOJ has demonstrated that it intends to pursue its "China Initiative" with vigor. During the latter five months of 2018, for instance, the DOJ unveiled criminal indictments against Chinese companies and alleged state

actors in five separate cases involving alleged theft of trade secrets, including cases involving the alleged theft of secrets pertaining to General Electric's aerospace technologies, Genentech's biopharmaceuticals technologies, Micron Technologies, Inc.'s dynamic random access memory (DRAM) technologies, and (through the hacking of dozens of third-party IT service providers) the proprietary and competitively sensitive information of businesses in the banking and finance, telecommunications, consumer electronics, medical equipment, manufacturing, healthcare, biotechnology and automotive industries. Moreover, in January of this year, the DOJ continued its trend of stepped-up enforcement, announcing criminal charges against affiliates of China's Huawei Technologies, Co. for allegedly stealing trade secrets relating to T-Mobile USA, Inc.'s wireless device technology.

As John Demers, head of the DOJ's National Security Division, recently explained, the government's investigation has led it to conclude that the alleged thefts underlying these various indictments are not "isolated incident[s]," but instead are "part of an overall economic policy" on the part of the Chinese government to establish strong Chinese competitors and dominate strategically important industries by stealing foreign information and technology – whether through cyber-hacking or the use of partnerships, joint ventures or current and former employees to obtain inside information. Accordingly, all businesses – and particularly those that operate in China or with Chinese partners or consultants – will want to ensure they have in place effective measures for the protection of their most sensitive assets, while remaining vigilant in trade secret monitoring and enforcement efforts. And, since the DOJ has made clear that it intends to continue vigorously combating Chinese economic espionage, including through stepped-up criminal prosecutions, we expect to see a significant uptick in the number of criminal trade secret cases this year – particularly against Chinese companies and their employees.

Consequently, Chinese companies (as well as their U.S. affiliates, partners and investors) will want to ensure they have robust training and compliance policies with respect to third-party trade secrets.

### Supreme Court To Clarify the Meaning of “Trade Secrets” and “Confidential” Commercial Information And Protection Against Public Disclosures Under the FOIA

On January 11, 2019, the U.S. Supreme Court granted certiorari in *Food Marketing Institute v. Argus Leader Media* (No. 18-481), a case that has potentially significant implications not only for the protection of trade secrets and other commercially sensitive business information that private sector businesses share with the government but, quite possibly, for the protection and enforcement of trade secrets generally.

The primary question presented by *Food Marketing* is the meaning of the term “confidential” in Exemption 4 of the Freedom of Information Act (FOIA), which exempts from FOIA’s mandatory public disclosure requirement information within the government’s possession that constitutes another person’s “trade secrets” or “commercial or financial information” that is “confidential” in nature. For decades, the courts have adopted an extremely narrow definition of the term “trade secrets” as used in Exemption 4, holding that, in light of the broad policies of government transparency and openness animating FOIA, the term is properly interpreted as encompassing only information that bears some “direct relationship” to the “productive process” by which a “trade commodity” is produced – i.e., a commercially valuable plan, formula or process that is used “for the making, preparing, compounding or processing of trade commodities.” Consequently, to prevent public disclosure under FOIA of a vast amount of competitively sensitive information – including, for example, pricing and sales data, customer and supplier lists, overhead and operating costs, and other information bearing no “direct relationship” to some

“productive process” but nevertheless asserted to constitute “trade secrets” – private sector actors have been required to show that such information constitutes “commercial or financial information” that is “confidential” in nature.

Historically, the courts have embraced a broad definition of “commercial or financial information,” holding that almost any information can qualify so long as it can be shown to relate to business or trade. The courts have been unwilling, however, to find that information is “confidential” simply because it is of a kind that customarily would not be disclosed publicly. Instead, they typically have required a showing that disclosure of such information would “cause substantial harm to the competitive position of the person from whom the information was obtained.”

In *Food Marketing*, however, the Supreme Court has been asked to abolish the “substantial competitive harm” test in favor of a textual “ordinary meaning” approach under which commercial or financial information would be found to qualify for protection against disclosure under Exemption 4 – even absent a showing that its disclosure would result in substantial competitive harm to its owner – if the information had simply been maintained by its owner, and provided to government, “in confidence.” In the alternative, and in recognition of Justice Thomas’ observation in *New Hampshire Right To Life v. Dep’t of Health and Human Servs.*, 136 S.Ct. 383 (2015), that the courts have embraced “varying versions” of the “substantial competitive harm” test, the Court has been asked to clarify the precise contours of that test and, more specifically, whether it requires pleading and proof of some “certain” and “defined” harm (such as lost market share to actual and identifiable competitors), or whether it instead can be satisfied by the mere demonstration of “possible” competitive use of the information at issue by “hypothetical” future competitors.

It remains to be seen whether the Supreme Court will abolish the “substantial competitive harm” test. Should



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it determine to do so, however, it effectively would abrogate the longstanding “restrictive definition” of “trade secrets” that historically has been held applicable under FOIA Exemption 4, thereby making it easier for private sector companies to protect a wider scope of potentially sensitive business information that they have shared with a government agency – including, potentially, information that would not even qualify as a “trade secret” under federal and state misappropriation laws. On the other hand, should the Court retain the “substantial competitive harm” test, it almost certainly will elaborate on the pleading and proof required to satisfy that test. In so doing, the Court will not only provide important guidance to companies that do business with the government or otherwise are required to share their commercially sensitive information with government agencies, it also may affect the pleading and proof required under state and federal misappropriation laws, whose definitions of the term “trade secret” overlap substantially with FOIA Exemption 4’s “substantial competitive harm” test.

# Employment Litigation

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The past year ushered in a range of impactful legislative, judicial and social developments affecting employers. Below, we discuss a number of new and continuing legal trends that we expect to see in 2019, and offer recommendations as to how employers can navigate these changes and developments.

## Sexual Harassment

The legislative response to the #MeToo movement gained additional momentum in 2018, as revelations about sexual harassment claims against dozens of high-profile figures continued to fill headlines. At least 125 bills addressing #MeToo issues were introduced across the country in 2018, and at least 11 states enacted legislation targeting employer practices, such as mandatory arbitration, non-disclosure requirements, and investigations relating to sexual harassment claims, as well as anti-sexual harassment workplace policies and training. At the federal level, 2018 was the first calendar year in which legislation (enacted in December 2017) became effective denying employers a tax deduction for “any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney’s fees related to such a settlement or payment.” 26 U.S.C. § 162(q). To date, there has been no definitive guidance as to how the federal government defines settlements or payments “related to” sexual harassment or sexual abuse, but employers should keep this amendment in mind when assessing the benefits of entering into a nondisclosure agreement.

Several states also enacted legislation regulating settlements of workplace sexual harassment claims. For example, Maryland now requires employers with 50 or more employees to submit information on the number of settlements of sexual harassment claims entered into by the employer to the Maryland Commission on Civil Rights on or before July 1, 2020, and then again on or before July 1, 2022. Other states, including California, New York, and Washington, enacted legislation restricting employers’ ability to require sexual harassment complainants to keep their allegations confidential as part of a settlement of

their claims. These laws are far from uniform, however, so employers that operate in multiple jurisdictions may be required to navigate many disparate requirements.

Several states, including Maryland, New York, Vermont, and Washington, also passed laws attempting to ban mandatory arbitration of sexual harassment claims. We expect employers to challenge these state laws as contrary to the Federal Arbitration Act (FAA), which preempts state laws that limit the enforceability of arbitration agreements. In light of the U.S. Supreme Court opinion in favor of the enforcement of arbitration agreements in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) and a long line of pro-arbitration rulings by the Supreme Court, there appears to be a strong likelihood that the courts will agree with many of these challenges.

New York State and City, along with other states including California, Delaware, and Louisiana, enacted anti-sexual harassment training and policy requirements. New York State's law imposes a broad range of requirements on employers, from policies and training to recommended complaint forms and investigation protocols. The necessary content and frequency of training vary from state to state.

The legislative response to the #MeToo movement shows no signs of abatement in 2019, and many additional states and cities may issue regulations or other interpretative guidance in the coming year further clarifying the new laws already enacted. In addition, we have recently seen shareholders' lawsuits, such as those filed against Google's parent company, Alphabet, Inc., alleging breach of fiduciary duty by boards of directors and engaging in corporate waste by failing to investigate and covering up claims of sexual harassment by corporate executives and paying executives found to have engaged in such harassment severance upon the termination of their employment. Given the rapidly changing legislative and judicial environment, employers should monitor changes in the laws in the jurisdictions in which they operate in 2019.

### Class Action Waivers in Arbitration Agreements

As a result of the U.S. Supreme Court's aforementioned May 2018 decision in *Epic Systems Corp. v. Lewis* rejecting a challenge under the National Labor Relations Act to mandatory class-action waivers in individual arbitration agreements, more employers are adopting such individual arbitration agreements, including a class-action waiver. According to current estimates, approximately 60 million employees in the United States are covered by arbitration agreements. A countervailing force to this trend, however, is the increased public scrutiny of mandatory arbitration of certain types of employment claims in the wake of the #MeToo movement, in addition to the high cost of arbitration. For example, in 2017 and 2018, companies such as Google, Uber, and Facebook voluntarily ended mandatory arbitration of sexual harassment claims.

Any federal legislative attempts to undo the holding in *Epic Systems* will likely be unsuccessful in a divided Congress. While state and local governments may seek to limit the enforceability of such arbitration agreements, we expect such efforts will be challenged as contrary to the FAA. Notwithstanding the clear dictates of federal law, New York enacted legislation in 2018 which provides that employers may no longer include in any written agreement, a provision mandating arbitration of sexual harassment claims or allegations, except where such a prohibition is "inconsistent with federal law." Because most arbitration agreements are likely to fall within the scope of the FAA, and the Supreme Court has held in a long line of cases, including *Epic Systems*, that the FAA mandates the enforcement of arbitration agreements as written, employees seeking to rely on new state legislation precluding arbitration of certain claims face an uphill battle against FAA preemption.

### State Pay Equity Legislation

The pay equity movement aimed at closing the wage disparity between men and women will continue to have an impact on virtually all employers in 2019. In 2017 and

2018, several state and local jurisdictions introduced legislation banning salary history inquiries in an effort to avoid perpetuating pay disparities or gender-based wage discrimination that may have affected female applicants in their prior work experiences. States and localities that have already implemented such legislation include Albany County (New York), Westchester County (New York), New York City, California, San Francisco, Massachusetts, Kansas City, New Jersey, Delaware, Oregon, and Vermont. These laws typically prohibit employers from asking an applicant for his or her compensation history. Some of these laws also prohibit an employer from using pay or salary history to determine a new hire's pay, even if the employer has obtained the information inadvertently or the applicant has volunteered the information.

In 2019, more state and local legislation will become effective to alleviate the pay disparity between men and women. Effective January 1, 2019, Hawaii prohibits employers from asking applicants about salary histories, and employers cannot rely on that information to determine salary, benefits or other compensation, unless volunteered without prompting by the applicant. Hawaii, however, does permit "discussions with an applicant for employment about the applicant's expectations with respect to salary, benefits and other compensation." Effective January 1, 2019, Connecticut also prohibits employers from asking about pay history, unless voluntarily disclosed. Connecticut, however, does not prohibit an employer from inquiring about other elements of a prospective employee's compensation structure, "as long as such employer does not inquire about the value of the elements of such compensation structure." Effective June 30, 2019, Suffolk County (New York) will also prohibit employers not only from asking about an applicant's wage or salary history, but also from conducting searches of public records for the same. In an effort to thwart the growth of state and local laws banning inquiry into salary history, at least two states have recently passed preemption measures to prohibit local jurisdictions from banning pay history inquiries. A

Michigan bill specifically provides, in relevant part, that "[a] local governmental body shall not adopt, enforce, or administer an ordinance, local policy or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or potential employee." In a similar vein, Wisconsin passed preemption legislation that specifically cites salary history among issues that local jurisdictions cannot address through ordinances.

Employers should continue to be vigilant about reviewing their hiring procedures and documents, and properly training individuals with hiring responsibilities to ensure that they do not violate any prohibitions on inquiries and use of compensation history. Employers also should continue to evaluate and identify, where appropriate, any pay disparities impacting protected groups, as robust private and governmental enforcement efforts in this area will undoubtedly continue and possibly increase in frequency. Employers also should take steps to conduct such pay audits under the protection of the attorney-client privilege, which privilege will also provide employers with more flexibility to communicate regarding relevant issues and solutions stemming from the pay audit. To this end, from the outset of any pay audit, in addition to the human resources department, employers should work in conjunction with their in-house legal department and/or outside counsel, and document through an internal memorandum (for in-house counsel) or an engagement letter (for outside counsel) that the scope of the audit includes providing legal advice. Finally, employers should also be aware of any state or local guidance in this area, in connection with a sale or purchase of the assets of a business. In this context, aggressive plaintiffs' lawyers may argue that the buyer should not use compensation history in making offers of employment even though the buyer does not consider the transferred employees to be job applicants covered by the law.

## Employment Litigation

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### Paid Leave Laws

Increasingly more states have continued the trend of enacting paid leave laws. Massachusetts has joined six other states in recently passing legislation granting eligible employees paid family medical leave. Massachusetts's law became effective January 1, 2019, but benefit payments will not begin until January 2021. Washington, D.C. and Washington State enacted paid family leave measures in 2017, but benefit payments will not begin under either law until 2020. New York's paid family leave law began phased implementation in 2018, and the number of paid weeks eligible employees can take increased from 8 to 10 as of January 1, 2019, and will increase to 12 weeks in 2021. In addition, various localities have passed legislation requiring employers to provide paid family medical leave. Relatedly, 11 states and Washington, D.C., as well as numerous localities including New York City and San Francisco, have enacted legislation requiring employers to provide paid short-term sick leave and to permit carryover of accrued sick time. The paid sick leave laws of Maryland, New Jersey, and Washington State all became effective in 2018, and Michigan's paid sick leave law will become effective in April 2019.

State and local paid leave laws impose new mandates on employers which the federal Family Medical Leave Act (FMLA) does not require. The FMLA requires employers, under certain circumstances, to provide employees with up to 12 weeks of leave, but does not require that employees be paid during the leave period.

The United States also does not require employers to provide paid sick leave for their employees. The state family leave laws of California, New Jersey, New York, and Rhode Island have created funding mechanisms requiring employees, not employers, to pay for the paid leave benefits under taxing schemes related to state workers' compensation and disability laws. Washington, D.C.'s program will be financed by employers via payroll taxes on employers, and the programs enacted by

Washington State and Massachusetts will be jointly financed by employers and employees. There are efforts currently underway in 21 additional states to pass paid family medical leave legislation, so employers can expect to see additional jurisdictions adopting such paid family medical and sick leave laws in 2019. Employers should review their policies and procedures to ensure compliance with state and local laws.

### Laws and Other Activities Limiting Enforceability of Restrictive Covenants

In 2018, employers witnessed governmental action limiting the enforceability of restrictive covenants. This trend, which has been picking up steam since becoming an initiative during the latter years of the Obama administration, likely will continue in 2019.

The most significant milestone in 2018 in the area of further restrictions on employers' use of restrictive covenants was the passage of the Massachusetts Noncompetition Agreement Act, which goes further than nearly any other state law (short of the outright bans on non-competes, other than in limited circumstances, in California, Oklahoma, and North Dakota) in restricting the use of post-employment covenants not to compete. Under this new Massachusetts law, which applies to agreements signed on or after October 1, 2018, non-competition restrictions are limited to 12 months in duration; cannot be used with non-exempt employees and other low wage workers; cannot be enforced against employees laid off or terminated without cause; and must be supported by additional consideration beyond "continued employment" for current employees. Additionally, in a particularly unique aspect of this new law, employers must pay employees half their salary or "other mutually agreed-upon consideration" during the non-compete period. The law does not define "other mutually agreed-upon consideration," and we anticipate that employers will take creative approaches in providing non-monetary benefits as consideration.



The Massachusetts legislation comes on the heels of laws restricting the use of non-competes in several other states – such as a 2016 Utah law that, among other things, like the Massachusetts law, prohibits non-competes of more than one year – and could be followed by bills targeting non-competes that have been proposed in other state legislatures, including a proposal in Vermont to ban nearly all non-competes (similar to California). And just this month, a group called the Center for American Progress issued a report calling on state lawmakers to take additional (and stronger) actions to limit the use of restrictive covenants – a further sign that the recent trend of state-level restrictive covenant legislation is likely to continue.

This state-level activity in the area of non-competition agreements comes against the backdrop of significant recent activity at both the state and federal levels targeting so-called “no-poach” agreements as violations of antitrust law. Following the October 2016 publication by the Department of Justice of its “Antitrust Guidance for Human Resources Professionals,” which declared the DOJ’s position that “no-poach” agreements – i.e., agreements between companies not to recruit or hire each other’s employees – are violations of federal antitrust law, employers have seen litigation as well as state and federal enforcement activities targeting these types of agreements. Most recently, as discussed above in our [Antitrust Trends](#) segment, this activity has included a wave of class action lawsuits involving fast-food restaurant chains (such as McDonald’s, Burger King, Papa John’s, Little Caesar’s, and several others), alleging that individual franchise locations of each of these chains unlawfully agreed not to hire employees from other franchisors of the same chain.

Finally, while 2018 saw several noteworthy judicial decisions in the restrictive covenant space, what was likely the most significant decision came down in November when a California appellate court affirmed an order precluding the enforcement of an employee non-solicitation agreement against employees who had left

their company to join a competitor. While it remains to be seen whether the decision in *AMN Healthcare v. Aya Healthcare*, 28 Cal. App. 5th 923, 926 (Ct. App. 2018), was unique to the facts of that case (which involved recruiters of travel nurses whose very job was to recruit travel nurses for temporary assignments), or whether it means that California courts will now consistently treat employee non-solicitation agreements like non-competition agreements (i.e., as *per se* unlawful) – indeed, *Barker v. Insight Glob., LLC*, 2019 WL 176260, at \*2-3 (N.D. Cal. Jan. 11, 2019) did just that, relying on *AMN Healthcare* in holding that California law prohibits employee non-solicitation agreements – the decision was yet another blow to employers in a year full of “tightening of the reins” in the restrictive covenant space.

### Age Discrimination

As discussed in our [October 2018 Employer Update](#), age discrimination claims frequently arise from hiring and recruitment practices. Job applicants, rather than current employees (unless the claim relates to an internal hiring), typically bring these claims. The law clearly authorizes applicants to bring claims of intentional discrimination, but courts disagree as to whether applicants can bring claims of disparate impact, or unintentional discrimination based on neutral practices that tend to eliminate older applicants.

Our October 2018 *Employer Update* described *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 961 (11th Cir. 2016), in which the Eleventh Circuit found that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, does not authorize job applicants to bring disparate impact claims. The Seventh Circuit recently reheard a case in which the 58-year-old applicant alleged disparate impact discrimination based on a job posting for someone with “3 to 7 years (no more than 7 years) of relevant legal experience.” *Kleber v. CareFusion Corp.*, 888 F.3d 868, 870 (7th Cir. 2018) (opinion vacated). While an early 2018 Seventh Circuit panel decision found the ADEA to permit claims of disparate

impact by job applicants, the full court reheard the case and determined in a January 23, 2019 opinion that the ADEA does not do so. The dissenting judges argued that the textual analysis was less clear than the majority found, and that the decision was contrary to the intent behind the ADEA.

The Seventh Circuit's alignment with the Eleventh Circuit may be an indication of a trend in U.S. Circuit Courts of Appeal to limit the scope of the ADEA and appears to strengthen employers' ability to argue that the ADEA does not protect job applicants against disparate impact discrimination. However, courts in other circuits may find differently, setting the issue up for U.S. Supreme Court review. For example, an ongoing case in the Northern District of California is awaiting an order on class certification in connection with a claim of disparate impact discrimination against older applicants through the filling of entry-level positions exclusively through on-campus recruiting. *Rabin v. PricewaterhouseCoopers LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017). Job applicants may also bring claims under state law, which could be more specific and provide broader protections than ADEA.

Therefore, employers should be mindful of the ongoing possibility of disparate impact claims by applicants and assess whether their neutral hiring and recruitment practices tend to exclude older workers. Employers can then determine whether these practices are targeted at a reasonable business purpose and consider other ways to achieve the same purpose. For example, employers may currently use an experience cap to deter those applicants with greater experience who may require a higher salary. Including a target salary in the job posting could deter these applicants (who may be older), without precluding them from applying in the event they are willing to accept the lower salary. Given the current uncertainty in the law, employers should nevertheless assess their current hiring and recruitment practices to ensure that they are defensible and to modify those that may not be.

### 2019 Supreme Court Term

The U.S. Supreme Court's rulings in 2019 will likely usher in noteworthy legal developments affecting employers, particularly with respect to arbitration programs. In early January 2019, in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, the Supreme Court unanimously held that the "wholly groundless" exception to the general rule that courts must enforce contracts that delegate threshold arbitrability questions to an arbitrator, not a court, is inconsistent with the Federal Arbitration Act (FAA). 139 S.Ct. 524 (2019), 2019 WL 122164. Under that exception, courts were empowered to determine the arbitrability of a dispute, even if the contract delegated the question of arbitrability to an arbitrator, if the argument that the arbitration agreement applies to a dispute was "wholly groundless." *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 495 (5th Cir. 2017), vacated and remanded, 139 S.Ct. 524 (2019). Now, under the Supreme Court's decision in *Schein*, when a contract delegates threshold arbitrability questions to an arbitrator, courts may not override the contract even if the argument that the arbitration agreement applies to a particular dispute is "wholly groundless." *Schein*, 139 S.Ct. 524 (2019). In light of this development, employers who wish to bolster the likelihood that their disputes will be resolved in arbitration, should review their arbitration agreements with employees and may wish to ensure that such agreements expressly delegate the threshold question of arbitrability to an arbitrator.

As we discussed in our [Complex Commercial Litigation](#) section, the Supreme Court also recently held in *New Prime Inc. v. Oliveira* that the FAA's mandate that courts enforce arbitration provisions does not apply to independent contractors who work in transportation industries. 139 S.Ct. 532 (2019), 2019 WL 189342 (U.S. Jan. 15, 2019). Ordinarily, the FAA requires courts to enforce private arbitration agreements. As the Supreme Court stated in *New Prime*, however, the FAA, "like most laws[,] . . . bears its qualifications." *Id.* In particular, the FAA exempts "contracts of employment" for

transportation “workers” (e.g., railroad workers, truckers, and airline attendants). 9 U.S.C. § 1. In the past, some courts had ruled that the FAA’s transportation worker exemption applied only to contracts between employers and employees. In *New Prime*, however, the Supreme Court clarified that the exemption applies to independent contractors, as well. Focusing on the definition of “employment” at the time Congress enacted the FAA, as well as the statute’s broad use of the term “workers,” the Supreme Court held that the FAA’s exemption applied to “any contract for the performance of work by workers” in the transportation industry. *New Prime*, 139 S.Ct. 532 at 541.

Later in 2019, the Supreme Court will rule on its third employment-related arbitration case, *Lamps Plus, Inc. v. Varela*, 701 F. App’x 670, 672 (9th Cir. 2017), cert. granted, 138 S. Ct. 1697 (2018) (also discussed [above](#)). In that case, the Supreme Court will determine whether the FAA prohibits lower courts from applying state law to interpret arbitration agreements to authorize class arbitration in the absence of an express provision authorizing class claims. The *Lamps Plus* dispute centered on an employer and an employee’s opposing arguments that the general arbitration clause in their employment agreement authorized – or that it was too ambiguous to authorize – the employee’s pursuit of arbitration on a collective basis. Applying California contract law to construe the parties’ employment agreement, the Ninth Circuit concluded that the litigants’ arbitration provision was sufficiently clear and possessed an adequate “contractual basis” that demonstrated the parties’ agreement to class arbitration. *Id.* at 673. On review, the Supreme Court will decide whether courts are permitted to interpret similar general arbitration agreements to provide for class arbitration under state law.

The Supreme Court may hear one additional employment case in 2019. Litigants have filed a petition for certiorari in a case that could determine whether Title VII of the Civil Rights Act of 1964 prohibits

employment discrimination based on sexual orientation or gender identity. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), petition for cert. filed (July 20, 2018) (18-107) (concluding that “discrimination on the basis of transgender and transitioning status violates Title VII”). In a different case, the Supreme Court could have determined whether an employer is permitted to consider salary history as a “factor other than sex” when making pay determinations under the Equal Pay Act. *Yovino v. Rizo*, — S.Ct. — (2019). However, the Court’s per curiam order turned on a procedural question, and remanded the case for further proceedings.

# International Arbitration

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## Uses of Technology in International Commercial Arbitration

The use of technology in international arbitration is getting more advanced each year. Digitalization and digital transformation are two key factors driving the change and advancement.

To start at the beginning, digitization is the process of turning analog data into digital form. We then come to digitalization, which has been variously described as the use of digital technologies to create an environment for the (digital) business. In turn, digital transformation is widely understood to mean the integration of digital technologies into all areas of an enterprise.

To put this into an arbitration context, parties and tribunals already utilize certain forms of this technology. Significant innovation over recent years has also paved the way for a range of new services to become available to parties to international arbitration. For example, working with electronic filing systems instead of a paper-based filing, using videoconferencing and multimedia presentations for oral hearings instead of having everyone appear in person, and exchanging documents through a cloud-based service provider rather than producing vast amounts of paper.

Looking ahead to what is to come, it is fair to say that 2019 will provide the international arbitration community with new technological developments designed to make arbitration faster, more cost-effective and easier to administer.

From the parties' perspective, one of the great advantages of utilizing digitalization and digital transformation in international arbitration is cost savings. Arbitral institutions such as the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* – DIS) and Vienna International Arbitration Centre (VIAC) recently amended their arbitration rules with the aim of maximizing efficiency and minimizing costs. Other arbitral institutions such as the London Court of International

Arbitration (LCIA) have already implemented such measures. Generally, all major arbitral institutions now have electronic filing systems in place that enable the parties to file arbitration papers using an online system. The VIAC, for example, is planning to advance its electronic filing systems even further by offering a case management system in which documents are uploaded and become immediately accessible to all parties to the arbitration.

Similarly, the use of “e-briefs” and electronic hearing bundles are becoming more popular in the day-to-day handling of the arbitration. An e-brief is essentially an interactive version of a submission, which uses hyperlinks to direct the arbitral tribunal to the relevant cross-reference, which may be to a witness statement, exhibit or legal authority. The use of electronic hearing bundles also eliminates the need to produce (often voluminous) paper form hearing bundles which can be cumbersome both to produce and navigate. It is quite plausible that e-briefs and electronic hearing bundles will replace hard copy in its entirety in the not-too-distant future and that hardcopies will cease to exist.

The use of technology at the oral hearing stage also enables further time and cost savings. For example, where fact and/or expert witnesses are required to give oral testimony at the hearing, the use of videoconferencing can decrease the overall cost and length of the proceedings by eliminating the need for witnesses to travel, often overseas, to attend the hearing in person. The location of witnesses is, therefore, less of an important consideration, and means that the pool of potentially available expert witnesses expands significantly. Videoconferencing can also facilitate the practice known as “hot-tubbing,” in which two or more experts are questioned together, by using multiple digital screens. The rationale behind this form of questioning is to ensure that experts answer the same questions, based on the same assumptions, in parallel.

Another buzzword in the technology space is, of course, artificial intelligence (AI). “AI in IA” (artificial intelligence in international arbitration) is becoming more widely discussed amongst practitioners, academics and AI program developers alike. It has been suggested that AI could, for example, be used to support the parties in their selection of an arbitrator, by using an algorithm to define certain criteria and identify the most suitable candidate. AI might also lend itself to “predictive justice,” whereby the merits of case are predicted by analyzing arbitration or court decisions to derive statistical probabilities of success. This technology might not only encourage the parties to consider settlement at an earlier stage but can also impact the decision as to whether to file a claim in the first place. In third-party funding, such technologies are more commonly used to assess the chances of success and to decide whether a specific offer to grant funding will be made. Whether more progressive concepts such as “robot arbitrators” will begin to emerge in practice is yet to be seen. Certainly the legal framework will have to adapt in tandem (for example, to ensure that a decision rendered by a robot in code will constitute an award for enforcement purposes) and parties would need to be comfortable in delegating the adjudication of their dispute to a machine – particularly given our innate preference for human interaction and the uniquely human concepts of fairness and justice which we associate with dispute resolution.

Whether digitalization and digital transformation will be used in international arbitration is for the parties and the tribunal to decide. However, as technology becomes increasingly accessible, sophisticated and affordable, it is anticipated that its use in international arbitration over the coming years will become more commonplace than abstract possibility.

### **Arbitration and Blockchain-Related Disputes**

No longer just another conceptual buzzword, we are increasingly seeing blockchain being implemented in various real-world applications. However, as with any



nascent technology, there remain many open questions as to how best to resolve blockchain-related legal disputes. It is suggested that the flexibility offered by arbitration makes it the ideal dispute resolution method for such disputes.

At its core, blockchain is a type of shared or decentralized database, where each entry is maintained and cross-verified by its users. Since there is no centralized distribution system and no central server, blockchain has the ability to provide instant verification of data that is free from manipulation and the threat of hacking.

Smart contracts are also often associated with blockchain technology. These are coded instructions which automatically perform an act once an event occurs. For example, they can transfer insurance funds when a verified insured event takes place (e.g., a plane is delayed). Self-executing codes are certainly not a new concept. However, when combined with blockchain tools, the coded instructions become immutable and tamper-proof. In addition, control over the agreement no longer needs to be held by a central party (e.g., a bank), which could be seen as biased or susceptible to human error. Naturally, however, as no line of code is entirely infallible, disputes are bound to arise.

For the reasons explained below, arbitration is particularly well-suited to resolving blockchain and smart contract disputes.

Given its decentralized nature, parties using blockchain or smart contract technology can be located anywhere in the world. Nor is there necessarily an obvious central nexus (e.g., a central server or a moderating/controlling party) on which jurisdiction can be determined. Unless blockchain platforms are wrapped in standard contractual terms containing exclusive jurisdiction and governing law clauses that users must sign up to (a move which could appear to somewhat defeat the point of the technology in the first place), courts might

struggle to find a jurisdictional anchor to hear the dispute. In contrast, arbitration allows parties to select a neutral venue to resolve disputes, avoiding these jurisdictional issues entirely.

Further, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows for ease in enforcing international awards throughout the world. This is a crucial advantage, given the cross-border nature of blockchain platforms. Hence, even if a national court could be seized of the matter, parties might find it practically advantageous to pursue arbitration instead.

Arbitration also allows parties to have greater flexibility in customizing the underlying rules and procedures governing the dispute resolution process. This means parties may be able to deviate from traditional legal systems and, to some extent, traditional legal doctrines.

Another key benefit of arbitration in this context is the confidentiality of arbitral proceedings. Such confidentiality of proceedings complements the anonymity which is a key feature of the blockchain market.

Finally, arbitration allows parties to choose the arbitrators with the appropriate degree of expertise. Having adjudicators with an expert understanding of computing in general, as well as the distributed ledger technology that underpins blockchain, is particularly important when dealing with such a technical subject matter. This is not to say that all courts are ill-equipped to handle such complex technological disputes – China's Supreme Court, for example, issued a ruling on September 7, 2018 that evidence authenticated with blockchain technology is binding in legal disputes (and rightly so) – but the lack of control over which judges will preside over a dispute might be particularly prohibitive for parties faced with a dispute concerning such a difficult subject matter. Arbitration takes luck out of the equation entirely.

### Third-Party Funding in International Arbitration

There has been a significant increase in the use of third-party funding in international arbitration in recent years. Traditionally associated with investor-state arbitration, third-party funding has now spread to commercial international arbitration and it is estimated that the global market for dispute funding (both litigation and arbitration) exceeds \$10 billion. This rapid growth in funding has brought into sharper focus some of the issues that arise in relation to third-party funding in the context of international arbitration, some of which were recently considered in the Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration published in April 2018 (the ICCA-Queen Mary Report).

Third-party funding is an alternative means of funding arbitration proceedings. A third-party, not involved in the arbitration, provides funding to a party to that arbitration in return for an agreed amount (usually a percentage of any recoveries in the arbitration or a multiple of the amount of funding provided). The funder may also agree to pay the other side's costs in the event of an adverse costs order.

Once a decision has been made to explore the possibility of third-party funding, it is worth bearing in mind some of the issues currently under discussion and debate amongst the international arbitration community, or otherwise of practical importance, prior to making an approach.

First, several jurisdictions currently restrict or prohibit the use of third-party funding, so the seat of the arbitration will be a key consideration when determining whether or not third-party funding is an available option. Funders will generally favor jurisdictions which are perceived to be "funder-friendly," which are currently considered to include the U.K., U.S., Australia, Germany, France and the Netherlands. Hong Kong and Singapore are also moving towards a funding culture, having recently introduced rules to permit third-party funding and to require the disclosure of the existence of a funding arrangement. This is in contrast to Ireland, for example, which continues to prohibit third-party funding.

Second, it may be necessary to provide the funder with confidential and often privileged information relating to the claim at an early stage as part of the funder's assessment of the merits and overall suitability for funding. It is therefore advisable to enter into a non-disclosure agreement at the outset, on terms that privilege in any legal advice is not waived, in order to clarify the basis on which such information is being provided and to protect against disclosure requests from the opposing party on grounds that privilege has been waived. It will also be important to seek local law advice on matters of privilege and confidentiality in the relevant jurisdiction, including whether non-disclosure agreements will retain the privilege.

Third, entering into a funding arrangement will invariably involve sacrificing an element of autonomy, in particular, with respect to matters such as settlement. A funding agreement will often contain provisions regulating the circumstances in which the claim can be settled, and provide that in the case of a "deadlock," an independent third-party will make the determination. It will therefore be important to consider whether retaining sole discretion over settlement is of paramount importance, and whether there is scope to negotiate these terms with the funder.

Fourth, the practice of party-appointment of arbitrators can give rise to the potential for a conflict of interest. The relatively small pool of third-party funders increases the likelihood of there being prior relationships as between the funder and a party, law firm or arbitrator. Care should be taken to ensure that no such conflict exists, in order to avoid any satellite proceedings or a challenge at the enforcement stage on grounds of a conflict of interest.

Finally, the issue of conflicts also gives rise to the further question of whether the existence of the funding arrangement should voluntarily be disclosed at the outset of the arbitration (which the ICCA-Queen Mary Report recommends). One of the key tactical advantages of doing so, in addition to warding off any subsequent challenge, is informing the other side that an

independent third-party also sees merit in the claim – which may encourage early settlement – although this should be weighed against the risk of triggering an application for security for costs by the opposing party.

Another key factor in favor of disclosure relates to costs recovery. In the recent case of *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), the English High Court upheld an arbitrator's decision in an ICC London seated arbitration that the successful party was entitled to recover its costs of third-party funding (almost £2 million) from the unsuccessful party. Although the facts of this case were extreme (the arbitrator found that the respondent had acted egregiously by putting the claimant in a position where it was unable to fund the arbitration out of its own resources), other parties may follow suit and seek to recover their funding costs. Of course, whether or not such claims will be successful will depend on a number of factors, including the applicable national legislation and procedural rules, and whether the paying party was made aware of the increased costs risk posed by the funding arrangement.

This rapid growth in third-party funding raises the question of whether third-party funding in international arbitration should be regulated so as to address some of the issues discussed above. The debate continues, but it is submitted that the approach of the ICCA-Queen Mary Report is to be preferred, i.e., a set of non-binding principles and best practice guidelines for practitioners in the international arbitration community to follow.

# IP/Media

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## Online Media Companies Grapple with Threat to “Server Test”

Since the 9th Circuit's 2007 decision in *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), copyright liability for the infringing public display or performance of photographs and videos has been commonly accepted as resting on the entity that hosts and serves the offending content. To take just one example, it is common for third-party websites to embed YouTube videos, which users can view through a player embedded or framed on the third-party site; while the viewer may access the video from that third-party site (and remain on that site while she views the video), the legal consensus has been that it is *YouTube* that actually performs the video for the user, even if the third-party website developer caused the video to play for the user by incorporating instructions to fetch and embed the video in the HTML code of the third-party web page. Such “inline linking” between and across websites is in many ways the lifeblood of the modern internet: social media sites are filled with embedded content from third-party sites – much viewable without leaving the social media platform – and news organizations regularly include embedded content in their online stories.

The decade-long acceptance of that practice was starkly challenged in 2018 when Judge Forrest refused to apply the so-called “server test” in a high-profile case in the Southern District of New York involving an infringing photo of New England Patriots' quarterback Tom Brady. The case, *Goldman v. Breitbart News Network, LLC, et al.*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018), involved a photo of the quarterback taken by Goldman and uploaded by others, without permission, to Twitter. Various news organizations, including Breitbart, Gannett, Vox, and the Boston Globe, subsequently embedded the photo (actually, Tweets containing the photo) in stories about Brady on their own websites. As a technical matter, when readers opened those stories, the display of the photo was delivered by Twitter: i.e., the literal bits and bytes of information comprising the photo flowed from the Twitter servers directly to the reader's computer, where they were

rendered and framed by the surrounding story. But it was Breitbart and the other defendants who, even if they didn't themselves transmit the photo, caused its display to occur by including the Twitter embed code in their webpages' HTML instructions. And that was enough to make those news organizations liable for violating Goldman's right to publicly display the photo, according to Judge Forrest, who, in denying summary judgment to the defendants, claimed that the 9th Circuit's server test had not been widely adopted outside the 9th Circuit, or had been applied only in factual circumstances distinguishable from the case at bar.

Recognizing the potential seismic impact of her holding, Judge Forrest quickly certified the defendants' request for an interlocutory appeal to the Second Circuit. Surprisingly, however, the Second Circuit rejected that application. As a result, there is now conflicting authority in the 2nd and 9th Circuits regarding the server test, and a high-profile decision calling seriously into question whether that legal test has ever been embraced outside the 9th Circuit, notwithstanding a decade-plus of online practice assuming that to be so. Resolution of that conflict must await the conclusion of the case (currently still in discovery) in the district court. In the meantime, the copyright and larger online media community – owners of photographs and videos, social media platforms, news sites – are left with unanswered questions: will the Second Circuit eventually overturn Judge Forrest's decision, or uphold and create an explicit split with the 9th Circuit (one that almost assuredly will then be taken up by the U.S. Supreme Court)? How far does Judge Forrest's decision sweep: is it limited, for example, to its news-story context, where embedded photos display automatically and seamlessly when the page is loaded and the reader has no idea she is viewing content embedded from another site? Or might it stretch to cover situations where the embed is more obvious, or the user must click a link to initiate the display (in the case of a photo) or performance (in the case of music or video played in an embedded player)? The pressing nature of such questions is only

exacerbated by an extremely active copyright bar: not a day goes by that some major media company isn't sued by a photographer for displaying a photo (typically found elsewhere on the internet) without permission. If an online service's potential liability is now expanded to include embedded as well as hosted content, such litigation is likely to become even more common in the year ahead.

### Music Industry Adjusts to New Legislative Landscape

On October 11, 2018, President Trump signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the MMA). Widely hailed as the most significant copyright legislation in decades, the MMA ushered in sweeping changes to the music licensing landscape that will take shape over next several years and alter music-industry litigation in a number of ways. Chief among the MMA's innovations was the creation of a blanket license for the so-called "mechanical rights" on-demand streaming services like Spotify and Apple Music need to offer musical works on their services. Digital music providers that comply with the payment and reporting terms of the blanket mechanical license will be shielded from infringement liability for reproducing or distributing musical works on their services: in any infringement suit filed after January 1, 2018, the copyright owner's remedy shall be limited to the recovery of royalties due, provided the music service has made ongoing good-faith efforts (prescribed in detail) to identify and pay for all works used on its service, and has otherwise accrued payments for unidentified works. This effectively puts an end to lawsuits like those that have bedeviled Spotify, Rhapsody, and other on-demand streamers, each of which has, in recent years, been accused of failing to secure necessary mechanical licenses in advance of offering certain songs, and faced class actions alleging billions of dollars in infringement penalties.

Second, a portion of the MMA known as the Classics Protection and Access Act has, for the first time, provided federal copyright protection for sound recordings

recorded before February 15, 1972. In the past, those “pre-72” recordings have been protected, if at all, only under various state laws. The uncertainty of those state-level protections led to a number of high-profile cases against Sirius XM, Pandora, and other digital streaming services, which were accused of publicly performing pre-72 recordings without authorization under the laws of New York, Florida, California, Illinois, and other states. While the record industry largely failed in those lawsuits, the MMA puts a new and powerful arrow in its legal quiver: digital services (other than over-the-air radio broadcasters) who fail to secure performance licenses comparable to those they have long secured for sound recordings created after February 15, 1972 – and to pay back royalties on pre-72 plays for the prior three years – will be subject to the full range of copyright infringement penalties available under the Copyright Act, including statutory damages and attorneys’ fees.

Third, 2019 will witness the creation (or at least the beginning of the creation) of an entirely new Mechanical Licensing Collective (MLC), an entity somewhat comparable to SoundExchange and performance rights organizations like ASCAP and BMI, to collect mechanical license royalties under the new blanket license and distribute those royalties to songwriters and music publishers. The Copyright Office has already begun to solicit proposals from parties interested in creating and running the MLC, while the Copyright Royalty Board (CRB) is designing procedures to guide the proceedings which will determine the budget for the MLC and allocate its costs (sure to run into the tens of millions of dollars) across the various digital music services using the blanket license. The first such CRB proceeding will commence this year.

### **A Continued Increase in Television Programming Blackouts May Spike Associated Litigation**

As cable and satellite television distributors and content providers continue to encounter strong headwinds from consumer cord-cutting and a growing number of online

streaming services, they are increasingly turning to the so-called nuclear option of “going dark.” Going dark – also commonly referred to as a programming “blackout” – refers to the temporary or prolonged absence of a broadcaster’s or other programmer’s television networks on a distributor’s platform when the two sides fail to reach agreement on a new programming contract. Long thought of as a relative rarity in the industry due to the economic consequences involved for both programmers and distributors (among other things, lost license fees for the former and lost subscribers for the latter), there have in fact been more than 750 television blackouts since 2010. In 2018 alone, cable distributor Altice blacked out Starz’s premium programming services for over a month; Verizon Fios customers lost access to multiple stations across the country owned by Tegna, including a CBS affiliate in the Washington, D.C. area; and DISH Network – a satellite distributor – removed Univision’s programming services from its satellite and online platforms, and also ceased carrying HBO (a first for the premium network).

This proliferation of blackouts will likely continue into 2019 and beyond, bringing with it the possibility of related civil litigation and FCC proceedings. To provide one example, Charter Communications was recently sued in New York Supreme Court by the owner of “The Jewish Channel,” a Subscription-Video-on-Demand channel that was removed from Charter’s lineup following Charter’s acquisition of Time Warner Cable. *See Compass Prod. Int’l LLC v. Charter Comm., Inc.*, No. 655627/2018 (Sup. Ct. N.Y. Cty. 2018). The plaintiff’s claims stem from various representations made by Charter’s executives during the parties’ negotiations, which were allegedly later rescinded. The plaintiff has brought claims for breach of contract, promissory estoppel, fraudulent inducement, and defamation. Additionally, in the Altice/Starz blackout referenced above, Starz filed a petition for emergency injunctive relief with the FCC before the parties resolved the matter.

As contentious renewal negotiations and service interruptions continue to increase, we may well see a



continuation of this uptick in litigation as the parties seek to find leverage points and alter the negotiating dynamic. Just a few examples of the relevant legal issues that may arise include: (i) alleged breaches of contractual non-disparagement provisions (e.g., when one side employs aggressive messaging against the other); (ii) alleged breaches of contractual restrictions on the use of on-screen “crawls” to inform customers of an impending blackout; (iii) alleged breaches of contractual confidentiality provisions; (iv) tortious interference with contract or prospective economic relations (e.g., if customers are improperly induced to break their locked-in contracts with distributors amid a blackout); and (v) copyright claims if the distributor attempts to import the signal of an over-the-air broadcaster from another market to end-run a blackout. Moreover, if the distributor continues to advertise the availability of a programmer on its platform despite a blackout, such conduct can give rise to claims for false advertising and/or trademark infringement under the Lanham Act, and may also implicate the Federal Trade Commission Act and various state-law consumer protection statutes.

# Patent Litigation

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## **What Will Be the Impact of the Changed Claim Construction Standard in *Inter Partes* Review?**

When *inter partes* review (IPR) first became available as a tool to challenge patents in 2012, the standard for interpreting unexpired claims was the same as that used by patent examiners when initially reviewing patents: the broadest reasonable interpretation. The rationale behind this standard is that in deciding whether to issue a patent the claims should be viewed in their broadest possible light so as to more stringently test whether they are distinguishable over the prior art. The Patent Office changed this standard in November 2018, conforming IPR claim interpretation to that of district courts as set forth in the Federal Circuit's decision in *Philips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). Under the *Philips* standard, claims are interpreted to adhere more closely to the patent specification and prosecution history.

This change has been viewed as quite dramatic and may have a significant impact on patent litigation strategy. Because the Patent Office will now give claims a narrower interpretation in IPR, the scope of potentially invalidating prior art may narrow as well. Accused infringers often file IPRs well in advance of any claim construction ruling in a parallel district court proceeding. Because the district court and Patent Office will interpret claims according to the same standard, an accused infringer can no longer advocate for a broad interpretation in an IPR and then later seek a narrower interpretation in district court. Both accused infringers and patent owners will now need to make early decisions on claim construction strategy, and these early decisions may have long term consequences for both IPR and district court infringement cases. A key issue to watch is whether district courts will defer to Patent Office claim interpretations, if available.

### How Will the Supreme Court Decision in *SAS Institute* Change Overall Patent Litigation Strategy?

IPRs typically involve two phases. Initially, the Patent Office determines whether the IPR request includes evidence that at least one claim is unpatentable to justify further proceedings. Only if the Board determines this threshold is met will it then “institute” the IPR and allow for development of a full record culminating in an oral hearing. Since IPR proceedings became available, the Patent Office has routinely exercised its discretion to institute only portions of an IPR request. For instance, the Patent Office often instituted only some of the challenged claims in an IPR request. Likewise, if an IPR request presented multiple grounds for challenging a particular claim, the Patent Office would often institute only the grounds it deemed most compelling. In April 2018, however, the U.S. Supreme Court decided *SAS Institute, Inc. v. Matal* (No. 16-969), holding that this partial institution practice was contrary to law. As the Supreme Court explained, “in an inter partes review the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decisionmaker might wish to address.” *Id.* After *SAS*, so long as the requester has presented evidence sufficient to show that a single claim is reasonably likely to be invalid, the Patent Office must institute the IPR and issue a final written decision with respect to all claims and grounds in the IPR request.

This outcome presents both pros and cons for IPR requesters. On the one hand, so long as the Patent Office deems a single challenge worthy of consideration, it may no longer reject other challenges prior to development of a full record. In addition to potentially lowering the barrier to institution, this practice may make it easier for accused infringers to seek a stay of district court litigation pending the IPR. On the other hand, now that the Patent Office will address all challenges in an IPR petition, accused infringers will have a difficult time arguing that they

were unable to present a full range of invalidity arguments to the Patent Office. As a result, IPR requesters and their privies will likely be held to broad estoppel provisions prohibiting them from presenting to the district court any invalidity ground they “raised or reasonably could have raised during that inter partes review.” 35 U.S.C. § 315(e).

### Will *WesternGeco* Continue to Open the Door to Patent Damages For Foreign Acts?

There has long been a firm presumption in U.S. patent law against extraterritorial application of U.S. patents. In June 2018, however, the U.S. Supreme Court issued its opinion in *WesternGeco LLC v. ION* (No. 16-1011), which has the potential to soften that presumption. In *WesternGeco*, the accused infringer manufactured components for conducting surveys of the ocean floor, which it exported from the U.S. for assembly into completed products overseas. This exportation was alleged to infringe under 35 U.S.C. § 271(f)(2), a rarely used section of the patent code that makes it an act of infringement to export components of an infringing product for assembly overseas. The patent holder further claimed lost profits from foreign service contracts it would have been able to enter into were it not for the presence of the infringing products overseas. The Supreme Court ruled that patent holder was entitled to recover these foreign lost profits because the patent laws provide that a patent owner should be made whole for infringement.

While *WesternGeco* involved infringement by exportation, the Supreme Court’s rationale was not clearly limited to any particular section of the patent code. Thus, Judge Stark in the District of Delaware recently applied *WesternGeco* to allow a patent holder to potentially recover lost profits for foreign sales lost due to direct infringement under 35 U.S.C. § 271(a), the statute that forms the basis for run-of-the-mill direct infringement allegations. The Federal Circuit has agreed to hear an early appeal of Judge Stark’s decision. See *Power*

*Integrations, Inc. v. Fairchild Semiconductor International, Inc., et al.* (No. 2019-102). If affirmed, patent owners may be able to broadly recover for foreign sales so long as they tie the foreign damages to some act of domestic infringement.

### How Will District Courts React to New Federal Circuit Limits on Patent Eligibility Challenges Under § 101

Following the U.S. Supreme Court's decision in *Alice v. CLS Bank*, it has become routine for accused infringers to contend that inventions are ineligible for patenting under § 101 because they cover nothing more than an abstract idea or natural phenomenon. Such challenges have become a standard tool for attacking a patent at the earliest stages of a case, before discovery has begun or the court has construed the patent claims. Patent owners typically respond to such challenges by alleging that their inventions are, in fact, eligible for patenting because they are based on an "inventive concept," which the Supreme Court has recognized makes an invention eligible for patenting. Yet, this response has had mixed success.

In two important decisions, however, the Federal Circuit provided guidance that may significantly reduce early-stage eligibility challenges. Specifically, in *Aatrix Software v. Green Shades Software* (No. 2017-1452), the Federal Circuit held that the whether "the claim elements or the claimed combination are well-understood, routine, conventional is a question of fact." The Federal Circuit provided nearly identical guidance in *Berkheimer v. H.P.* (No. 2017-1437). This guidance may limit the district courts' ability to conclude early in a case that a patent is ineligible under § 101, particularly where the patentee has sought to inoculate itself against early eligibility challenges by including detailed factual allegations regarding patent eligibility in its complaint. Notably, *Aatrix* and *Berkheimer* have generated controversy among Federal Circuit judges, with one judge recently stating that he "cannot agree

with the court when it states that the patent eligibility inquiry 'may contain underlying issues of fact.'" *In re Marco Guldenaar Holding B.V.* (No. 2017-2465). Given these conflicting judicial views, one issue worth watching in 2019 is whether courts seek to cabin the impact of *Aatrix* and *Berkheimer*.

# Product Liability

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## Can You Be Held Responsible for Another Company's Product?

For years, it has been black letter law in products liability cases that a company should only be liable for injuries caused by a product it had designed, manufactured, or sold. Recent court decisions, however, have begun to challenge this black letter law. For example, in *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760 (N.D. Ill 2014), and *Chesher v. 3M Company*, 234 F. Supp. 3d 693 (D.S.C. 2017), the courts found that a defendant could be found liable under certain circumstances for another company's product when it was used with defendant's products. And, the New York Court of Appeals, similarly, held that the manufacturer of a product has a duty to warn of the foreseeable danger arising from the use of its product with another company's defective product in affirming a consolidated appeal holding a gasket manufacturer liable for failure to warn about later-added asbestos packing and insulation. See *In the Matter of N.Y. Asbestos Litig. (Dummitt and Suttner)*, 59 N.E. 3d 458 (N.Y. 2016).

Liability for another company's product has also been brought to the pharmaceutical world. The California Supreme Court found in *T.H. v. Novartis Pharmaceutical Corporation*, 407 P.3d 18 (Cal. 2017), that a brand name drug manufacturer had a duty to warn generic drug consumers of side effects – even though it had not manufactured the generic drug – because it is foreseeable that the failure to warn could harm the generic consumer. The Court reasoned that since U.S. Food and Drug Administration regulations require generic drug labels to mirror exactly their corresponding brand-name version, brand-name drug manufacturers are the only entities with the ability to strengthen a warning label, and thus should be considered liable for a generic consumer's harm caused by a failure to adequately warn of risks. The Massachusetts Supreme Court followed California, finding in *Rafferty v. Merck & Co.*, 92 N.E. 3d 1205 (Mass. 2018), that brand-name drug manufacturers had a duty not to act recklessly in

causing harm to others, including “intentionally fail[ing] to update the label on its drug, [or] knowing or having reason to know of an unreasonable risk of death or grave bodily injury associated with its use.”

The U.S. Supreme Court now has the chance to weigh in on this issue. In *In Re: Asbestos Products Liability Litigation (No. VI) (DeVries v. Air & Liquid Systems Corp., et al./McAfee v. Ingersoll Rand Co.)*, 873 F.3d 232 (3d Cir. 2017), the Third Circuit found that Defendants may be liable for injuries caused by others' products. The case concerns metal parts manufactured for Navy ships that, during the relevant times, required asbestos insulation to operate effectively. As time passed, the asbestos insulation degraded and was replaced, causing sailors to be exposed to inhalable asbestos. Over time, some of the seamen on the ships went on to develop asbestos-related diseases. The court found that “a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning.”

The Supreme Court granted certiorari and heard oral argument on October 10, 2018. The oral arguments suggest that this maritime law case may have far-reaching implications for all products liability litigation. Since the manufacturing company did not manufacture or install the asbestos installation, it argued that its product is not the product that caused the harm, it is not in the best position to issue a warning about the asbestos, and that the company providing the actual asbestos should be responsible. Both the attorneys and the justices seemed more interested in product liability and tort law as it currently exists across the nation than in the maritime law under which the case originated. Thus, the decision could have a broad impact on the circumstances in which manufacturers can find themselves on the hook.

Respondents argued that the manufacturer had a duty to warn because the metal products required asbestos components for operation, and the metal products contributed to the harm. Despite Respondents' reading of the Third Circuit decision as limited to circumstances where the asbestos is “required” for regular operation, Justice Gorsuch questioned whether the Third Circuit's reasoning might necessitate liability where there is only a “10 percent” or “30 percent” chance of asbestos use. Although the respondents argued for the more limited application of the rule, Justice Gorsuch's expansive reading of the Third Circuit's holding is worthy of attention.

In brief, companies should continue to monitor *Air & Liquid Systems Corp. v. DeVries* (No. 17-1104), to see how the Supreme Court decides this case, and how that decision may impact the duty to warn in products cases across the nation. It could become an important tool for defendants to fight this trend of courts allowing companies to be held liable for products they never designed, manufactured, or sold.



# Securities Litigation

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## Securities Class Action Filings Continue at Record Pace

Securities class action filings “remained at near record levels” in 2018, according to Cornerstone Research’s “Securities Class Action Filings: 2018 Year in Review.” While the increased number of filings continues to be attributable, in part, to a significant increase in federal court merger-related securities class actions (discussed below), the number of non-merger-related cases increased year-over-year in 2018, continuing a recent trend and marking the highest number of filings since the financial crisis in 2008. We expect the high volume of filings to continue in 2019.

## Increased Risk of Securities Litigation in State Court

Federal and state courts have concurrent jurisdiction over claims arising under the Securities Act of 1933, which generally prohibits false and misleading statements in connection with securities offerings. In 2018, the U.S. Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), that Securities Act claims filed in state court are not removable to federal court under the Securities Litigation Uniform Standards Act. As a result, recent data already indicates an uptick in the number of Securities Act filings in state court. The *Cyan* decision also engendered renewed interest in a long-debated question: can a corporation adopt a forum selection provision in its certificate of incorporation or bylaws to steer securities litigation into a particular venue? In December 2018, however, the Delaware Court of Chancery held that Delaware corporations do not have the power to regulate the forum where federal securities law claims may be filed. *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) (appeal pending). Absent new federal legislation, we expect to see an increase in Securities Act cases filed in state courts.

## Continued M&A Litigation in Federal Courts

Since 2015, the number of merger suits filed in state court, particularly Delaware, has declined dramatically due to a number of Delaware law developments that have discouraged the filing of such actions – most notably, Delaware’s condemnation of the practice of “disclosure-only” settlements to resolve merger litigation. At the same time, there has been a sharp increase in such filings in other jurisdictions, particularly in federal courts. These cases typically assert disclosure claims under Section 14 of the Securities Exchange Act of 1934 (and related regulations promulgated by the Securities and Exchange Commission). While the U.S. Supreme Court has recently agreed to hear an appeal regarding the pleading standards in merger-related class actions under Section 14(e) of the Exchange Act, see *Emulex Corporation v. Varjabedian*, No. 18-459, we expect federal court merger litigation to continue at recent levels.

## Increased Use of Books and Records Inspections Relating to M&A Deals

In 2015, the Delaware Supreme Court held that a fully-informed and uncoerced vote in favor of a merger by a majority of a corporation’s stockholders invokes the business judgment standard of review (Delaware’s most deferential standard). *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015). Since then, post-closing M&A litigation in Delaware has often focused on the adequacy of pre-vote disclosures and whether the directors of the target corporation are entitled to have claims dismissed under the *Corwin* doctrine at the pleading stage. In an effort to potentially avoid the application of the *Corwin* doctrine, would-be stockholder plaintiffs are making increasing use of 8 *Del. C.* § 220, a Delaware statutory provision that permits a stockholder to seek to inspect the books and records of a corporation with the goal of utilizing any such pre-litigation discovery obtained to support lawsuits that might survive the *Corwin* analysis. Given the powerful protections afforded directors under

the *Corwin* doctrine, we expect to see the continued use of Section 220 demands as a means of obtaining pre-suit discovery in Delaware M&A cases.

## Delaware M&A Appraisal Litigation

Over the past decade, there has been a substantial increase in the number of M&A transactions subject to appraisal proceedings – actions seeking a court determination as to the “fair value” of a stockholder’s shares in a cash-out merger transaction. In late 2017, the Delaware Supreme Court issued two decisions emphasizing that, in appropriate cases, “market-based indicators of value” – such as the merger price – have “substantial probative value” in determining “fair value” under Delaware’s appraisal statute. See *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.2d 346 (Del. 2017). These decisions have led to a decline in the number of appraisal actions filed in Delaware (76 in 2016 versus 26 in 2018, according to recent data). Also, in 2018, the Delaware Court of Chancery concluded that a target company’s unaffected stock price – a nearly 31% discount to the deal price – was the best evidence of fair value in an appraisal action. *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018), *reargument denied* 2018 WL 2315943 (Del. Ch. May 21, 2018). While *Aruba Networks* is presently on appeal to the Delaware Supreme Court, we expect that market evidence will continue to receive significant consideration and weight in Delaware appraisal proceedings.

# White Collar Defense, Regulatory and Investigations

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## Overview

2018 marked significant developments for the U.S. Department of Justice (DOJ) in the area of white collar crime enforcement but not because of any singular blockbuster policy announcement, as in years past. Instead, the DOJ made several notable discreet policy changes that together have changed the enforcement landscape. These developments reflect the DOJ's ongoing efforts to refine and direct key aspects of corporate enforcement, such as voluntary disclosure, cooperation credit, coordination among domestic and foreign regulators, and the use of monitors. Relatedly, legal developments in the United States, United Kingdom and European Union have important implications for the conduct of corporate internal investigations. The DOJ's continuing commitment to prosecute corporate healthcare fraud also resulted in several important corporate criminal cases.

## Developments in DOJ Corporate Enforcement and FCPA Policies

### Application of DOJ's FCPA Corporate Enforcement Policy

In late 2017, the DOJ announced a formal Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy that creates a presumption – rather than a mere possibility – of a declination to prosecute by the DOJ, provided that companies meet certain criteria, including: voluntary self-disclosure of potential violations of the FCPA; full cooperation in the ensuing investigation; timely and appropriate remediation of the issues that contributed to the violation; and disgorgement of illicit gains. As explained by the DOJ, a case *publicly* declined under the policy is one that, without the policy, otherwise would have been prosecuted or resolved with a criminal corporate settlement.

In 2018, several companies received declinations under the new policy, including:

- Polycom, which paid over \$30 million in disgorgement over allegations involving kickbacks through third-parties to Chinese government officials in exchange for ordering Polycom products;
- The Insurance Corporation of Barbados, Ltd., which disgorged approximately \$93,000 in profits from illegally gained insurance contracts after bribing Barbadian government officials;
- The Dun & Bradstreet Corporation, which disgorged approximately \$6 million and paid a \$2 million civil penalty to the Securities and Exchange Commission (SEC) related to improper payments to Chinese government officials in exchange for acquiring non-public financial information; and
- Cognizant, which received a declination in February 2019 after agreeing to pay \$6 million in a civil penalty and \$19 million in disgorgement for paying bribes of \$2 million to Indian government officials in exchange for securing permits to construct an office park.

Companies that do not qualify for a declination under the new policy, such as those whose conduct involved executive management or who failed to disclose timely their wrongdoing, can still receive favorable treatment under the policy if they cooperate with the DOJ's investigation and remediate the conduct. For example, three significant FCPA settlements in 2018 involved companies that did not qualify for a declination because they did not voluntarily disclose the misconduct at issue but nevertheless managed to earn some cooperation credit, resulting in discounted penalties as compared to the U.S. Sentencing Guidelines:

- Petroleo Brasileiro S.A. paid a penalty of \$835.2 million for bribing politicians and political parties in Brazil in connection with an alleged bid-rigging scheme;

- Panasonic Avionics Corporation paid a penalty of \$137.4 million to the DOJ and \$143 million in disgorgement to the SEC for a scheme allegedly involving the mischaracterization of payments made to third-party consultants and agents; and
- Société Générale S.A., a Paris-based global financial services firm, and Legg Mason, a Maryland-based investment management firm, entered into settlements with the DOJ and France's anti-corruption authorities for having paid bribes of \$90 million to third-parties in order to secure investments from Gaddafi-era Libyan government officials. SocGen agreed to pay \$585 million and Legg Mason agreed to pay \$36.6 million in penalties and \$31.6 million in disgorgement. The settlement marked the first time that the DOJ had reached a coordinated FCPA settlement with French anti-corruption authorities.

Important questions remain about the contours of the new policy, such as what constitutes full and timely "voluntary disclosure" that we expect will be clarified in future declinations and resolutions.

### **DOJ Extends Corporate Enforcement Policy to M&A Transactions**

In July 2018, the DOJ announced that it would expand the application of the Corporate Enforcement Policy to conduct uncovered in the context of mergers and acquisitions. With this announcement, the DOJ seeks to incentivize and encourage acquirers to conduct pre- and post-closing due diligence and to report any wrongdoing that surfaces during either process. As such, acquirers that conduct adequate due diligence, remediate issues, and disclose historical noncompliance to the DOJ may be afforded a presumptive declination from FCPA successor liability. One question that is not resolved, however, is how the DOJ will treat an acquirer that conducts reasonable due diligence but still fails to identify a bribery issue in the target's operations that subsequently comes to the DOJ's attention. The DOJ has not made clear whether the failure to self-report in such

cases, notwithstanding reasonable due diligence, precludes leniency under the policy.

### DOJ Announcement of Policy Against “Piling On” of Penalties

In addition to the Corporate Enforcement Policy, the DOJ announced a new policy in May 2018 to prevent the “piling on” of duplicative penalties by different regulators in all DOJ cases involving corporate liability. The policy encourages DOJ prosecutors to consider “the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result.” Prior to the announcement of the policy, the DOJ followed a similar practice of crediting companies for penalties paid to foreign regulators against penalties assessed by the DOJ. For example, the DOJ credited its penalty against SocGen with the \$292 million penalty it paid to the French authorities. It remains to be seen whether the anti-piling on policy will result in more cooperation internationally, as well as between state and federal regulators in multi-jurisdictional investigations.

### DOJ Announcement of New Monitorship Selection Guidelines

In October 2018, the Criminal Division of the DOJ announced a new policy for the selection of corporate monitors. The policy instructs prosecutors to weigh the costs and burdens of a monitor against a “demonstrated need for, and clear benefits to be derived from, a monitorship.” Prosecutors are also directed to consider “whether the proposed scope of a monitor’s role is appropriately tailored to avoid unnecessary burdens to the business’s operations” as well as whether a company has an “effective” compliance program by the time of a resolution. The new policy essentially formalizes the trend away from the use of monitors in corporate resolutions. As with the other new policies, open questions remain, notably, how the DOJ will assess whether a company’s compliance program is “effective” when considering whether the appointment of a monitor is warranted.

### Relevant Developments for Corporate Internal Investigations

#### Implication of Government’s Close Involvement in Internal Investigations

In two recent prosecutions of individuals whose conduct was uncovered through corporate internal investigations, defendants, who were former company employees, argued that the government was so closely intertwined in the company’s investigation that the company essentially acted as a government agent when interviewing them. This theory, which is not new but may be gaining renewed traction with courts, could result in suppression at trial of statements made by those former employees to company investigators. In *United States v. Connolly*, No. 16-cr-370 (CM) (S.D.N.Y.), a former Deutsche Bank trader asserted that the company had initiated its internal investigation at the request of the Commodity Futures Trading Commission and provided the DOJ an investigative plan and list of documents prior to interviews. The DOJ even received assurance that outside counsel would approach an interview “as if he were a prosecutor.” In *United States v. Blumberg*, No. 14-cr-458 (JLL) (D.N.J.), a former ConvergEx Group executive asserted that the government had delegated investigation tasks to ConvergEx, including conducting the entirety of its document and audio review, creating analytical charts and spreadsheets for the government, and providing input on investigative targets. Although the courts in both cases expressed a willingness to hear and potentially credit these arguments, developments in the respective cases mooted the issues. These cases may nevertheless provide a basis for counsel to push back on particularly intrusive government demands, as no prosecutor should want to risk the availability of evidence at trial because of their interactions with companies and their counsel.

#### Developments in U.K. Privilege Law

As we noted last year in our white collar review, a U.K. court in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corp. Ltd. (ENRC)*, [2018] Court of Appeal, Case

*No. A2/2017/1514*, had compelled the production of attorney notes and other materials to the SFO. This year, the U.K. Court of Appeal reversed that ruling and affirmed that the U.K. litigation privilege (which is the equivalent of the U.S. work product doctrine) applies to attorney notes of witness interviews and materials prepared by forensic accountants during an internal investigation, if the dominant purpose of creating the materials was in reasonable contemplation of adversarial proceedings. In the *ENRC* case, the court held that the litigation privilege applied to the company's internal investigation begun in response to a fraud allegation inquiry from the SFO.

While the decision provides needed clarity surrounding the scope of the litigation privilege in internal investigations, the Court observed that the U.K. legal advice privilege (which is the equivalent of the U.S. attorney-client privilege) only protects communications between a company's attorneys and employees within the company who are explicitly authorized to solicit and receive legal advice from counsel on behalf of the company or instruct counsel regarding a legal matter. Companies should thus be aware that, in the U.K., attorney interviews of certain employees conducted during an internal investigation may not be protected under the legal advice privilege if those employees were not specifically tasked by the company to seek and obtain legal advice on the company's behalf.

### **General Data Protection Regulation (GDPR)**

The E.U. General Data Protection Regulation, which took effect on May 25, 2018, requires any company that offers goods or services in the E.U., or that otherwise monitors or processes E.U. citizens' personal data, to take measures to safeguard that data. A failure to comply with the GDPR can result in a heavy fine, of up to EUR 20 million or four percent of the company's annual global revenue.

Since its implementation, data protection authorities in Germany, Austria and Portugal have all imposed relatively small fines under the GDPR based on a variety of theories involving inadequate security measures, lack of

transparency in the collection of data, and lack of care with respect to patient files. In late January 2019, France's data protection authority issued the first substantial penalty under the GDPR, fining Google EUR 50 million. France's data protection authority determined that Google had violated the GDPR by inadequately informing its users that Google would process their personal data for its ad personalization feature and by ineffectually informing its users how long it would store that information.

Given the demonstrated intent of E.U. countries to impose penalties under the GDPR, companies required to cooperate with U.S. regulators in investigations involving E.U. data subjects must be mindful that the collection and transfer of data must still comply with GDPR requirements. Furthermore, companies should be aware that the GDPR poses additional challenges for entities conducting cross-border internal investigations, responding to U.S. enforcement actions, or seeking DOJ cooperation credit. Because the GDPR generally proscribes international transfer of personal data to non-E.U. countries (unless such transfer falls within limited exceptions allowing transfer to a third country), cooperating fully with the DOJ by producing all relevant or requested documents may conflict with the GDPR's processing and transfer restrictions.

### **Corporate Health Care Fraud**

The DOJ has continued to pursue corporate health care fraud in 2018, under both criminal and civil theories of liability. Certain settlements resulted in significant penalties against publicly-traded healthcare companies.

### **Health Management Associates**

Health Management Associates, Inc. (HMA), a U.S. hospital chain, entered into a non-prosecution agreement with the DOJ and paid over \$260 million to resolve criminal charges and civil claims under the False Claims Act, the Anti-Kickback Statute, and the Physician Self-Referral Law (Stark Law), for having committed health



care fraud, including inducing physicians to increase the number of emergency patient admissions, increasing inpatient admissions of Medicare, Medicaid, and other programs, and bribing physicians for patient referrals and then billing federal health care programs for those unnecessary services. One of HMA's subsidiaries also agreed to plead guilty to one count of conspiracy to commit health care fraud, illustrating the continuation of the DOJ's efforts to prosecute corporate health care fraud as a criminal offense.

The HMA non-prosecution agreement also demonstrates the benefits for acquirers of post-acquisition remediation. In January 2014, Community Health Systems, Inc. (CHS), another U.S. hospital chain, acquired HMA, fully aware of multiple ongoing *qui tam* lawsuits and criminal and civil investigations at the hospital chain. Following the acquisition, CHS undertook remedial measures, including removing the entire HMA Board of Directors and certain senior executives. Consequently, CHS avoided incurring criminal liability for HMA's conduct.

### **AmerisourceBergen Corporation**

AmerisourceBergen Corporation (ABC) agreed to pay \$625 million to settle civil fraud charges related to violations of the False Claims Act, including selling drugs for chemotherapy patients that had been prepared in an unsterile environment, billing multiple health care providers for the same drug, and paying kickbacks to doctors. One of ABC's subsidiaries pleaded guilty in September 2017 for related conduct, paying \$260 million in criminal fines and forfeiture.

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