

Weil

LITIGATION **TRENDS** 2021





DEAR ESTEEMED COLLEAGUES AND FRIENDS,

Approximately 53 weeks ago, in the first week of lockdown, we made a decision to table our 2020 Litigation Trends Report. Trends were difficult to discern; client and business priorities were rightfully elsewhere; and uncertainty and anxiety were beginning to crescendo. We shared our clients' goals of ensuring the health of employees and the populations of the cities we call home, and focused on developing innovative responses to further those goals and stave off business and legal risks.

Looking back over this challenging period, we remain impressed: by the resilience of our clients and the customers and markets they serve; by the considerable efforts of the people and institutions that make up our judicial system to adapt and pivot to virtual proceedings; and by the determination of our own attorneys to continue advocating strenuously for their clients' best interests – especially those most impacted by the pandemic. Progress – in the law and more broadly – has been possible because of all of your good work, and we remain hopeful that

we will continue on the road towards normalcy in 2021.

In support of that goal, we are pleased to introduce the 2021 edition of Litigation Trends, in which our partners offer their forecasts for the coming year.

Some of our assessments this year, not surprisingly, focus on the aftereffects of COVID-19, as they have dictated public policy, driven business disputes, and demanded change in legal practice. For example, our Employment practitioners review the cascade of new federal statutes and guidance that impacts everything from parameters for mandatory employer vaccination policies to employer tax credits associated with employees' paid leave. Our Complex Commercial Litigation group looks at the effects of the pandemic on live sports, suspensions and cancellations of which have added more uncertainty to the already precarious pay-television environment. And, our International Arbitration practice examines how COVID-19 has accelerated the growth of technology in the arbitration

community, to the point that virtual hearings may be here to stay.

The change in U.S. presidential administrations also features prominently in our Report. Our Antitrust and White Collar teams evaluate how the Biden DOJ could enhance merger control, international cartel enforcement, and financial crime enforcement. Meanwhile, as our Employment group details, the new administration already has begun changing course on federal policy governing independent worker classification rules, and it may also provide momentum for nascent legislation impacting non-competes, mandatory arbitration clauses, and pay equity.

We also review other legislative developments that could impact our clients. For example, our Antitrust group examines new federal laws that provide civil protections for whistleblowers who report criminal antitrust violations, as well as reinforce incentives for companies to self-report such violations – both material changes in cartel enforcement. Our IP/Media practice discusses the advent of a copyright small claims court, signed into law towards the end of the Trump administration, and its impact on creators and users of content. And, our White Collar team explores a new law passed early in 2021 that provides powerful new tools for prosecuting securities fraud and money laundering.

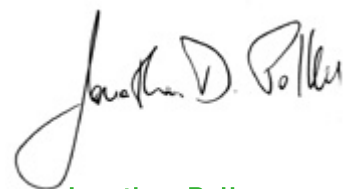
Finally, as in prior years, we dedicate space to recent and anticipated Supreme Court jurisprudence. For example, our commercial litigation team examines how different circuits have interpreted the Supreme Court's 2017 *Bristol-Myers Squibb* decision in the class action context, and also outlines the consequential impact the Court's late-breaking decision in *Ford* will have on the critical issue of personal jurisdiction. Our Securities group looks at the Court's forthcoming decision in *Goldman Sachs* and its potential impact on class certification in the securities context. Meanwhile, our patent litigators address a jam-packed Supreme Court docket, including *Arthrex*, which could overturn the entire *inter partes* review process, and *American Axle*, which could clarify patent eligibility law under section 101.

As always, please do not hesitate to reach out to us or your usual Weil contact if you would like further information on any of the enclosed topics. Contact information is listed on the inside back cover.

We eagerly await the opportunity to partner with you again this year, and more stable times ahead.



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ANTITRUST

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Antitrust M&A Enforcement in 2021 May be “Turned Up to 11”

Despite the recent chorus of political and media scrutiny of so-called “permissive” antitrust enforcement, 2020 in fact saw an unprecedented level of antitrust merger enforcement, including nine litigated merger challenges by the Federal Trade Commission (FTC) alone. The FTC’s challenges spanned a range of industries, including technology (*e.g.*, Facebook, CoStar/RentPath), healthcare (*e.g.*, Methodist/Tenet), energy (*e.g.*, Peabody/Arch Coal), and consumer products (*e.g.*, Edgewell/Harry’s). The Department of Justice (DOJ) Antitrust Division was close behind, filing litigations seeking to block transactions such as Visa/Plaid, Sabre/Farelogix, and Geisinger Health/Evangelical Community Hospital, and requiring divestitures as a condition of clearing numerous other transactions, including Intuit/Credit Karma, Dean Foods/DFA, and Waste Management/Advanced Disposal Services.

As of this update, it is not yet clear who the new administration will appoint to key antitrust leadership positions such as FTC chair and Assistant Attorney General for the Antitrust Division. However, the recent appointment of Lina Khan, a vocal critic of “big technology,” confirms that antitrust enforcement is front of mind for this administration, and it is nearly certain that mergers and acquisitions will face even greater scrutiny in the years ahead. Some on Capitol Hill have gone so far as to call for major, fundamental changes to the antitrust laws, including to focus on less-traditional antitrust concerns such as the potential effects of mergers on labor markets, data privacy, racial equality, and wealth disparity. Although more radical changes appear somewhat unlikely in a 50/50 Democratic Senate, at a minimum the current enforcement tools will likely be used in more expansive ways to challenge proposed (and even consummated) mergers. More specifically, we expect potential transactions to face the following

regulatory challenges in the year ahead:

- **More focus on “big is bad.”** As the antitrust agencies seek to aggressively challenge mergers, we expect even greater weight on high market shares, and somewhat less willingness to consider merger defenses premised on dynamic issues such as competitive entry and expansion.
- **A broader range of anticompetitive theories.** Regulators may investigate the potential for mergers to harm competition by facilitating anticompetitive bundling or tying, in addition to the more traditional focus on post-merger pricing, quality, and innovation effects.
- **Even greater scrutiny of proposed merger remedies.** The evaluation of proposed remedies to resolve competition concerns has now become an “investigation within the investigation.” As a result, it is more important than ever to conduct a pre-merger analysis of the acceptability of potential remedies.

- **An even longer Second Request process.** Today, the average full-phase merger review in the United States is about nine to 12 months. We may see that stretch out even further as a result of the agencies investigating broader theories of harm and conducting extra scrutiny of proposed remedies.
- **Continued aggressive use of litigation to challenge transactions.** We expect the antitrust agencies to continue, and likely increase, their use of the courts to challenge transactions, including attempts to break-up consummated mergers where evidence may suggest post-closing harm. Such cases will provide an interesting testing ground for the agencies' more expansive theories of harm, and we expect that some judges may rein in the less traditional theories of harm that are gaining traction with regulators.

There is no sugar coating the challenges that some mergers will face in the antitrust M&A climate in the year ahead. But, with careful planning and

early, thorough analysis, there is still a path forward for most transactions.

Antitrust Cartel Enforcement on the Rise Domestically, Especially in Labor Markets, and Set for a Reset Internationally

In 2020, overall cartel enforcement efforts continued to be lower than they had been during the Obama administration, with pleas, indictments, and fines all at lower numbers. 2020 also saw a continued focus on cartel enforcement with respect to domestic markets, which reflects a shift from the DOJ's attention to greater international cartel enforcement during 1995-2015. However, it is generally expected that the Biden administration will revive and strengthen relationships with foreign competition authorities in all aspects of antitrust enforcement, including cartels, and we may see some shift back towards investigations and prosecutions of international cartel conduct.

2020 saw the first criminal prosecutions in labor markets, after several years during which the DOJ

indicated that enforcement against “no-poach” and other HR-related cartel conduct would be prioritized. In 2016, the DOJ and FTC released joint policy guidance highlighting two types of labor market agreements – wage-fixing and no-poach agreements – as *per se* illegal and subject to potential criminal prosecution. In December 2020, the DOJ announced its first

Two legislative developments materially impact cartel enforcement going forward. First, after years of attempts to pass protections for private-sector employees who report criminal antitrust violations, on December 23, 2020, the Criminal Antitrust Anti-Retaliation Act of 2019 (the Act) became law. The Act amends the Criminal Penalty Enhancement and

At a minimum, the current antitrust enforcement tools will likely be used in more expansive ways to challenge proposed mergers.

criminal wage-fixing indictment of Neeraj Jindal for conspiring with other physical therapy companies to decrease and fix the wages of physical therapists and their assistants. Relatedly, in January 2021, a grand jury indicted a health care provider, Surgical Care Affiliates LLC, for conspiring with other health care companies not to solicit each other’s senior-level employees.

Reform Act of 2004 by adding civil protections for whistleblowers. The Act protects a broadly defined group of “covered individuals” from discharge, demotion, suspension, threats, harassment, or discrimination by an employer (*i.e.*, “a person, or any officer, employee, contractor, subcontractor, or agent of such person”). A covered individual is an “employee, contractor, subcontractor, or agent of an employer.”

In light of this development as well as the DOJ's focus on labor markets, it will be even more important that corporations' human resources staff participate in their employers' cartel compliance efforts. Second, on June 25, 2020, Congress repealed the sunset provision of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). ACPERA provides that leniency applicants enjoy single damages and no joint and several liability in follow on civil litigation, and thus provides a further incentive for corporations to seek leniency and disclose the existence of conspiracies to the DOJ.

2020 also saw the rise of the deferred prosecution agreement (DPA) in resolutions of cartel investigations. Prior to 2019, the DOJ Antitrust Division had agreed to DPAs in certain very limited cases where the defendant was a major supplier to federal and state governments, and a conviction would have barred the defendant from competing for such business going forward (with a resulting loss of

competition enjoyed by those government purchasers). In July 2019, the Assistant Attorney General for the Antitrust Division announced its new policy allowing prosecutors to potentially resolve cartel prosecutions through DPAs where the defendant corporation had a strong compliance program. The Division has since entered into seven DPAs, spanning three investigations.

Antitrust Litigation in “Hot” Areas will Continue to be Shaped by Government Advocacy

Government agencies are continuing their efforts to influence antitrust policy at the district and appellate court levels. Impacting everything from price-fixing, monopolization, and mergers to no-poach agreements, intellectual property, and state action immunity, government agencies filed statements of interest, amicus briefs, and even made appearances (albeit, mostly by videoconference) in an array of antitrust cases.

Whatever the conduct, one thing is clear: online platforms and the digital economy as a whole will continue to be in the antitrust spotlight this year.

For example, in the Sherman Act Section 1 “no-poach” context, in *In re Railway Industry Employee No-Poach Antitrust Litigation*, the Antitrust Division argued that such agreements between competitors are generally *per se* unlawful. The Antitrust Division reiterated this position in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, stating in an amicus brief that naked non-solicitation agreements between horizontal competitors are *per se* illegal. On the other hand, the Antitrust Division took a different approach in *Harris v. CJ Star LLC an Idaho Limited Liability Corporation et al.*, arguing that no-hire and non-

solicitation employment agreements between franchisors and franchisees are vertical in nature and thus could have legitimate business justifications triggering a rule of reason analysis.

In the Sherman Act Section 2 monopolization context, in *Viamedia, Inc. v. Comcast Corp.*, the Antitrust Division filed an amicus brief at the Seventh Circuit taking a position on the scope of refusal-to-deal claims. They argued that refusing to deal with a competitor is only an antitrust violation in limited circumstances and a violation only occurs where a refusal makes no economic sense. The Seventh Circuit reinstated the plaintiff’s claim and the U.S. Supreme Court is now considering whether to grant *certiorari*, with the Solicitor General being invited to express the position of the United States.

Additionally, the Antitrust Division has weighed in on claims at the intersection of antitrust and patent law. Specifically, in *In re Humira (Adalimumab) Antitrust Litigation*, the Antitrust Division filed an

amicus brief arguing that AbbVie's organic patent accumulation is not anticompetitive conduct and "to avoid chilling such procompetitive conduct, courts recognize Section 2 liability for conduct involving patent procurement only in limited circumstances." And in *Intel Corp. v. Fortress Investment Grp. LLC*, a case involving a patent assertion entity, the Antitrust Division discussed the scope of antitrust immunity for petitioning behavior and said that where a party has yet to enforce its patent in court, *Noerr-Pennington* would not bar liability "where the acquisition itself of patents lessens competition," and such immunity does not extend to non-petitioning anticompetitive conduct.

Increased Monopolization Cases by Government Enforcers

Antitrust enforcers at the federal and state levels have particularly focused of late on monopolization claims, and it looks like that trend will continue into 2021. Government enforcers took aim at a myriad of practices they claim stifle competition and consolidate market

power, with enforcement inquiries and lawsuits against technology companies taking center stage in 2020. For example, in early October, the House Antitrust Subcommittee released a 449-page report focused on "big technology." Before the end of the Trump Administration and continuing into the Biden Administration, the Antitrust Division and FTC brought enforcement actions in this space.

The state attorneys general have followed and there is a slew of follow-on and other private actions. The suits generally focus on the online search, social media, data collection, and online advertising spaces. The general thread in these cases is alleged exclusionary conduct through long-term, exclusive contracts, serial acquisitions of smaller technology companies, or acts of self-preferencing where companies will favor their own service or product. Whatever the conduct, one thing is clear, online platforms and the digital economy as a whole will continue to be in the spotlight this year.

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U.S Supreme Court's Decision in *Bristol-Myers Squibb Co.* Continues to Divide Courts in Nationwide Class Action Context

In *Bristol-Myers Squibb Co. v. Superior Court of California*, the U.S. Supreme Court limited the ability of out-of-state mass tort claimants to sue a defendant that is not “at home” in a given jurisdiction. But it did not indicate the decision’s applicability to nationwide class actions. That important question continues to divide courts across the country.

The majority of courts, including the D.C. Circuit and the Seventh Circuit, have declined to apply *Bristol-Myers’s* holding on specific jurisdiction to class actions (at least prior to class certification). The D.C. Circuit considered this question after the district court certified it for resolution, noting the diverse approaches among courts and finding “a substantial ground for difference of opinion.” *Molock v. Whole Foods Mkt. Grp.*, 317 F. Supp. 3d 1, 5 (D.D.C. 2018). In light of

putative class members' status as nonparties, the D.C. Circuit concluded, over a dissenting opinion, that "[p]ersonal jurisdiction need not be established over these hypothetical parties and claims because they are not 'before the court.'" *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 299 (D.C. Cir. 2020) (citation omitted and alteration adopted).

The Seventh Circuit has also considered this question and rejected *Bristol-Myers's* applicability to a nationwide class action. It characterized the application of *Bristol-Myers* in this context as "a major change in the law of personal jurisdiction and class actions," because unlike a mass tort action, class plaintiffs must satisfy the requirements of Rule 23, which serves to protect the due process rights of defendants. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447-48 (7th Cir. 2020). And like the D.C. Circuit, the Seventh Circuit ascribed importance to unnamed class members' status as nonparties in many circumstances. *Id.* Many district courts have also taken this approach, citing similar reasons.

For example, the U.S. District Court for the Northern District of Georgia, in *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018), rejected *Bristol-Myers's* application to a class action because: (i) that device differs from a mass tort action, (ii) Rule 23 affords due process protections to defendants; and (iii) unnamed class members are treated as nonparties for many purposes.

Despite the majority of courts declining to apply *Bristol-Myers's* specific jurisdiction holding to class actions, a number have gone the other way – including some courts that have split from their colleagues within the same circuit. In the Eastern District of New York, for instance, one judge stated that "[t]he constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case." *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20,

2017). However, other courts in the Second Circuit have noted the contrary majority position, and still others have avoided the issue by deferring its resolution until class certification. In the Ninth and Eleventh Circuits, there is also intra-circuit (and sometimes intra-district) disagreement.

The Supreme Court's holding in *Bristol-Myers* offers defendants facing mass tort actions a potential defense against the claims of out-of-state plaintiffs, where there is neither general jurisdiction nor a clear nexus with the forum. But it did not clarify whether that potential defense can be deployed against a nationwide class action. Though two circuits and a majority of district courts to consider the issue have rejected *Bristol-Myers's* applicability in this context, other courts have permitted this defense, creating a shifting legal landscape – even within a given circuit or district. Defendants finding themselves facing a class action in this jurisdictional situation should

closely evaluate their options under the rapidly evolving case law.

The Supreme Court Continues to Shape the Limits of Personal Jurisdiction

The U.S. Supreme Court addressed an important personal jurisdiction issue this term: the connection required between a cause of action and the defendant's forum contacts in order to establish specific jurisdiction over the defendant. Personal jurisdiction concerns a court's authority over a defendant and therefore must comport with constitutional due process. If a defendant's contacts with a forum are too attenuated, a case may be dismissed for lack of personal jurisdiction or, in some cases, transferred to a more appropriate forum.

As recognized by Justice Sotomayor, the Supreme Court had “imposed substantial curbs” on specific and general personal jurisdiction over the last half decade. But the Supreme Court pumped the brakes on that trend in *Ford Motor Company v.*

Montana Eighth Judicial District Court (No. 19-368).

For general (or all-purpose) jurisdiction, a corporation can always be sued where it is at “home,” even if its contacts with the forum have no relation to the underlying claims. A corporation’s quintessential home forums are its state of incorporation and the state where it has its principal place of business. Although not necessarily limited to those states, the Supreme Court has been reluctant to acknowledge additional forums. Five years ago, *Daimler AG v. Bauman*, 571 U.S. 117 (2014), rejected as “unacceptably grasping” general jurisdiction based on a corporation’s substantial, continuous, and systemic course of business in the forum. Thus, in *Daimler*, it was not enough that a corporation had a number of facilities and offices in the forum to support general jurisdiction.

Because general jurisdiction is so limited, specific jurisdiction has become more important to plaintiffs. Under specific (or case-linked) jurisdiction, the claims at issue must “arise out of or

While *Bristol-Myers* made clear that the Supreme Court is interested in a bright line between general and specific jurisdiction, *Ford* was the Supreme Court’s first recent chance to decide how bright that line should be.

relate to the defendant’s contacts with the forum.” The forum contacts have to be connected to the controversy at issue, such as where defendant’s contacts caused plaintiff’s injury in the forum. *Bristol-Myers Squibb v. Superior Court of California*, 137 S. Ct. 1773 (2017) (referenced above), rejected a “sliding scale approach” that relaxed the strength of the connection needed if a defendant otherwise had extensive forum contacts that were unrelated to the underlying claims, which the Court characterized as a “loose and spurious form of general jurisdiction.” Therefore,

out-of-state plaintiffs who had joined a mass tort action could not maintain suit in California because their injuries arose in their home states and not California.

While *Bristol-Myers* made clear that the Supreme Court is interested in a bright line between general and specific jurisdiction, *Ford* was the Supreme Court's first recent chance to decide how bright that line should be. Although rejecting a "but-for causation" test, the Court ultimately left the line drawing for another day.

In *Ford*, plaintiff's estate sued for a design defect after plaintiff died when the tire on her Ford vehicle failed causing the vehicle to roll over. The estate sued in Montana, where the accident occurred, and Ford moved to dismiss because Ford sold plaintiff's vehicle in Washington, and did not design or manufacture the vehicle in Montana. The Montana Supreme Court held it was sufficient that Ford placed the vehicle in the stream of commerce, advertised its vehicles in Montana, and owns dealerships in Montana.

The Supreme Court affirmed unanimously 8-0 (with Justice Barrett taking no part in the decision). Justice Kagan, writing for five members of the Court, rejected Ford's "causation-only approach" and holding that the connection between Ford's activities in Montana that systematically cultivated a market for its cars was sufficiently tied to the plaintiff's claim involving a Ford car malfunctioning in Montana. In particular, Justice Kagan emphasized that the product liability claim "relates to" the variety of advertisements where Ford "urges" Montanans to buy its vehicles, the 36 auto dealerships within the state that sell and repair Ford cars, and Ford's distribution of replacement parts to auto shops in Montana.

In a concurring opinion, Justice Alito agreed with the "main thrust" of the majority opinion, but cautioned that treating "relate to" as its own independent basis for specific jurisdiction will lead to new issues with line drawing and cause confusion among lower courts. Justice Gorsuch also concurred (joined by Justice Thomas), and similarly voiced concern

about recognizing “relate to” as a separate way to satisfy the connectivity requirement. He also suggested it might be time to re-think the Court’s personal jurisdiction precedent in light of the internet age and expressed reservations about how “corporations continue to receive special jurisdictional treatment in the name of the Constitution.” He concluded with a call to “future litigants and lower courts” to help better define the lines of personal jurisdiction “in light of the Constitution’s text and the lessons of history.”

Given the majority’s adoption of the “relate to” test without further clarification, it seems inevitable that plaintiffs will take up the dual concurrences’ invitations for further litigation to press more expansive approaches to specific jurisdiction.

Eleventh Circuit Strikes Incentive Awards for Class Representatives

In *Johnson v. NPAS Solutions, Inc.*, the Eleventh Circuit held in a split decision that U.S. Supreme Court precedent

prohibits incentive awards for class representatives.

Relying on two Supreme Court cases – *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) – the Eleventh Circuit reversed the lower court’s approval of a \$6,000 incentive award as improper.

In *Greenough*, a bond-holder for the Florida Railroad Company sued the trustees thereof for wasting and destroying trust funds. The bond-holder prevailed and a large amount of the trust was secured and saved. Because the bond-holder bore the whole burden of the litigation, he sought to recover his expenses and services from the fund. The Supreme Court allowed the bond-holder to recover expenses for “his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund[,]” but held that he could not recover for his personal services and private expenses. Specifically, the bond-holder was not allowed to recover his salary and money

spent on hotels and railroad fares. The Supreme Court disapproved of these expenses because allowing such expenses “would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors.”

In *Pettus*, the Supreme Court allowed class attorneys to recover their fees from a common fund, which was created through their efforts. The Eleventh Circuit relied on *Pettus* as illustrative of the dichotomy highlighted in *Greenough* between fees for litigation expenses and fees for personal services and private expenses. While the former fees are properly awarded from a common fund, the latter are not.

In *Johnson*, the Eleventh Circuit found that modern day incentive awards can function as an award for a salary, a bounty, or both. While Mr. Johnson’s counsel argued that the incentive fee was for Mr. Johnson’s efforts in the case, including responding to discovery and keeping himself apprised of the

matter, the Eleventh Circuit determined that these efforts amounted to a salary for time spent litigating the case (*i.e.*, an award for personal services under *Greenough*). The Eleventh Circuit also found that because incentive awards induce class representatives to participate in the suit, they can be viewed as bounties. According to the Eleventh Circuit, such a characteristic creates a pronounced risk that parties will intermeddle in the management of awards from a common fund, a key concern in *Greenough*. Ultimately, the Eleventh Circuit held that regardless of whether Mr. Johnson’s incentive award constituted a salary, a bounty, or both, Supreme Court precedent prohibited it. Practitioners should keep an eye on what impact *Johnson* will have on class actions going forward. Indeed, finding a class representative may be a tougher task without an incentive award. The same reasons that underlie incentive awards for class representatives are the very reasons that render them improper, according to the Eleventh Circuit.

Supreme Court To Decide Whether All Class Members Must Have Article III Standing to Recover Monetary Damages

In *Ramirez v. TransUnion LLC*, a 2-1 Ninth Circuit panel held that all Rule 23 class members must have Article III standing at final judgment to recover monetary damages. Although the Ninth Circuit has made similar determinations at earlier stages of litigation, *Ramirez* marks the first time the Ninth Circuit has addressed the issue at the final judgment stage.

TransUnion is an American consumer credit reporting agency which collects and aggregates information on more than a billion consumers in more than 30 countries. In the early 2000s, TransUnion commenced a program which matched names of persons against the United States government's list of Specially Designated Nationals (SDNs). SDNs include terrorists, drug traffickers, and others with whom persons in the United States are prohibited from doing business pursuant to the Treasury Department's

Office of Foreign Assets Control (OFAC) regulations. TransUnion began this matching program in order to help businesses avoid penalties resulting from engaging in business with SDNs.

At the request of the named plaintiff, Sergio Ramirez, a car dealership obtained Mr. Ramirez's TransUnion credit report. The dealership told Mr. Ramirez they would not sell him a car because the report indicated he was on a terrorism watch list. Mr. Ramirez, on behalf of himself and a putative class, filed suit alleging TransUnion violated the Fair Credit Reporting Act (FCRA) by placing false OFAC alerts on consumers' credit reports and later sending misleading and incomplete disclosures about the alerts.

The United States District Court for the Northern District of California certified a class of "all natural persons in the United States . . . to whom TransUnion sent a [similar letter to that of Ramirez] ... regarding the [OFAC Database]." This class definition resulted in a putative class of 8,000 individuals who alleged they had improperly been listed

with terrorist-type alerts. The class was certified and a jury trial returned a verdict in the plaintiffs' favor for more than \$60 million in statutory and punitive damages for three willful violations of the statute.

TransUnion moved for judgment as a matter of law, or in the alternative, for

Ramirez marks the latest decision in the evolution of Article III standing requirements in the class action context post-*Spokeo*.

a new trial, remittitur, or an amended judgment. The district court denied the motion. TransUnion appealed to the Ninth Circuit. Among other things, TransUnion argued that not all class members had standing because not all class members actually had their credit reports disclosed.

Although the Ninth Circuit agreed with TransUnion in principle that all class members must satisfy Article III standing requirements at the final judgment stage, it found that the

evidence established that all class members had standing. Specifically, the Ninth Circuit found the class members had suffered a concrete injury because (1) of the severity and nature of the inaccuracy, (2) of the risk of sharing the information with its third-party vendor (which was made

worse by TransUnion's failure to follow its normal data storage procedures), and (3) the reports were easily available to potential creditors or employers at a moment's notice, even without the consumers' knowledge in some instances. The Ninth Circuit held that, although not all class members actually had their credit reports disclosed to third parties, the statutory violations and material risk of disclosure were sufficient to establish a concrete

injury-in-fact sufficient for Article III standing purposes.

In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court held that Article III standing requires a concrete injury and that an allegation of a violation of a statutory right is insufficient injury to qualify for standing. However, since *Spokeo*, dozens of federal courts have often inconsistently applied the Supreme Court's reasoning in determining what degree of harm, or threat or likelihood of harm, is sufficient to be deemed concrete. *Ramirez* marks the latest decision in the evolution of Article III standing requirements in the class action context post-*Spokeo*. The Ninth Circuit charted new waters by holding that, although early in a litigation, such as at the motion to dismiss stage, only the named plaintiff needs to establish Article III standing, every class member needs standing to recover damages at the final judgment stage. Practitioners should keep in mind, however, that the Ninth Circuit noted that evidence of standing need not always be individualized and may, in certain cases, be established

through class-wide methods such as "expert testimony, representative class members, and credit agency protocol[s]," and individual evidence need not "be proffered as to each class member." Accordingly, arguments marshalled to attack purported class evidence at the class certification stage continue to be relevant after a class certification order. Defendants should continue to attack the purported methods of establishing class-wide injury through and after trial.

On December 16, 2020, the Supreme Court granted TransUnion's petition for writ of *certiorari* on the question of whether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered. Oral arguments were heard on March 30, 2021.

Proposed "Identification" Rule Offers a Much-Need Framework for Trade Secret Misappropriation Litigation

Identification of the specific trade secrets at issue in misappropriation

cases can often times be difficult. In some jurisdictions, the issue of whether a plaintiff has adequately identified the allegedly misappropriated trade secrets is routinely and heavily litigated at the outset of the case. Although both the Uniform Trade Secrets Act (UTSA), which has been adopted by nearly all states, and the federal Defend Trade Secrets Act (the DTSA), require plaintiffs to establish that the misappropriated information is in fact a trade secret, there are no uniform rules governing the level of specificity required of the plaintiff in identifying its trade secrets. Indeed, at the federal level, neither the DTSA nor the corresponding criminal statute (the Economic Espionage Act) explicitly addresses identification. And, Massachusetts, California, and Puerto Rico are the only states with statutory requirements regarding identification. See Mass. Gen. Laws Ann. ch. 93 § 42D(b) (2018), Cal. Civ. Proc. Code § 2019.210 (enacted in 1985), and P.R. Laws title 10, § 4139(a) (2011).

Proponents of strict identification requirements contend that early identification helps define the scope of discovery and streamline substantive motion practice, pretrial proceedings, and trial.

It also prevents the plaintiff from engaging in a fishing expedition, which could put the defendant's own trade secrets at risk in a dispute between competitors. On the other hand, more stringent identification standards places a heightened burden on plaintiffs seeking to advance a misappropriate claim.

In an effort to provide clarity and facilitate uniformity across the various jurisdictions, the Sedona Conference Working Group on Trade Secrets (WG12) published "*The Sedona Conference Commentary on the Proper Identification of Asserted Trade Secrets in Misappropriation Cases*" in October 2020. The Sedona Conference is a nonpartisan research and educational institute dedicated to the study of intellectual property rights – among other areas of the law

– and its work is cited and endorsed by courts across the country. The *Commentary* sets forth a number of principles and guidelines that incorporate and supplement current authority and practices regarding the identification of alleged trade secrets in trade secret litigation, including the following:

- Identification of each asserted trade secret must be served on the parties by the outset of merits discovery;
- Identification must be sufficiently particularized to allow the other party to meaningfully compare the asserted trade secret to information that is generally known or readily ascertainable and to permit the parties and the court to understand what information is claimed to be the trade secret;
- Identification does not need to specify the differences between the alleged trade secret and publicly available information;
- Identification should separate, to the extent practical, different asserted

trade secrets into numbered paragraphs;

- Identification may be amended if the parties so agree or the court permits such amendment;
- Identification shall be verified under oath or affirmation by one or more employees or officers of the party asserting trade secret misappropriation;
- Courts may adjudicate cases concerning the rule, and address violations of the rule as they would address other issues concerning discovery; and
- If the plaintiff claims that the defendant has taken files or other materials, the court may allow motion practice and/or discovery relating to the return or inspection of such files or materials prior to requiring identification of an asserted trade secret contained within such files or materials.

In light of this *Commentary*, we can expect to see courts and parties alike

pay more attention to how much detail plaintiffs provide when identifying the trade secrets at issue in trade secret cases, which could impact a plaintiff's burden at the outset of these litigations.

Pre-Existing Tensions Between Regional Sports Networks and Pay-TV Distributors May Begin to Boil Over

Two years ago in these pages, we discussed an emerging trend in the television industry: with cable and satellite television distributors (MVPDs) and content providers all confronting consumer cord-cutting and competition from virtual streaming services, their renewal negotiations were becoming ever more contentious. Some of these disputes culminated in high-profile programming “blackouts,” and some spilled over into civil litigation. We expect this trend to continue, and focus this year on the regional sports networks (RSNs), which are add-on cable channels that present live sports programming to a local market or geographic region. Live sports have

long been critical to the value proposition of the “Pay TV bundle,” since the rights to telecast “DVR-proof” live sporting events tend to be held by traditional linear television networks, including the RSNs.

With the onset of the COVID-19 pandemic, however, much of the sports world shut down for several months, which left sports fans paying monthly RSN surcharges but receiving far fewer games than usual. This chain of events brought with it the question of consumer refunds, as well as an increased focus on the various layers of licensing contracts that are the lynchpin of the entire pay TV distribution ecosystem. These contracts include: (i) the rights deals between the major sports leagues/teams and the content providers (e.g., the RSNs); (ii) affiliation agreements between the content providers and the MVPDs; and (iii) customer service agreements between those MVPDs and their customers. The specific language contained in several contractual clauses – including, for

example, any force majeure provisions and the specific definitions of terms such as “service interruption” and “service in the entirety” – will drive the analysis of who may be entitled to any refunds or credits, and under what terms. Already, we have seen several of the major MVPDs offer more than a billion dollars collectively in refunds or bill credits to customers who have lost sports programming, which raises the question as to who should ultimately be on the hook economically for those give-backs.

Even before the pandemic, though, the relationships between the RSNs and MVPDs have become increasingly fraught. For example, in late 2019 the Denver-area RSN Altitude – which telecasts the games of the NBA’s Denver Nuggets and the NHL’s Colorado Avalanche – sued Comcast following Comcast’s alleged refusal to renew the parties’ distribution agreement. Reminiscent of other content providers’ complaints in the wake of a service interruption, Altitude called Comcast’s renewal proposal

“entirely unreasonable and unworkable for Altitude given the costs it pays to rights holders and its production costs.” Altitude alleged that Comcast – the dominant cable provider in the Denver market – was trying to eliminate Altitude and take over the regional sports market for its own competing sports network, NBC Sports Network (NBCSN). Altitude contended that Comcast was seeking to usurp competition by replacing independent RSNs like Altitude with vertically integrated, MVPD-affiliated sports channels like NBCSN. In addition to federal and state monopolization claims, Altitude brought claims for anti-competitive conduct, refusal to deal, intent to monopolize, and probability of achieving monopoly power. It also brought claims for tortious interference with contractual relations and tortious interference with prospective business relations based on several alleged public misrepresentations by Comcast about Altitude’s viewership numbers and pricing demands.

In December 2020, the U.S. District Court for the District of Colorado dismissed Altitude’s monopolization and tortious interference claims without prejudice to replead them, but allowed Altitude’s remaining claims to proceed. The court held that Altitude did not show how it has sustained harm on the “buy side” of the programming market (*i.e.*, monopsony power), even if the alleged result of Comcast’s actions was the temporary or permanent elimination of one of its competitors from selling regional sports programming in the Denver area. Altitude will likely file a further amended complaint that will attempt to further flesh out its monopoly allegations. Regardless of the outcome of this particular litigation, though, it is emblematic of a growing trend of discordant RSN/MVPD relationships that we will continue to track.

EMPLOYMENT LITIGATION*

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Navigating Governmental Responses to the COVID-19 Pandemic

In 2020, employers navigated a dense and ever-changing thicket of legislative and regulatory measures responding to the COVID-19 pandemic. Employers may face more of the same in 2021, as federal, state, and local governments respond to a changing economic landscape, ongoing COVID-19 outbreaks, and the availability of a vaccine. Among other areas of focus, employers will need to remain cognizant of evolving workplace safety guidance from the Centers for Disease Control (CDC) and the Occupational Health and Safety Administration (OSHA), revised sick or family medical leave requirements, unemployment reporting obligations, and other programs designed to support businesses and workers affected by the COVID-19 pandemic, as well as any additional federal response measures that may be initiated by the new Biden administration.

The most recent federal legislation

*The following are excerpted from Weil's January 2021 Employer Update. Additional trends and analysis from that report can be found [here](#).

responding to the COVID-19 pandemic is the Consolidated Appropriations Act, 2021, which was signed into law on December 27, 2020. This Act encompasses several smaller acts that renew or revise programs initially implemented under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) or the Families First Coronavirus Response Act (FFCRA), the federal government's initial responses at the outset of the COVID-19 pandemic (which included, among various other measures, increased unemployment benefits, and paid leave for pandemic-related reasons). Among the various acts encompassed by this latest legislation, those of key concern to employers include:

- The Continued Assistance for Unemployed Workers Act of 2020, which provides federal funds to support states' payments of \$300 per week on top of the normal unemployment benefit and to allow workers who exhausted their unemployment eligibility in the past

year to claim an extra 11 weeks of benefits between December 26, 2020 and March 14, 2021. To address individuals who refuse to return to work or decline an offer of suitable employment because they prefer to collect unemployment benefits, each state receiving federal funds to support the broadened unemployment benefits must institute a hotline or online portal for employers to report individuals who refuse an offer of suitable work without good cause.

- The COVID-related Tax Relief Act of 2020, which extends until the end of March 2021 the availability of refundable tax credits for payments made to employees under the FFCRA for emergency paid sick or family and medical leave.
- The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, which replenishes funding for the Paycheck Protection Program (PPP), permits second draw loans, and expands permissible uses of

Employers must remain nimble during 2021 as governmental authorities continue to update and expand upon existing measures intended to keep workplaces safe and to support the economy, the labor force, and businesses suffering from the ongoing impact of the COVID-19 pandemic.

- PPP proceeds to include certain operating expenditures, property damage costs, supplier expenses, and group insurance costs.
- The Taxpayer Certainty and Disaster Tax Relief Act of 2020, which extends and expands the employee retention tax credit originally made available to employers under the CARES Act.
- The Coronavirus Economic Relief for Transportation Services Act and the Airline Worker Support Extension, which provide monetary support to airlines and other transportation services entities in order to maintain employment and continue operations, with various strings attached.

In addition to these legislative measures, the federal government's recent COVID-related activity of particular note to employers includes updated guidance issued on December 16, 2020 by the U.S. Equal Employment Opportunity Commission (EEOC) regarding employment issues arising out of the availability of COVID-19 vaccinations. See EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), available [here](#). The guidance explains that under federal law, employers may institute mandatory vaccination policies and may lawfully ask employees for proof they have

been vaccinated, but “subsequent employer questions, such as asking why the individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be ‘job-related and consistent with business necessity.’” The EEOC’s guidance does not address whether or in what circumstances an employer inquiry regarding why an employee did not receive a vaccination might be job-related and consistent with business necessity. To avoid having to satisfy the ADA standard for disability-related inquiries, employers would need to refrain from asking why an employee has not received a vaccination. Instead, employers may wish to advise employees of the appropriate contact person to whom any requests for a reasonable accommodation regarding the mandatory vaccination policy should be directed. See *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (“Generally, it is the

responsibility of the individual with a disability to inform the employer that an accommodation is needed.”). Once an employee requests an accommodation based on a disability or a sincerely held religious belief, practice, or observance, employers must engage in an interactive process to determine whether a reasonable accommodation could excuse the protected individual from the vaccination requirement. The EEOC guidance states that an employer may prohibit an unvaccinated employee from entering the worksite only if the employee would pose a “direct threat” at the worksite – meaning that based on “reasonable medical judgment” and the “best available objective evidence,” the individual’s unvaccinated status would pose a significant risk of substantial harm to the health or safety of the individual or others – that cannot be eliminated or reduced by reasonable accommodation. See also 29 C.F.R. 1630.2(r). However, as the EEOC guidance explains, even in

such circumstances, “[t]his does not mean the employer may automatically terminate the worker.” Instead, according to the EEOC, “[e]mployers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities,” such as an accommodation allowing the employee to “perform[] the current position remotely,” or a right to take a leave of absence (such as leave under the FFCRA, the FMLA, or the employer’s policies).

Notwithstanding the rollout of vaccination in the United States, employers must remain mindful of CDC and OSHA guidance and regulations regarding maintenance of a safe worksite, especially because of proposed legislation in some states that, if enacted, would prohibit employers from enforcing mandatory vaccination policies. See Karla Grossenbacher, *Some States Put Brakes on EEOC’s Stance on Mandating Covid-19 Vaccine* (Jan. 13, 2021), available [here](#). OSHA’s COVID-19

webpage (available [here](#)) collects the agency’s requirements including enforcement memoranda, regulations, and other guidance for maintaining a safe worksite during the pandemic. The CDC’s website also provides an array of resources for employers, such as guidance for treatment of workers who are at high risk, guidance tailored to specific industries and types of jobsites, and other suggestions regarding COVID-19 risks in the workplace. See CDC, *COVID-19: Workplaces and Businesses*, available [here](#).

Employers must remain nimble during 2021 as governmental authorities continue to update and expand upon existing measures intended to keep workplaces safe and to support the economy, the labor force, and businesses suffering from the ongoing impact of the COVID-19 pandemic.

Developments in State and Federal Efforts to Regulate Independent Contractor Classification

Over the past year, there have been significant developments at the state and federal levels with respect to independent contractor classification standards. As discussed in the [January 2020](#) and [December 2019](#) issues of Weil's Employer Update, California's Assembly Bill 5 (AB5) went into effect on January 1, 2020, and codified a classification test pursuant to which a worker is generally presumed to be an employee unless the hiring entity can prove:

- A.** the worker is free from control and direction in the performance of the work, both under the terms of the contract and in fact,
- B.** the worker performs work that is outside the usual course of the hiring entity's business, and
- C.** the worker is customarily engaged in an independently established

trade, occupation, or business of the same nature as that involved in the work performed.

In September 2020, California's Assembly Bill 2257 amended AB5 by creating additional exemptions for certain occupations and industries, most notably in the media, music, entertainment, and insurance industries. On November 3, 2020, California also voted to pass the ballot initiative Proposition 22, which further exempts app-based rideshare and delivery drivers from AB5. Proposition 22 permits drivers to be classified as independent contractors with certain benefits and protections, including: (i) a guarantee of 120% of the applicable minimum wage for "engaged time" spent on rides or deliveries, (ii) healthcare subsidies for workers driving 15 hours per week or more, (iii) certain vehicle expense reimbursements, and (iv) occupational accident insurance for on-the-job injuries. Cal. Bus. & Prof. Code § 7449(f). Under Proposition 22,

companies that engage such app-based drivers must also adopt anti-discrimination and anti-harassment policies and rest break policies, perform background checks and safety training, and enter written agreements with their drivers with certain protections from termination. *Id.* Proposition 22 does not indicate whether it is intended to apply retroactively. However, the California Supreme Court recently held that the application of the “ABC” test from *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* applies retroactively to “all nonfinal worker classification cases that predate the effective date of the *Dynamex* decision.” *Vazquez v. Jan-Pro Franchising International*, No. S258191 at *18 (Cal. Jan. 14, 2021).

On January 12, 2021, drivers of certain app-based services (including Uber, Lyft, and DoorDash), the Service Employees International Union California State Council, and Service Employees International Union filed an Emergency Petition for Writ of Mandate and Request for Expedited

Review in the California Supreme Court to invalidate Proposition 22. Petition for Writ of Mandate, *Castellanos v. California*, (Cal. 2021) (No. S266551). The *Castellanos* petitioners assert, among other challenges, that Proposition 22 is unconstitutional because it improperly usurps the authority of the California legislature under the state Constitution, as well as the inherent authority of the judiciary to interpret initiative amendments. *Id.* at *10.

At the federal level, on January 7, 2021, the Department of Labor (DOL) published a final rule which adopts a revised version of the “economic reality” test under the Fair Labor Standards Act (FLSA) that would modify the federal requirements for classifying workers as independent contractors and prescribes the relative weights of the five “economic reality” factors. According to the DOL, to determine whether an individual should be classified as an independent contractor, *i.e.*, someone in business for him/herself, or an employee, *i.e.*, someone economically dependent

on an employer, the two “core” factors entitled to greater weight are:

- 1) the nature and degree of the worker’s control over the work; and
- 2) the worker’s potential for profit or loss. Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1175-76 (Jan. 7, 2021) (to be codified at 29 C.F.R pt. 795.105(b)-(d)).

The three other factors would supplement the “core” factors as “guideposts”:

- 1) the amount of skill required for the work;
- 2) the degree of permanence of the working relationship between the worker and the potential employer; and
- 3) whether the work is part of an integrated unit of production. *Id.*

The DOL’s final rule also provides that businesses may offer independent contractors certain benefits, such as

“health, retirement, and other benefits,” without altering the company-contractor relationship. *Id.* at 1185. The final rule was slated to take effect on March 8, 2021.

On Inauguration Day, the Biden administration issued a memorandum to freeze the DOL’s modified “economic reality” test from taking effect, as well as other “midnight” regulations from the Trump administration. With respect to the DOL’s final worker classification rule, which has been published in the Federal Register but has not taken effect, the memorandum advises the DOL to consider postponing the effective date for 60 days from Inauguration Day. See Chief of Staff, Exec. Office of the President, Memorandum For the Heads of Executive Departments and Agencies: *Regulatory Freeze Pending Review* (2021), available [here](#). The memorandum also advises agencies to consider opening a 30-day public comment period during the 60-day

delay period. *Id.* After the Biden administration issued this regulatory freeze memorandum, the DOL's Wage and Hour Division withdrew two opinion letters addressing independent contractor status that were published on January 19, 2021. See Fair Labor Standard Act 2021 Opinion Letter Search, U.S. Dep't of Labor, available [here](#). The DOL stated that the letters had been published prematurely because they were based on rules that had not taken effect. *Id.* In these revoked opinion letters, the DOL had applied its modified "economic reality" test to conclude that certain owner-operators and certain distributors of manufacturer's food products are likely independent contractors under the FLSA. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-8 (Jan. 19, 2021); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-9 (Jan. 19, 2021).

In contrast to the DOL's modified "economic realities" test, the Biden administration has signaled that it may

seek to mirror California's AB5 legislation on the federal level by "working with Congress to establish the 'ABC' test as the federal standard for all labor, employment, and tax laws." See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions (2020), available [here](#).

Developments and Expected Shifts in Restrictive Covenant Legislation

Currently, there is no legislative or regulatory scheme at the federal level governing the use of restrictive covenants, such as non-competition and non-solicitation agreements, in the employment context. But two bills that have been proposed in Congress in recent years could become the subject of further legislative activity in 2021 under the Biden administration. First, the Federal Freedom to Compete Act, introduced in the Senate in 2019 (S. 124), seeks to ban the use of non-competes with any workers who are not exempt from the requirements of the Fair Labor Standards Act. Second,

the Workforce Mobility Act, introduced with bipartisan cosponsors in the Senate in 2019 (S. 2614) and the House in 2020 (H.R. 5710), seeks to ban all non-competes except those associated with a sale of business or the dissolution of or disassociation from a partnership, and to limit the scope of permissible non-competes even in those scenarios. The bill also would have enabled the Federal Trade Commission (FTC) and DOL to issue civil penalties for violations, and to pursue action in court. It was silent on other restrictive covenants, such as customer and employee non-solicitation covenants and confidentiality agreements.

Joe Biden's election as President may bring new life to these stalled bills. The Biden campaign's website signals his support of legislation in this area, stating that, "[a]s president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary

Biden's election as President may bring new life to stalled legislation that seeks to significantly curtail the use of non-competes clauses.

to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements." See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, available [here](#). In light of this campaign promise, either the Federal Freedom to Compete Act or the Workforce Mobility Act – or, perhaps, a variant of those bills – might regain traction on Capitol Hill.

Beyond legislative proposals, there also was movement this past year toward the possibility of a regulatory scheme at the federal level for restrictive covenants. In January 2020, the FTC held a public workshop with

legal scholars, economists, and policy experts to evaluate the merits and legality of rulemaking “that would restrict the use of non-compete clauses in employer-employee employment contracts.” See *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, Federal Trade Commission (Jan. 9, 2020), available [here](#). In March, 19 state attorneys general sent a letter to the FTC urging the agency to create new rules limiting non-competes in the employment context. Similarly, in July, Senators Elizabeth Warren (D-Mass.) and Chris Murphy (D-Conn.) sent a letter to the FTC requesting immediate rulemaking that would curb employers’ use of non-competes. Despite these efforts, the FTC has yet to propose rulemaking with respect to non-competes.

While the federal government has yet to enact any restrictive covenant legislation or regulations, over the past year, several state and local governments continued the recent

trend of filling the federal void with a patchwork of legislation in this area. For example, on December 15, 2020, Washington, D.C.’s City Council unanimously passed the Ban on Non-Compete Agreements Amendment Act of 2020 (B23-0494). If it becomes law, this bill would ban virtually all non-compete agreements between employers and employees entered into after the bill’s effective date, except in the sale of business context. Mayor Muriel Bowser has signed the bill, which will take effect upon the expiration of a 30-day window for congressional review. Also, in April 2020, Virginia followed a number of other states (including Illinois, Maine, Massachusetts Maryland, New Hampshire, Rhode Island, and Washington) by enacting a law that prohibits employers from entering into non-competition or non-solicitation agreements with low-wage workers – specifically, those earning less than the state’s average weekly wage. These laws have a similar purpose and effect as the Federal Freedom to Compete Act

in that they limit the use of non-competes to higher-earning employees. Virginia's new law, Va. Code § 40.1-28.7:8, also goes a step further than many of its counterparts in other states by banning restrictive covenants that prohibit employees from providing services to former clients who initiate contact with the employee.

Developments in Mandatory Arbitration and Class Action Waivers

While Congress has not amended the Federal Arbitration Act (FAA) in decades, the U.S. Supreme Court has, in recent years, strengthened the enforceability of arbitration and class action waiver provisions in employment agreements. *See, e.g., Epiq Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). However, President Biden has expressed support for significant amendments to the FAA that could limit the ability of employers to require confidential arbitration provisions or class action waivers in

connection with employment-related disputes. In fact, President Biden has expressly promised to “enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits...” *See The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*,” available [here](#). In an effort to effectuate this campaign promise, President Biden may push to enact a number of different pieces of proposed legislation regarding mandatory arbitration and class action waivers.

For instance, President Biden has expressed support for enacting the Forced Arbitration Injustice Repeal Act (FAIR Act), which the House passed in late 2019, available [here](#). The FAIR Act, if enacted, would prohibit employers from requiring employees to sign predispute arbitration agreements or class action waivers as a condition of employment, and specifically states

that “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute.” Further, it would define an “employment dispute” to include any disputes “arising out of or related to the work relationship or prospective work relationship . . .” The FAIR Act would apply to employees at all levels, and to all predispute arbitration provisions, regardless of whether the provision allows for class arbitration. If Congress enacts the FAIR Act, employers would have to re-evaluate their employment arbitration and class action waiver policies and practices.

President Biden has also expressed support for enacting the Protecting the Right to Organize Act (PRO Act), which the House passed in early 2020, available [here](#). The PRO Act would classify as an unfair labor practice an employer entering into or attempting to enforce a predispute class action waiver with an employee, coercing an employee into agreeing to a predispute class action waiver, or retaliating or

Employers may wish to enhance their use of standalone class action waivers, subject to and consistent with other applicable legislation, as a remaining tool towards reducing the risk of material litigation by employees.

threatening to retaliate against an employee for refusing to agree to a predispute class action waiver. However, these provisions would apply only to workers protected by the National Labor Relations Act – which excludes, among others, supervisors and independent contractors – and prohibit only arbitration provisions that require individualized proceedings. Therefore, if the PRO Act is enacted, while employers may still be able to compel confidential arbitration of many employment claims,

the use of predispute class action waivers may be more limited with respect to many employees.

President Biden also may support enacting the Ending Forced Arbitration of Sexual Harassment Act, which was introduced in the Senate in 2017, available [here](#). This proposed legislation states that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.” It defines “sex discrimination dispute” as “a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under title VII of the Civil Rights Act of 1964...regardless of whether a violation of such title VII is alleged.” Like the FAIR Act, this proposed legislation would apply to all employees at any level. However, in contrast to the FAIR Act, it would not apply to *all* employment disputes, but rather, *only* to sex discrimination disputes as defined in the act. In addition, in contrast to both the PRO

Act and the FAIR Act, this legislation would prohibit only predispute arbitration provisions, but would not address the enforceability of standalone class action waivers. Thus, if the Ending Forced Arbitration of Sexual Harassment Act is enacted, employers may wish to consider carving out “sex discrimination disputes” from any existing arbitration policies and practices. Employers also would need to assess the practicalities of determining which claims fall within the definition of “sex discrimination disputes,” and enforcing arbitration provisions when non-“sex discrimination disputes” and “sex discrimination disputes” are intertwined in a single case. Employers may also wish to enhance their use of standalone class action waivers, subject to and consistent with other applicable legislation, as a remaining tool towards reducing the risk of material litigation by employees.

In the past few years, several states have already begun enacting

legislation which purports to restrict employers' abilities to direct employment disputes to confidential mandatory arbitration on an individualized basis. (N.Y. C.P.L.R. § 7515 (New York); Cal. Labor Code § 432.6 (California); 820 ILCS § 96/1-25(b) (Illinois); N.J. Stat. 10:5-12.7 (New Jersey); MD Code Labor & Empl. § 3-715; V.S.A. 21 § 495h (Vermont); RCW § 49.44.210 (Washington)). Employers may have taken some comfort from criticism from commentators of these laws as likely being preempted by the FAA. However, with the Biden administration and a Democratic-controlled Congress, the prospect of meaningful restrictions on arbitration through federal legislation may be a realistic prospect for the first time in many years. Employers certainly should monitor federal legislative efforts in this area.

Developments in Pay Equity and at the EEOC

The issue of pay equity remained front and center in 2020, including in the

courthouses and in state legislatures, and with the election of a new President who has signaled his support for federal legislation in this area.

Perhaps the highest-profile recent litigation in the pay equity space has been the United States Senior Women's National Soccer Team's (USWNT) lawsuit against the United States Soccer Federation, Inc. (USSF), alleging (among other claims) that the USSF discriminates against female players by paying them less than male players. But in May 2020, a federal judge in California rejected these claims and granted partial summary judgment to the USSF, finding that the evidence submitted by the parties showed that the plaintiffs were actually paid at a rate that was *more* – not less – than the rate paid to their male counterparts. *Morgan v. United States Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020). The court based its decision on consideration of all forms of compensation received by the male and female players, rejecting the USWNT's

argument that their lower per-game bonuses under the terms of their collective bargaining agreement amounted to an Equal Pay Act violation. *Id.* at 652-57.

Beyond the courtroom, several state legislatures have taken up the issue of pay equity. For example, Colorado's New Equal Pay for Equal Work Act (NEPEWA), which went into effect on January 1, 2021, forbids employers from asking about or relying on an applicant's salary history (following the lead of numerous other states and municipalities that have enacted similar restrictions) and mandates that employers pay employees of different sexes the same wage rate for substantially similar work. Colo. Rev. Stat. § 8-5-102. The NEPEWA's associated regulations, the Equal Pay Transparency rules, go further than other states' initiatives in this area by requiring employers to announce internal job openings and disclose all compensation and benefits for a job on both internal and external postings.

Colo. Dep't of Labor, 7 C.C.R. § 1103-13 (2020). California also passed pay equity legislation in 2020, becoming the first state to enact an employee data reporting law. California's law, which is modeled after the EEOC reporting requirements implemented during the Obama administration, requires private employers with 100 or more employees to annually report employee pay data, including an indication of each employee's race, ethnicity, sex, and job category. S.B. 973, 2020 Leg. (Cal. 2020) (effective Mar. 31, 2021).

With Joe Biden's election as President, the possibility of pay equity legislation at the federal level will be a hot button topic in 2021. The Obama-Biden administration prioritized various equal pay initiatives, such as by enacting the Lilly Ledbetter Fair Pay Act as its first piece of legislation and implementing the EEOC's collection of gender pay data. President Biden may attempt to build off some of these Obama-era pay-equity policies. For example, one of

his campaign platforms was support of the Paycheck Fairness Act (PFA), which passed the House of Representatives in 2019 but did not come up for a vote in the Senate in 2020. See *The Biden Agenda for Women*, available [here](#). The PFA would amend the Equal Pay Act of 1963 by replacing the catch-all “any factor other than sex” defense to a pay disparity claim with the revised defense of “a *bona fide* factor other than sex” (emphasis added), “such as education, training, or experience,” which factor may not be derived from a sex-based pay differential, must be job-related and consistent with business necessity, and must account for the entire pay disparity at issue. Paycheck Fairness Act, H.R. 7, 116th Cong. § 3 (2019). The PFA also would require employers to provide the EEOC with compensation, hiring, termination, and promotion data, disaggregated by sex, race, and national origin, and would prohibit employers from relying on wage history in the determination of wages (much like many existing state and local laws). *Id.* §§ 8, 10.

However, the Biden administration’s policy goals related to pay equity and other employment issues may face a roadblock in the form of the Trump administration’s lingering impact at the EEOC. Although Republican Janet Dhillon stepped down as chair of the EEOC after President Biden’s inauguration and was replaced by Democratic EEOC-veteran Charlotte Burrows, Democrats are still a minority on the Commission. Because President Trump appointed three commissioners to the EEOC, each for a five-year term, Republicans will retain control of the Commission until at least July 2022.

Another remnant of the Trump administration that will continue to impact the EEOC going forward is the Commission’s newly effective rule requiring the Commission to provide employers with additional information during the conciliation process, including information it relied on when making a reasonable cause determination. Update of Commission’s Conciliation Procedures, 29 C.F.R.

§ 1601 (2021). This information includes a summary of the facts and other non-privileged information the Commission based its findings on, an explanation of the legal basis for the EEOC's decision, underlying calculations and explanations relating to damages, and the Commission's designation of the case (*e.g.*, systemic, class, or pattern or practice). *Id.* The rule went into effect on February 16, 2021 and applies to all conciliations beginning after that date.

In another notable change from past practices, in 2020, the EEOC issued its first opinion letters in over 30 years. See Paige Smith, *EEOC to Issue First Opinion Letter on Job Bias in Over 30 Years*, Bloomberg Law (Apr. 29, 2020), available [here](#). Members of the public may request opinion letters on the application of EEOC-enforced laws to any specific question or factual scenario, and reliance on such letters may provide a defense to liability for claims under Title VII and the Age Discrimination in Employment Act. See

Formal Opinion Letters, U.S. Equal Employment Opportunity Commission, available [here](#). While the EEOC has discretion whether to respond to requests for opinion letters, responding to such requests may be another way in which the Republican commissioners seek to flex their muscles in opposition to the Biden administration's agenda while they remain in control of the Commission.

INTERNATIONAL ARBITRATION

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Impact of Brexit on England & Wales as a Jurisdiction and How This May Affect the Use of Arbitration

After four years of speculation on the impact of Brexit upon litigation and arbitration, clients have begun reassessing their dispute resolution clauses in light of the EU-UK Trade and Cooperation Agreement announced on December 24, 2020. In this context, international arbitration appears to be emerging as a lower-risk alternative, in particular for counterparties concerned that Brexit might diminish the jurisdiction of the English courts and the enforceability of their judgments across the EU.

The absence of a direct replacement for the Recast Brussels Regulation means that courts in the remaining 27 EU member states will no longer be automatically required to respect non-exclusive English jurisdiction provisions, and English court judgments will no longer be automatically enforceable across the EU. Although exclusive jurisdiction clauses will remain subject

to the Hague Convention to which the UK acceded on January 1, 2021, the status of “asymmetric” jurisdiction clauses (common in finance transactions) will likely remain unclear until the UK is accepted into the Lugano Treaty, which will require the unanimous consent of the EU Member States and Denmark and could take several years.

In contrast, because arbitration is excluded from the scope of the EU jurisdiction and enforcement regime set out in the Recast Brussels Regulation, leaving the EU will not affect substantive arbitration law in England & Wales, nor will it affect arbitration proceedings with a seat in London. Parties seeking recognition and enforcement of arbitral awards after Brexit will continue to do so under the New York Convention, to which 165 states (including all 27 EU Member States and the UK) are signatories, meaning that, in theory, arbitration awards can be enforced almost universally. Similarly, the procedural law governing arbitration in England &

Wales – as set out in the Arbitration Act 1996 – will be unaffected by Brexit.

Given the above, it is unsurprising that clients are increasingly interested in arbitration as a means of dispute resolution.

However, some commentators have expressed concerns that the long-term effect of Brexit will threaten the internationalist and commercially orientated foundations upon which London-seated arbitration is based. It is feared that, even where the practice of arbitration itself is unchanged, London may become less of a natural and convenient location to resolve disputes if the UK’s attractiveness to international businesses is reduced following Brexit. There may also be practical difficulties which may cumulatively diminish the appeal of London as a location for European arbitration. For example, it remains unclear whether parties, advisors, and witnesses traveling from the EU would require visas before entering the UK. On the other hand, it is possible that

Brexit may precipitate a revival in English court anti-suit injunctions restraining proceedings commenced in EU Member States in breach of arbitration agreements (a topic we address in more detail later in this section), as such anti-suit injunctions were previously prohibited under EU law (*West Tankers Inc. v Allianz*, 2009).

Although it is too early to appreciate the relative importance of these challenges and opportunities, we can say with some certainty that the primary reasons for the popularity of London-seated arbitrations will not be materially undermined by Brexit. English law will remain by far the most frequently chosen governing law in commercial contracts between international parties, the English language shows no signs of losing its primacy in international commerce, and the wealth of specialist arbitration professionals (and their supporting infrastructure) are unlikely to immediately relocate from London to Paris or Dublin. Commercially aware parties will therefore be aware that the

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Recent Case Law Demonstrates a Continued Forceful Approach Toward Anti-Suit Injunctions

Two features that make London-seated arbitration highly attractive to international contracting parties are the robustness of English procedural law and the careful exercise by the English courts of their statutory supervisory powers to support the arbitral process. Among the discretionary tools available to the courts in this pursuit is the power to grant anti-suit injunctive relief.

The power, which derives from s.37 of the Senior Courts Act 1981, provides a remedy that restrains a party from commencing or continuing foreign proceedings in breach of an agreement to arbitrate, on “*the simple and clear ground that the defendant has promised not to*” (per Lord Mance in *AES Ust-Kamenogorsk Hydropower Plant LLP* [2013]). A number of recent cases provide welcome reminders of the English courts’ forceful approach towards exercising their supervisory powers under the Arbitration Act 1996, which shows no sign of fading.

Anti-suit relief may be granted against third parties

In *XL v Little* (May 2019), the High Court granted XL, an insurance company, a final anti-suit injunction preventing Mr. Little from pursuing a D&O claim against XL in the New York courts, on the basis that he was bound by the London arbitration agreement in the relevant insurance policy issued to his former employer by XL. The High Court granted the injunction despite Mr.

Little himself not being party to that arbitration agreement, confirming that the English courts recognize the value of determining all disputes arising under one contract in the same jurisdiction. In turn, this highlights a major advantage of nominating London as the arbitral seat, particularly in sectors where claims are likely to be brought by third parties, such as insurance.

However, the English courts will not restrain a third party’s foreign claims unless they are “*vexatious and oppressive.*” In *Evison v Finvision, Orient Express Bank* [2019] EWHC 3057 (Comm), the High Court refused to continue an anti-suit injunction against a non-party to an arbitration agreement. The original injunction restrained the third party from pursuing Russian proceedings involving issues overlapping with those in an active London arbitration. Evison argued that the third party had colluded with the respondent to the English arbitration to initiate Russian proceedings that would impede the

arbitration, however the Court was unwilling to regard the Russian claims as vexatious or unconscionable in circumstances where they were a party's own legitimate claims.

The English Courts clarified the “*vexatious and oppressive*” threshold in *Clearlake and Gunvor v Xiang Da* [2019] EWHC 2284 (Comm). Here, the High Court granted anti-suit relief restraining third party proceedings in Singapore, on the basis that the claims had been brought in tort in an attempt to circumvent an exclusive jurisdiction clause in favor of the English courts. The third party here was not party to the exclusive jurisdiction clause, but because it expressly extended to “*any dispute which might arise out of [the agreement]*” it was deemed to apply to the relevant sub-contracts. Accordingly, the third party's claims in tort were restrained because the Singaporean proceedings were deemed “*vexatious or oppressive.*”

While the English courts are prepared and equipped to grant anti-suit injunctive relief to restrain third parties'

foreign proceedings, such claims must fall within the scope of the underlying arbitration/jurisdiction agreement. Further, where a party seeks to argue that foreign proceedings are vexatious or oppressive it must be willing to provide compelling evidence that the proceedings were initiated to impede arbitration/litigation.

Clear drafting is key

While it is true that English courts will make every effort to give effect to an arbitration agreement, clear drafting is imperative to minimize the scope for any argument, particularly where one arbitration clause is incorporated by reference in a related contract.

This issue arose in *Hiscox v Weyerhaeuser* [2019] EWHC 2671 (Comm), in which the High Court considered conflicting dispute resolution clauses in a “coverage tower” of excess liability insurance agreements. The question was whether a “service of suit” clause in a policy entitled the claimant to pursue its substantive claim before the U.S.

courts, or whether it was compelled to arbitrate in London in accordance with the express terms of the lead underlying policy. In the end, brief words citing the lead underlying policy alongside the reference to U.S. jurisdiction in the policy were deemed sufficient to incorporate the London arbitration clause. The decision highlights that parties should be mindful of consistency between dispute resolution clauses, particularly within a coverage tower or related agreements, to minimize risks of inconsistent judgments and satellite multi-jurisdictional proceedings.

By its eagerly awaited and significant judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, the Supreme Court confirmed the approach to be taken when determining the governing law of an arbitration agreement. The Supreme Court held that where parties specify a contractual governing law, that same law would apply to any arbitration agreement in

the absence of an express choice in that regard. However, in the absence of a contractual governing law clause full-stop, the arbitration agreement will be governed by the law most closely connected with the arbitration agreement (often, the law of the seat of arbitration).

That approach meant that the Court upheld an anti-suit injunction restraining Chubb from pursuing proceedings in Russia. In so doing, the Court confirmed that where parties nominate England as the arbitral seat, they choose to submit to the supervisory jurisdiction of the English Court and its powers to grant anti-suit injunctive relief. The Court also noted that in all cases, in principle, it should make no difference whether the agreement is governed by English, or foreign, law – in both cases the question “*is whether there has been a breach of the arbitration agreement and whether it is just and convenient to restrain that breach*” by granting an anti-suit injunction. Here, the Court once again showed no hesitation when

exercising its powers to prevent parties' attempts to circumnavigate an agreement to arbitrate.

The decision in *Enka* underlines the importance of clear drafting, highlighting that counterparties should carefully consider and make express provision for both the governing law of the contract and the law of the arbitration agreement – taking care when drafting these clauses.

Parties must not delay when seeking relief

Successful applications for anti-suit injunctive relief will be made promptly, before foreign proceedings are advanced. In *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA* [2020] EWHC 1223 (Comm), the court granted an anti-suit injunction restraining Chubb's pursuit of Brazilian proceedings in breach of an agreement to arbitrate in London and a later undertaking to that effect. Some eight months following that undertaking (and in breach of the same) Chubb sought to revive its Brazilian proceedings against Daiichi. In England, the High

Court disagreed with Chubb's position that Daiichi had delayed too long before making its application for injunctive relief, and that the Brazilian litigation was too far advanced. Instead, the Court acknowledged that "delay" is a fact-sensitive test and here Daiichi's delay was not "*material*" in circumstances where it had relied on Chubb's undertaking not to pursue its claims in Brazil. The decision follows that in *A v B* (July 2019, unreported), in which the court granted an anti-suit injunction restraining a party's pursuit of Israeli proceedings in breach of an exclusive jurisdiction clause mandating London-seated arbitration. In that case, the court held that while the applicants were aware of the overseas proceedings for several months before seeking an injunction, they were entitled to wait until they were actually served with those proceedings, provided that the application had been made before the Israeli proceedings were too far advanced. Both decisions reaffirm the longstanding position that anti-suit relief must be sought promptly, but that

whether there has been “delay” will depend on the facts of each particular case.

Nevertheless, it pays to be mindful of the risk that the English court will simply refuse to grant anti-suit relief following any delay, even where there is a clear, valid London arbitration agreement: in *Essar v Bank of China* [2015] EWHC 3266 (Comm) the lack of promptness alone was enough to thwart the application.

Looking ahead: Brexit

Following *West Tankers* [2012] EWHC 854 (Comm), EU Member State courts are effectively precluded from granting anti-suit injunctions restraining proceedings in other Member States in breach of an arbitration agreement. However, post-Brexit and while the UK remains party to the Hague Convention, the English courts are no longer bound by this, meaning that English-seated arbitration may become even more popular between international contracting counterparties.

Arbitrators and Apparent Bias in International Arbitration

After a year-long wait, the UK Supreme Court finally handed down its decision in *Halliburton Company v Chubb Bermuda Insurance Company* [2020] UKSC 48 in November 2020. Billed as one of the most significant cases relating to arbitration in recent years, the decision provides the arbitration community with much needed clarity on the circumstances in which an arbitrator in an international arbitration may appear to be biased. In particular, the Supreme Court affirmed that arbitrators have a legal duty to disclose circumstances which may give rise to justifiable doubts as to their impartiality, and while a failure to disclose should be taken into account in assessing apparent bias, it is not determinative.

The two-day hearing took place in the Supreme Court in November 2019, following a Court of Appeal decision in April 2018. The facts of the case arose out of the Deepwater Horizon

oil spill in the Gulf of Mexico in 2010 and a refusal by Chubb to make payments pursuant to a liability insurance policy. The policy provided for the resolution of disputes by arbitration and Halliburton commenced proceedings against Chubb. Each party appointed an arbitrator and, upon the parties' appointees being unable to agree, a third arbitrator, Mr. Kenneth Rokison, was appointed by the court as the chairman. Mr. Rokison was Chubb's preferred candidate. Subsequently, Mr. Rokison accepted appointments as an arbitrator in two other related arbitrations, in one of which he was Chubb's appointee. Mr. Rokison did not disclose these two subsequent appointments to Halliburton. Upon discovering Mr. Rokison's subsequent appointments, Halliburton challenged his ability to serve impartially as an arbitrator and brought an application to have him removed and replaced on the ground that his conduct had given rise to justifiable doubts as to his impartiality.

Both the High Court and the Court of Appeal agreed that there was no apparent bias and accordingly no basis for the removal of Mr. Rokison. They accepted that the relevant test to be applied was whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. However, they reached differing and unclear decisions on the circumstances in which an arbitrator should make a disclosure and the separate question of whether an arbitrator should be removed. It is not unusual for arbitrators to be appointed in multiple overlapping references with one common party, particularly in specialist fields with limited pools of arbitrators. As such, the arbitration community was concerned by the lack of clear Court guidance on these issues.

Thankfully, the Supreme Court's decision does provide helpful clarity. The judgment emphasises that arbitrators are under a continuing legal duty to disclose matters that might

reasonably give rise to justifiable doubts as to their impartiality. As such, they should expect that taking further appointments involving common parties and overlapping subject matters is likely to require disclosure, unless the parties have agreed otherwise.

The Supreme Court also clarified the test for determining whether an arbitrator should be removed for apparent bias. While it agreed that the “fair-minded and informed observer” test should be applied, it added that this objective test should consider the facts of the particular case and the custom and practice of the relevant field of arbitration. Therefore, failing to disclose multiple appointments in insurance arbitrations, for example, could give rise to justifiable concerns of bias, although the appeal was dismissed in this case. However, in other fields, the non-disclosure of multiple appointments may be part of normal, accepted practice and therefore disclosure is unnecessary.

The judgment has refined the law on apparent bias, providing much need clarity on the scope of these duties while pragmatically retaining flexibility to factor in the circumstances of each case. The Supreme Court adopted a pro-arbitrator stance, emphasizing that these challenges seldom succeed, but it will be interesting to see whether this fact-specific approach produces divergent decisions in future cases.

The Growth of Virtual Hearings in International Arbitration

Prior to the start of the COVID-19 pandemic in late 2019, the use of technology in international arbitration was steadily increasing. Parties were seeing advances in the use of electronic bundles for hearings and electronic filing of documents. In addition, a key development saw video-conferencing utilized for expert/factual witnesses. However, the rapid spread of the pandemic, and subsequent lockdowns across the globe, have forced the arbitration community to embrace technology in

Delocalization of hearings could present international contracting parties with greater choice of arbitration location, without locality or ease of international travel to that location being decisive factors.

a way never seen before. Not only do experts now routinely provide evidence by video-conference, but whole hearings take place remotely. 2020 saw the London Court of Arbitration's updated rules tackle the challenges of the pandemic head-on, including by expanding provisions that encourage the use of virtual hearings and the primacy of electronic communication, and numerous other arbitral bodies (the International Chamber of Commerce (ICC) being one example) publish guidance focused specifically on

measures to mitigate the effects of the pandemic on arbitral proceedings, specifically by virtual hearings.

Remote hearings are undoubtedly cheaper and more efficient. The often high costs associated with parties, their advisors and experts traveling to the location of the arbitration have now been removed with parties able to join from the comfort of their own homes. From an environmental perspective the use of remote hearings is also a significant improvement. There has long been an environmental argument against arbitration and, prior to the pandemic, one particular group (the Campaign for Greener Arbitration) had been calling for a more sustainable approach, including recommendations of flying less and encouraging the use of video-conferencing.

However, remote hearings are certainly not without their disadvantages. Most obviously, the reliance on high-quality internet speed and functioning technology can burden many participants. This is especially noticeable for advocates who need to

be able to communicate clearly with the arbitrators and their instructing counsel, neither of which is easy during a remote hearing. Legal teams have resorted to communicating by instant messaging services or emails, however, neither of these methods has the speed or clarity of speaking in-person. Further, many advocates rely on interpreting an arbitrator's body language to detect if he or she is interested (or not) in a particular argument, but this is near impossible when the arbitrator is visible only from one point-of-view on a small screen. Time zones also present practical challenges to parties based in different locations and who may, as a result, be required to attend hearings at unsociable hours.

The hybrid or semi-remote hearing has the potential to address a few of these disadvantages. Typically this involves legal teams and arbitrators being in the same venue but experts attending remotely. This certainly eradicates some of the concerns highlighted above. Hybrid hearings also utilize

“hubs” in various countries – centers fully equipped with technology that enables parties to attend remote hearings without the risks of poor internet connection or technical difficulties. These local hubs are of particular importance in developing countries which do not always have the same reliability of internet, especially in the context of increasingly global arbitration.

In addition, remote/hybrid hearings may encourage expansion of the pool of available expert witnesses and, in turn, increased diversity across that pool. Without the concerns of cost or travel, parties may access expert witnesses in all countries of the world. It will also be interesting to see whether remote/hybrid hearings affect the trend in international parties' choices of arbitration seat. The delocalization of hearings could present international contracting parties with greater choice of arbitration location, without locality or ease of international travel to that location being decisive factors. 2020 has seen Japan, in particular, actively

seek to increase its popularity worldwide as a seat for international arbitration, as part of a broader governmental strategy to encourage more widespread international arbitration in the country. The Japan International Dispute Resolution Centre has been actively promoting its virtual hearing facilities throughout the pandemic, and has plans to expand these including through agreements with other arbitral institutions (including HKIAC and SIAC) to host and assist arbitrations between parties that may have previously overlooked that location.

While it seems that remote hearings as a result of COVID-19 measures will be the norm for a while longer, it is quite possible that even after social-distancing rules have been relaxed, remote hearings in some form may be more prevalent than in-person hearings. It is clear that they have the potential to be more cost effective and time efficient and, as such, present the international arbitration community with an opportunity to market itself as a cheaper and more accessible alternative to

traditional methods of dispute resolution. The community will also be taking a distinct step towards a more environmentally friendly and sustainable future for its practice, which is a factor that will only grow in importance to parties in the coming years.

Diversity in the International Arbitration Community

The increase in attention globally on diversity issues has not overlooked the legal profession, including the field of international arbitration. The argument for diverse pools of arbitrators, across factors such as gender, ethnicity and age (among others), would help to ensure that arbitrators, and the arbitral process, reflect the businesses and communities that they represent. This is vital given the increasing range of parties and types of disputes that are referred to arbitral bodies across the world. Moreover, increased diversity would only encourage more innovation and efficiency, enabling parties to choose from the best practitioners available. Despite the benefits of diversity, the

The argument for diverse pools of arbitrators, across factors such as gender, ethnicity, and age (among others), would help to ensure that arbitrators, and the arbitral process, reflect the businesses and communities that they represent.

pool of potential arbitrators tends to be small, relatively homogenous and difficult to permeate. There are two broad arguments to explain this. The first is that the issue is one of supply, given that arbitrators tend to be retired judges, barristers, or solicitors, professions that are themselves often criticized for not being the most diverse of groups. The second broad explanation is that the issue is one of demand. For example, the number of repeat appointments of arbitrators is quite high. In 2018, just 13% of arbitrator appointments by the LCIA were of candidates not previously appointed in arbitrations administered by the LCIA, and in 2019 that figure increased just marginally to 19%.

Moreover, due to the confidential nature of arbitration, there is a lack of public information about arbitrators, meaning that parties must rely on lists in legal directories and compiled by arbitral institutions, speculative searches or recommendations which tend not to include a variety of candidates, even leaving aside the role that unconscious bias may play. For instance, as of January 2020, Chambers & Partners' list of the "*Most In Demand Arbitrators – Global-wide*" for international arbitration included just three women out of a list of 29 in its Band 1 rankings.

In reality, these factors probably serve to reinforce each other: repeated arbitrator appointments tend to

reduce the pool of experienced arbitrators from which to choose.

Despite this, there have been a number of initiatives aimed at increasing diversity. These include the “Equal Representation in Arbitration Pledge,” which was developed by members of the arbitration community in 2015 with a view to both improving the profile and representation of women in arbitration and to appoint women as arbitrators on an equal opportunity basis. While not including any specific quotas or targets, nearly 4,000 signatories to the pledge commit to take steps reasonably available to them to ensure wherever possible to, amongst other things, appoint a fair representation of female arbitrators, publish gender statistics for appointments, and mentor women. The African Promise, modeled on this pledge, was launched in September 2019 with similar aims in relation to African arbitrators.

A number of institutional and not-for-profit professional networks have also been established to promote diversity

in a number of aspects, including the Alliance for Equality in Dispute Resolution, which advocates for increased diversity in the profession. The ICC has also sought to promote younger practitioners through the development of the Young Arbitrators Forum, which is open to those under the age of 40.

Finally, there has been a proliferation in research tools and databases, developed to increase the quality of information on arbitrators, some of which are specifically focussed on diversity. Examples include the “ArbitralWomen” database, which offers a female-focused search tool, and “The New List – Arbitrators of African Descent” which was published in September 2020, containing more than 120 arbitrators of African descent. While these initiatives are promising and progress has been made, the challenge for lasting change continues. In 2019, ICC statistics revealed that just 38% of arbitrators were non-European, 34% were below the age of 50, and 21% were females – and this does not

account for intersectional problems that also arise. The tools mentioned above need to be emphasised, strengthened and broadened among stakeholders so that all parties can meaningfully engage and play their part in promoting diversity in arbitration.

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Embedding Online Copyrighted Content Creates Increasing Litigation Risks for News Sites and Other Users

Following the Ninth Circuit's 2007 decision in *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), it was commonly accepted that copyright liability for the public display or performance of photographs and videos resides with the entity that hosts and serves the offending content. Under this so-called "server test," one could embed social media posts, videos, or photographs on one's own web page or account, but it would be the original entity hosting the content that would be liable in the event the material were infringing. This consensus was called into question by the court in *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018), which held that certain news websites, even if they were not themselves hosting and serving photos embedded from Twitter, were nonetheless causing the public display of the photos by embedding the outside link containing the offending

content – and thus exposing themselves to liability for that display. As a single district court case without a definitive appellate decision (the case settled), *Breitbart* left the status of the “server test” – and the common practice of embedding content – unsettled and largely unresolved.

The legal status of embedded content got even thornier last year with the decision in *Sinclair v. Ziff Davis, LLC*, No. 18-CV-00790, 2020 WL 3450136 (S.D.N.Y. June 24, 2020). In *Sinclair*, the website Mashable embedded links to a photograph the plaintiff originally posted to Instagram. The court dismissed the copyright suit, finding that Instagram's Terms of Use gave Mashable a sublicense to embed the content on its website (thus avoiding the need to rely on, or address, the viability of the server test). But in *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594 (S.D.N.Y. 2020), a different S.D.N.Y. judge went the other way, concluding that there was no evidence of a sublicense between Instagram and Newsweek. The *Sinclair*

court then reconsidered its prior decision and reversed, holding that there was insufficient evidence to find that Instagram had actually granted Mashable a sublicense to embed plaintiff's photograph on its own website. To top it off, around the same time, Instagram publicly stated that its Terms of Service do *not* grant third-party websites a sublicense to embed its users' posts, and that third parties must secure any necessary permissions directly from the copyright owner (to the extent required) before embedding Instagram content elsewhere.

Given the presently uncertain state of copyright liability for embedded content, continued litigation in 2021 and beyond seems assured. Although *Sinclair* settled in February 2021, a final decision in *McGucken* is still pending. Another case, *Schroeder v. Volvo Grp.*, No. 20-cv-05127 (C.D. Cal.), has expanded the fight beyond S.D.N.Y. and introduced new arguments: the defendant there argues not only that it had a sublicense from Instagram to

share the plaintiff's post, but also that by making his Instagram account public and by tagging the defendant, the plaintiff had granted the defendant an implied license to share the post.

Several of the "embedder" defendants, including in *McGucken*, have also raised a fair use defense, which found success in *Boesen v. United Sports Publications, Ltd.*, No. 20-CV-1552, 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020), a case involving an embedded photo from the Instagram account of former tennis pro Caroline Wozniacki in a news article.

These cases and others will potentially resolve a series of yet-unanswered questions related to embedded content: if a social media platform's embedding functionality does not provide a sublicense to use the embedded content, can embedders seek refuge under the server test? And will the Second Circuit have an opportunity to opine on the viability of the server test, setting up a possible circuit split with the Ninth Circuit, one that would almost certainly be taken up by the U.S. Supreme Court? Does sharing an image to a social media site with an embedding functionality

constitute an implied license to third parties to embed the original post? What if the initial post tags the sharer in it – or even contains a photo of the sharer herself (a common issue where celebrities share paparazzi photos of themselves, and a question that is at the core of pending case *Ratajkowski v. O'Neil*, No. 19-cv-09769 (S.D.N.Y.))? Finally, what role does fair use play in the analysis? Answers to some of these questions may be forthcoming in the year ahead.

Litigation Challenging the Boundaries and Protections of Section 230

Dubbed "The Twenty-Six Words That Created the Internet," Section 230 of the 1996 Communications Decency Act (CDA) provides in brief but broad strokes that internet providers and social media platforms are not legally responsible for their users' speech absent rare extenuating circumstances. By treating internet platforms as *conduits* rather than the *authors* of their users' speech – even where they moderate their platforms and make

As demands for increased scrutiny around digital providers' amply protected editorial discretion grow... litigation over the metes and bounds of CDA Section 230, as well as calls for its revocation, are likely to persist.

editorial decisions – Section 230 provides a safe harbor for the proliferation of ideas and information, unrestrained by the chilling effects of potential liability. But in the 25 years since Section 230's enactment, the Internet has grown from a fledgling novelty to an all-powerful titan, and the CDA's broad exemptions from liability for user speech are now argued by some to threaten First Amendment protections and even public safety. In view of the Internet's current role as the central purveyor of

news, discussion, and social organizing, challenges to the wisdom of Section 230 are being made from all parts of the political spectrum, including in the courts.

The CDA was a well-known flashpoint in 2020 campaign politics, with some politicians decrying its toleration of falsehoods and hate speech, and others bemoaning increased censorship of certain unpopular viewpoints. In June 2020, Republican California congressman Devin Nunes sued Twitter for hosting a number of parody accounts suggesting that he had engaged in a host of illegal activities. A Virginia Judge swiftly ruled that Twitter was squarely immune from defamation liability under Section 230. In December 2020, computer repairman John Paul Marc Isaac allegedly asked to recover information from Hunter Biden's damaged laptop, filed a defamation lawsuit against Twitter for implying that he was a hacker – not because Twitter or a Twitter user said so, but because it blocked a *New York Post*

article drawn from information on the laptop under its policy against the use of “hacked materials.” Nor has Twitter been the only defendant in such suits – for instance, in May 2020 the D.C. Court of Appeals affirmed the dismissal of a defamation lawsuit filed by activists Laura Loomer and Freedom Watch against Facebook, Google, Twitter, and Apple for, *inter alia*, blocking her for being a “dangerous individual.”

Concurrent with the onslaught of litigation against social media providers have been official calls to reform or even repeal Section 230. Several bipartisan reform proposals have received congressional attention, like the Platform Accountability and Consumer Transparency (PACT) Act requiring more transparency from providers regarding their content moderation decisions. In June 2020, the U.S. Department of Justice weighed in, suggesting expansion of what specific actions make internet providers “responsible, in whole or in part” for user speech, and introducing carve-outs for the knowing

or purposeful facilitation of child exploitation and sexual abuse, terrorism, and cyber-stalking. Most recently, in February 2021, several Democratic senators proposed the Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms (SAFE TECH) Act, adding a veritable litany of new substantive Section 230 exceptions including in the areas of civil rights law, antitrust, and wrongful death. Most significantly, the SAFE TECH Act would exclude from the safe harbor any speech for which an internet provider “has accepted payment” or “funded” in any measure. Outside the political realm, Section 230’s long-standing exception for copyright infringement also continues to be actively litigated: for instance, recent copyright infringement suits have been pressed by photographers suing celebrities such as Amy Schumer and Jennifer Lopez for posting photos of *themselves* (taken by the plaintiff photographers) on social media platforms.

And these challenges show no signs of slowing down. As demands for

increased scrutiny around digital providers' amply protected editorial discretion grow – and as the boundaries between actionable misstatements of fact and protected opinions remain ever-murky – litigation over the metes and bounds of Section 230, as well as calls for its revocation, are likely to persist. Indeed, such efforts may persist precisely *because* of Section 230, which allows their contents to spread like wildfire across the internet and social media – meritorious or not – without fear they will be censored.

Creators and Users Prepare for New Copyright Small Claims Court

On December 27, 2020, President Trump signed into law the Copyright Alternative in Small-Claims Enforcement Act of 2020 (CASE Act). Until now, copyright claims in the United States were adjudicated exclusively by federal courts. The CASE Act creates a new Copyright Claims Board as an alternative venue

to adjudicate copyright owners' claims. The Board will consist of three Copyright Claims Officers, experienced copyright attorneys appointed by the Librarian of Congress for six-year terms. The Copyright Claims Board is slated to begin operations before the end of 2021, which means this year could witness the first cases brought before this new and untested copyright venue.

The CASE Act defines the Board's jurisdiction. The Board will operate as a small claims court, adjudicating copyright infringement claims valued at \$30,000 or less in total damages, not counting potential attorneys' fees and costs (which are to be borne individually by both parties unless the claim was brought in bad faith). The Board will be limited to adjudicating cases regarding (1) a § 106 infringement claim, (2) declaratory actions for non-infringement under § 106, and (3) improper takedown notices under § 512(f). (The Board will not hear, for example, Visual Artists Rights Act (VARA) claims under

§ 106A, most Digital Millennium Copyright Act (DMCA) takedown claims under § 512, or anti-circumvention violations under § 1201.) The procedures will consist of a streamlined version of those normally used in civil cases, with abbreviated filings, service, responses, scheduling, motion practice, discovery, hearings, written judgments, and appeals. Like federal courts, the Board can grant injunctive or monetary relief, with monetary relief limited to actual damages and profits under § 504(b) or statutory damages as prescribed under the CASE Act: up to \$7,500 per work for an untimely registered work or \$15,000 per work for a timely registered work, compared to up to \$150,000 per infringement under the Copyright Act. Unlike with federal proceedings, the Board does not consider whether the alleged copyright infringement was willful. Total recoverable damages are capped at \$30,000.

The stated goal of the CASE Act is to create a more effective option for copyright owners of all kinds to enforce

Until now, copyright claims in the United States were adjudicated exclusively by federal courts. The CASE Act creates a new Copyright Claims Board as an alternative venue to adjudicate copyright owners' claims.

their copyrights. What remains to be seen, however, is whether the new forum will achieve that goal – quick and efficient litigation of smaller copyright claims – and the degree to which parties will utilize this new forum. Respondents can opt out of litigation before the Board and instead force claims into more traditional federal court proceedings. And commentators have speculated that copyright “trolls” may take advantage of the cheaper and easier procedures of the Board to

extract settlements from unsophisticated or unprepared defendants or undercut legitimate fair uses of copyrighted works. To help protect against the latter, the CASE Act allows the Board to bar a party from filing a claim for 12 months if it is found to have pursued a bad faith claim or defense twice or more in one year.

Before the Board takes its place as a fixture of the U.S. copyright landscape, the Register of Copyrights will engage in a process to draft regulations (1) establishing the procedures the Board will follow during litigation, (2) creating even more simplified procedures for claims under \$5,000, and (3) limiting the number of proceedings that a claimant can file per year. The Register also has the authority to modify the monetary caps on statutory damages and attorneys' fees after three years, making those initial caps created by Congress potentially illusory. How the Register of Copyrights proceeds will have a

significant impact on who will pursue litigation through the Board instead of federal courts.

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Will the U.S. Supreme Court Uphold the Constitutionality of *Inter Partes* Reviews?

In October 2019, shockwaves rippled through the patent legal community when, in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), a Federal Circuit panel found that *inter partes* review (IPR) proceedings were unconstitutional as originally configured under the American Invents Act (AIA). After a divided Federal Circuit sitting *en banc* affirmed *Arthrex*, the U.S. Supreme Court granted *certiorari* petitions by both parties and the United States (as intervenor), and is now poised to decide whether and in what form IPRs will continue.

To recap, in *Arthrex* the Federal Circuit found that the Administrative Patent Judges (APJs) that preside over IPRs are principal “officers of the United States” within the meaning of the Appointments Clause of the Constitution, meaning that they must be appointed by the President “with the advice and consent of the Senate.” U.S. Const. art. II, § 2, cl. 2. The panel made this determination based upon the significant adjudicative

authority APJs possess (invalidation of issued patents) and their relative autonomy, especially the inability of any Senate-confirmed officer to fire an APJ at will. Based on this determination, the court in *Arthrex* found that the appointments of the APJs in the IPR at issue were unconstitutional because, consistent with the statutory structure of the AIA, they were appointed by the Commerce Secretary (rather than the President) and were not Senate-confirmed. Importantly, however, the *Arthrex* panel found that this Constitutional defect could be cured prospectively by severing the AIA provision that provided APJs Title 5 civil service protections (including that APJs are removable only for cause), thereby converting APJs from principal to inferior officers. *Athrex's* impact was thus limited largely to IPRs that were in progress before the decision issued. The Federal Circuit's reasoning failed to satisfy any of the parties. For its part, *Arthrex* (the patentee in the IPR proceeding) has argued to the Supreme

Court that the Federal Circuit was correct in its initial Constitutional analysis, but erred in concluding that APJ Title 5 civil service protections were severable. According to *Arthrex*, the only Constitutionally compliant remedy is to "hold the current *inter partes* review regime unconstitutional." *Smith & Nephew* and the United States, in contrast, argued that the Federal Circuit erred in finding that APJs were principal officers under the AIA's original framework. The Director's ability to determine the makeup of IPR panels, set policy and establish regulations, and remove APJs for cause (including violations of PTO regulations), they contended, establish that APJs are inferior officers that do not require Presidential appointment and Senate approval.

Unsurprisingly, the case has attracted a host of amicus briefs. Numerous trade groups representing intellectual property owners have filed briefs in support of *Arthrex*, many highlighting the damage (from patent owners' perspective) that IPRs have caused to

the value of their IP investments, and lamenting the PTAB's perceived lack of political accountability and oversight. Other groups, including the American Intellectual Property Law Association and several technology companies, filed briefs advocating for reversal of the *Arthrex* decision that APJs are principal officers. One issue that has united many amici, regardless of their view on the threshold Appointments Clause issue, is concern with the *Arthrex* panel's severability decision, with some expressing concern that it exceeded the Judiciary's power under Article III, and others that it undermined the PTAB's independence and appearance of neutrality.

Oral argument before the Supreme Court occurred on March 1 of this year, and a decision on the merits will likely issue this Term, no later than late June. Given the important role that IPRs play in patent litigation, it will be important to assess the impact that a Supreme Court decision that the IPR system as a whole is unconstitutional would have on ongoing and planned litigation.

Will American Axle Provide an Avenue for the Supreme Court to Clarify the Law of Patent Eligibility?

With each passing year, calls have grown for the U.S. Supreme Court to again take up a case relating to patent subject matter eligibility under 35 U.S.C. § 101 in order to provide more clarity as to how to apply the two part *Alice/Mayo* test for determining if patent claims are directed to a judicial exception to patentability (*e.g.*, an abstract idea, a law of nature, or a natural phenomenon). Last year concern intensified to the point that each of the twelve judges making up the Federal Circuit signed opinions requesting Supreme Court guidance on how to apply the *Alice/Mayo* test in the area of medical diagnostics. *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333 (Fed. Cir. 2019) (*en banc*). Hopes that the Supreme Court would weigh in on subject matter eligibility were dashed, however, when the Court denied each of the six Section 101-related *certiorari* petitions it considered.

This year, optimism is again growing that the Supreme Court will grant a Section 101 *certiorari* petition. One petition in particular stands out as ripe for Supreme Court intervention: *American Axle & Manufacturing, Inc. v. Neapco Holdings LLC, et al.*, No. 20-891. Indeed, Judge Moore has already expressed her belief that “American Axle has established that there is a reasonable probability *certiorari* will be granted.” *American Axle & Mfg., Inc. v. Neapco Holdings LLC*, 977 F.3d 1379, 1383 (Fed. Cir. 2020). Even if the Court does grant *certiorari*, however, the particular facts of *American Axle* leave open the possibility that Supreme Court resolution of the case will be narrow enough that it does not resolve thorny issues regarding the application of the *Alice/Mayo* test in the arts where it is mostly frequently relevant: software and life sciences. This is because the patent at issue in *American Axle* relates to a technology sector that has largely been insulated from the impact of *Alice/Mayo* – industrial manufacturing processes. The patent at issue in *American Axle*

“generally relates to a method for manufacturing driveline propeller shafts” for automobiles. *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 967 F.3d 1285, 1289 (Fed. Cir. 2020). The majority of the *American Axle* panel characterized the independent claim relevant to the Section 101 analysis as claiming a “method of manufacturing a driveline propshaft containing a liner designed such that its frequencies attenuate two modes of vibration simultaneously and (according to the patentee on appeal) a manufacturing method to tuning liners to attenuate bending mode vibration.” *Id.* at 1292–93. The district court below had found that this claim was directed to a natural law (Hooke’s law) relating to the relationship between frequency and mass and stiffness, and a divided Federal Circuit panel agreed. According to the panel majority, because the claim “confers patent coverage if the [frequency] attenuation goal is achieved by one skilled in the art using any method, including any method implemented by computer modeling and trial and

error,” it “amounts to simply claiming a result.” *Id.* at 1295. For that reason, the majority found that it fell squarely in line with a series of Supreme Court and Federal Circuit cases emphasizing that “[c]laiming a result that involves application of a natural law without limiting the claim to particular methods of achieving the result” falls afoul of Section 101. *Id.*

Writing in dissent, Judge Moore argued that “[t]he majority’s decision expands § 101 well beyond its statutory gate-keeping function and collapses the *Alice/Mayo* two-part test to a single step – claims are now ineligible if their performance would involve application of a natural law.” *Id.* at 1304 (Moore, J. dissenting). According to Judge Moore, “[t]he majority’s blended 101/112 analysis expands § 101, converts factual issues into legal ones and is certain to cause confusion for future cases.” *Id.* A sharply divided Federal Circuit split down the middle 6-6 on whether to grant *en banc* review, leaving the panel’s decision intact and setting the stage for American Axle’s *certiorari* petition, which it filed on December 28, 2020.

Concern over patent eligibility intensified to the point that each of the twelve judges making up the Federal Circuit signed opinions requesting Supreme Court guidance on how to apply the *Alice/Mayo* test in the area of medical diagnostics.

Conditions appear ripe for a grant of *certiorari*. According to Judge Moore, the present situation with respect to Section 101 “is worse than a circuit split – it is a court bitterly divided.” 977 F.3d at 1382. Between the 6-6 split at the Federal Circuit and widespread calls for Section 101 clarity from the patent bar, the academy, industry players, and even the Federal judiciary, chances for a Supreme Court intervention seem higher than ever. Even if such an intervention occurs, however, it may be less impactful than some hope.

That is because, as noted above, the claimed process in *American Axle* is very different from most claims challenged under Section 101. The closest Supreme Court case appears to be *Diamond v. Diehr*, 450 U.S. 175 (1981), in which the Supreme Court upheld the eligibility of a claim that used an alleged natural law (Arrhenius' equation) in an industrial process for curing rubber. Thus it is possible that the Supreme Court may grant *American Axle* the relief it seeks through a decision that narrowly applies *Diamond v. Diehr* but does not address broader structural concerns relating to the *Alice/Mayo* test. That said, the *American Axle* panel decision was based on *Alice/Mayo* and its progeny, and purported to apply long-standing Supreme Court precedent regarding result-based claiming. For that reason, any Supreme Court decision will likely at least provide some clarity regarding the outer boundaries of the *Alice/Mayo* test, and the increasingly muddled interplay between Section 101 and Section 112.

Availability of the DOE to Patentees and Important Limitations on its Application

Recent Federal Circuit precedent may potentially reinvigorate the doctrine of equivalents (DOE) as an alternative theory of infringement. The DOE allows a patentee to allege infringement based on products or processes that “perform substantially the same function in substantially the same way to obtain the same result as the claimed subject matter” even if the product or process does not literally infringe the patented claims. While there is precedent that, when applied broadly, the DOE is inherently at odds with 35 U.S.C. § 112 and the notice function of patent claims, the Supreme Court has long held that the DOE is available to patentees under proper circumstances, noting that the doctrine incentivizes innovation. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushki Co.*, 535 U.S. 722, 737-41 (2002). Courts have placed “important limitations on a patentee’s ability to assert infringement under the doctrine of equivalents” including, for example,

through the doctrines of prosecution history estoppel, claim vitiation, and the disclosure-dedication rule. *See, e.g., Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 n. 8, 40 (1997); *Festo*, 535 U.S. at 737-41; *Graver Tank & Mfg. Co. v. Linde Air Products, Co.*, 339 U.S. 605, 608 (1950); *Johnson & Johnson Assocs. Inc. v. R.E. Serv. Co.*, 285 F.3d 1046, 1054 (Fed. Cir.

Amgen sued Sandoz for infringing U.S. Patent No. 8,940,878, alleging that the process Sandoz used to manufacture its approved biosimilar Zarxio® and its proposed Neulasta® biosimilar infringed both literally and under the DOE.

On appeal, the Federal Circuit rejected Amgen's argument that Sandoz's manufacturing process infringed under the DOE, noting that "[t]he doctrine of

Despite the Supreme Court's long-standing endorsement of the doctrine of equivalents, the Federal Circuit has expressed an unwillingness to accept the DOE as a first-line remedy.

2002) (*en banc*); *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677, 683 (Fed. Cir. 1990).

Despite the Supreme Court's long-standing endorsement of the doctrine, the Federal Circuit has expressed an unwillingness to accept the DOE as a first-line remedy available to patentees. For example, in *Amgen Inc. v. Sandoz Inc.*, 923 F.3d 1023 (Fed. Cir. May 8, 2019),

equivalents applies only in exceptional cases and is not 'simply the second prong of every infringement charge, regularly available to extend protection beyond the scope of the claims.'" *Id.* at 1029. Amgen petitioned for rehearing *en banc*, insisting that "the doctrine of equivalents is available in all cases and assessed without regard to equities." The Federal Circuit granted Amgen's

petition, solely to remove the words “applies only in exceptional cases and” from the panel’s opinion. Thus, while the Federal Circuit maintained its holding that there was no infringement under the DOE, it walked back the language that would have potentially discouraged patentees from invoking the doctrine.

Subsequently, in *Eli Lilly & Co. v. Hospira, Inc.*, 933 F.3d 1320 (Fed. Cir. 2019) the Federal Circuit upheld a finding of infringement based on the DOE, and further discussed its application in the context of the disclosure-dedication rule. Eli Lilly originally sued Hospira, Dr. Reddy’s Laboratories Ltd., and Dr. Reddy’s Laboratories Inc. (collectively, DRL) for infringing U.S. Patent No. 7,772,209 (the “’209 patent”), which claimed methods of first administering folic acid, then vitamin B12, and then pemetrexed in salt form to treat cancer. Because DRL’s accused products used a different salt form than Eli Lilly’s product, Eli Lilly asserted that DRL’s products nevertheless infringed under the DOE. The district court ruled in

favor of Eli Lilly, holding that DRL’s products infringed under the DOE and, on appeal, the Federal Circuit affirmed. In affirming the district court’s decision, the Federal Circuit first cataloged the many Supreme Court cases endorsing the application of DOE, but also remarked that “the doctrine of equivalents is ‘the exception, however, not the rule,’ and not merely ‘the second prong of every infringement charge, regularly available to extend protection beyond the scope of the claims.’” *Id.* at 1330 (citing *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991)). Thus while apparently embracing the DOE as remedy that is available to patentees, the Federal Circuit nevertheless tempered its holding by noting important exceptions that may limit its application. One of those exceptions is the disclosure-dedication rule. The Federal Circuit discussed the application of this exception in addressing DRL’s argument that the disclosure-dedication rule barred Eli Lilly from asserting infringement

under the DOE. Specifically, DRL argued that a prior art patent (the “Akimoto patent”) incorporated by reference in the ’209 patent specification disclosed the pemetrexed salt form that DRL used in its products (pemetrexed ditromethamine), and that this salt form was dedicated to the public when Eli Lilly declined to claim it. *Id.* The Federal Circuit disagreed with DRL and held that the disclosure-dedication rule did not apply because the ’209 patent did not disclose methods of treatment using pemetrexed ditromethamine. *Id.* The Federal Circuit first noted that, “[t]he reason for the [disclosure-dedication rule] is that members of the public reading a disclosure of particular subject matter are entitled, absent a claim to it, to assume that it is not patented and therefore dedicated to the public (unless, for example, claimed in a continuation or other application based on the disclosure).” *Id.* at 1334. The Federal Circuit also noted that “subject matter is considered disclosed when a skilled artisan ‘can understand the unclaimed disclosed teaching upon

reading the written description,’ but not ‘any generic reference ... necessarily dedicates all members of that particular genus.” Leaning on its precedent regarding the requirements of 35 U.S.C. § 112, the Federal Circuit observed that the Akimoto patent disclosed thousands of compounds and did not expressly disclose pemetrexed ditromethamine. Using this reasoning, the Federal Circuit concluded that because the Akimoto patent contained “only a ‘generic reference’ to pemetrexed ditromethamine,” that it was not dedicated to the public.

The *Amgen* and *Eli Lilly* cases reinforce that while the DOE may be available as an alternative theory of infringement, there are nevertheless important limitations on its application for patentees to consider in determining whether or not to rely on the doctrine to show infringement.

How Will the PTAB’s Precedential Decision in *Fintiv* Affect the Institution Decisions?

With the rise in the popularity of a petition for IPR and the creation of

parallel schedules in district court and before the Patent Trial and Appeal Board (PTAB), there has been a lingering question on how to reconcile the two schedules. Normally, when an IPR is filed early in the district court proceeding, the court would often stay pending IPR. However, in some cases, an IPR may be filed late and the district court proceeding may have already advanced quite far. In such cases, the board has discretion to deny institution under 35 U.S.C. § 314(a). Two PTAB precedential cases provide insight into the board's exercise of this statutory discretion. The first case is *NHK Spring Co. Ltd. V. Intri-Plex Technologies Inc.*, which was designated as precedential in May 2019. In *NHK*, the board denied institution of an IPR filed shortly before the expiration of the time-bar, because granting institution would be "an inefficient use of Board resources." In reaching this conclusion, the Board noted that the same prior art and arguments were already made in the district court proceeding, and the final written decision may be issued after the conclusion of the district court trial.

The second case is *Apple v. Fintiv*, which was designated as precedential in May 2020. The *Fintiv* decision built on *NHK* and provided much needed clarity into the board's determination process and set forth six factors to be considered by the board:

- 1) whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
- 2) proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
- 3) investment in the parallel proceeding by the court and the parties;
- 4) overlap between issues raised in the petition and in the parallel proceeding;
- 5) whether the petitioner and the defendant in the parallel proceeding are the same party; and
- 6) other circumstances that impact the Board's exercise of discretion, including the merits.

Following the *Fintiv* decision, there has been a number of § 314(a) cases

applying the six *Fintiv* factors. In *Sand Revolution II, LLC et al. v. Continental Intermodal Group-Trucking LLC*, the board allowed a rehearing on its original decision to deny institution under *NHK* and ultimately granted institution based on the *Fintiv* factors. The board found that although factors 3 (on-going fact discovery and *Markman* order) and 5 (same parties) favored denying institution under § 314(a), factors 2 (uncertain trial date), 4 (petitioner's stipulation to not pursue the same grounds in the district court litigation), and 6 (reasonably strong merit) favored institution.

Importantly, a recent decision indicates that even if a trial date is scheduled before the final written decision, the board may grant institution if other factors favor doing so. In *GlobalFoundries Inc. v. UNM Rainforest Innovations f/k/a STC.UNM*, the board granted institution despite having the trial date scheduled more than three months before the final written decision deadline, because other *Fintiv* factors, namely factors 3 (expeditious filing; early stages of litigation), 4 (petitioner's stipulation to

not pursue the same grounds in the district court), and 6 (reasonably strong merit), favored institution.

By contrast, in *Fintiv*, the board exercised its discretion to deny institution. There, the board found that factors 2-6 favored denial, because the trial was scheduled two months before the final written decision deadline, *Markman* order was issued and fact discovery was ongoing, petitioner did not stipulate to not pursue the same grounds, same parties were involved, and there were weaknesses in the challenged grounds.

In August 2020, Apple Inc., Cisco Systems, Inc., Google LLC and Intel Corporation sued PTO Director Andrei Iancu in the Northern District of California challenging the PTO's decision to set the *NHK* and *Fintiv* decisions as precedential, thereby enabling the Board to exercise its discretion to deny institution based on pending district court litigation. The complaint alleges that the "NHK-Fintiv rule" is illegal for several reasons. First, the NHK-Fintiv rule violates the Leahy-Smith America Invents Act, which allows IPR to

“proceed in tandem with infringement litigation involving the same patent claims so long as the IPR petition is filed within one year after the petitioner was served with the complaint in the infringement suit.” Second, the NHK-Fintiv rule is “arbitrary and capricious because its vague factors lead to speculative, unpredictable, and unfair outcomes....” Lastly, the complaint alleges that the NHK-Fintiv rule is invalid because it did not go through the procedure for notice-and-comment rulemaking. The complaint seeks a declaration that the NHK-Fintiv rule is unlawful and a permanent injunction against the PTO Director and his officers from applying the NHK-Fintiv rule to deny institution of IPR. The district court held a motion hearing for temporary restraining order and preliminary injunction on January 14, 2021, and denied that motion on February 5, 2021. It then held a motion hearing on March 11, 2021 on lancu’s motion to dismiss and the plaintiffs’ summary judgment motion; as of this writing, decisions are pending. However, just one day after the March motion

hearing, the Federal Circuit issued an order in a separate case, *Mylan Laboratories Ltd. v. Janssen Pharmaceuticals N.V.*, No. 21-1071, rejecting Mylan’s appeal that sought 1) appellate review of a PTAB ruling that denied institution of an IPR proceeding, and 2) mandamus relief challenging the NHK-Fintiv rule as the basis for the PTAB’s decision. The Federal Circuit held that it does not have jurisdiction over appeals from PTAB decisions denying IPR institution, and denied Mylan’s request for mandamus – suggesting, as some prognosticators have noted, that other challenges to the NHK-Fintiv rule may not succeed. Given the relative early stage of its development, one area worth watching in 2021 is the board’s continued refinement of the standards under § 314(a) and its impact on IPR institution. This is particularly true given that a new PTO commissioner will be appointed by President Biden, who may bring a new approach to the issue of discretionary denials.

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Plaintiffs Will Continue to Attempt to Expand the Reach of Public Nuisance Tort Claims

Traditionally, public nuisance cases have been limited to claims involving a defendant's alleged *misuse of land* – such as blocking a public highway, diverting a public waterway, or creating a noxious odor – where the defendant had sufficient control over the instrumentality causing the harm. In general, the remedies for governmental plaintiffs in these lawsuits were limited to injunctive relief to abate the nuisance. Over the last several years, however, there have been repeated attempts by plaintiffs – often state and local governments represented by private counsel – to expand the reach of public nuisance to: (a) allow awards of money damages and not simply traditional injunctive and abatement remedies; (b) reach manufacturers of non-defective, lawfully manufactured, supplied, and distributed products; (c) dispense with the element of causation that must typically be proven in a tort case (or at least lower the burden of proof on

causation); and (d) address matters that more accurately reflect broad issues of public policy – typically addressed by the legislative and executive branches of government and not the courts – as opposed to discrete controversies. Private contingency fee attorneys representing governmental entities will likely become even more frequent in these types of cases. And nuisance lawsuits will continue to target a wide variety of defendants on a wide variety of topics – *e.g.*, opioid manufacturers and distributors, oil and gas companies relating to climate change, lead paint manufacturers, polychlorinated biphenyl (PCB) manufacturers, and subprime mortgage lenders, to name a few. As plaintiffs continue to push the envelope and turn traditional common law notions of nuisance seemingly beyond recognition, we can also expect that there will be calls upon state legislatures to rein in the scope of public nuisance law.

Plaintiffs Will Continue to Attempt to Hold E-Commerce Platforms Liable for Third-Party Products Sold on Their Online Marketplaces

There are multiple cases pending around the country involving the issue of whether an e-commerce platform can be held liable for alleged injuries to a plaintiff resulting from a defective product sold by a third-party vendor through the e-commerce platform.

One example is *Oberdorf v. Amazon*, in which a panel of the Third Circuit Court of Appeals vacated a district court's ruling that Amazon was not a “seller” within the meaning of Pennsylvania law, issuing the first decision subjecting Amazon to strict products liability. 930 F.3d 136, 153-54 (3d Cir. 2019). On rehearing the case *en banc*, the Third Circuit vacated the panel's decision and certified to the Pennsylvania Supreme Court the question of whether “an e-commerce business, like Amazon, [is] strictly liable for a defective product that was purchased on its platform from a

third-party vendor, which product was neither possessed nor owned by the e-commerce business." 818 F. App'x 138, 143 (3d Cir. 2020). Although the Pennsylvania Supreme Court accepted the certified question, Amazon and Oberdorf settled the case, effectively preventing the court's resolution of the issue. The Fifth Circuit Court of Appeals likewise certified a question on Amazon's status as a "seller" to the Texas Supreme Court, following a decision by the District Court to hold Amazon liable. *McMillian v. Amazon.com, Inc.*, 983 F.3d 194, 203 (5th Cir. 2020) (certifying question of whether "Under Texas products-liability law, [] Amazon [is] a "seller" of third-party products sold on Amazon's website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon's Fulfillment by Amazon program").

There are multiple other cases around the country involving these issues, with some courts finding Amazon could be liable for products sold by third-party

vendors using its website. *See, e.g., Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 462 (Ct. App. 2020) (finding Amazon could be strictly liable for a third-party seller's defective product); *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, No. 008550/2019, 2020 WL 7234265, at *3-4 (N.Y. Sup. Ct. Dec. 8, 2020) (holding Amazon could be strictly liable as a "seller" under New York law because it exercised "sufficient control" over the allegedly defective product); *State Farm Fire and Casualty Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019) (denying Amazon's motion for summary judgment and holding that Amazon could be held strictly liable under Wisconsin law). Other courts continue to hold that e-commerce retailers fall outside the chain of distribution and therefore cannot be held liable for products sold by third parties via their websites. *See, e.g., Ind. Farm Bureau Ins. v. Shenzhen Anet Tech.*, No. 4:19-cv-00168-TWP-DML, 2020 WL 7711346, at *7 (S.D. Ind. Dec. 29, 2020) (granting Wal-Mart.com's motion for summary

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judgment and holding Wal-Mart.com is not a “seller” or “manufacturer” under Indiana law); *State Farm Fire and Casualty Company v. Amazon.com, Inc.*, No. 19-17149, 2020 WL 6746745, at *3 (9th Cir. Nov. 17, 2020) (holding that Amazon is not a “seller” under Arizona’s strict liability law).

These cases are certainly worth monitoring, particularly since they potentially set up a circuit spit on the issue of whether online platforms may be liable for defective products sold by third parties. These cases are often resolved on the basis of the particular state’s products liability law, which means that each individual case could hinge on the interpretation of distinct laws. This could have significant

implications for e-commerce and, given the country’s increased reliance on e-commerce during the current pandemic, this issue will likely become even more in focus throughout 2021.

There Will Be a Continued Push for Civil Justice Reforms, Including With Respect to Federal Rules of Civil Procedure (FRCP) Amendments, MDL Practice, and Litigation Funding

We will likely see a focus on enacting procedures to ferret out meritless cases early on in the litigation. This could be accomplished by, in effect, codifying a “*Lone Pine*” case management order in the FRCP requiring plaintiffs to produce

evidence of exposure to the product and alleged injury soon after filing a complaint (perhaps within 60 or 90 days). Such “*Lone Pine*” orders stem from an unpublished Superior Court decision in New Jersey, *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, (N.J. Super., Law Div. Nov. 18, 1986). In *Lone Pine*, plaintiffs alleged personal injuries and property damage as a result of pollution from defendant Lone Pine Corporation’s operation of a landfill. *Id.* at *1. With respect to personal injuries, plaintiffs were required to produce “basic facts” by a certain date, including “(a) facts of each individual plaintiff’s exposure to alleged toxic substances at or from Lone Pine Landfill” and “(b) reports of treating physicians and medical or other experts, supporting each individual plaintiff’s claim of injury and causation by substances from Lone Pine Landfill.” *Id.* at 1-2. Regarding property damage, plaintiffs were required to produce “(c) each individual plaintiff’s address, including tax block and lot number, for the property alleged to have declined in

value” and “(d) reports of real estate or other experts supporting each individual plaintiff’s claim of diminution of property value, including the timing and degree of such diminution and the causation of same.” *Id.* at 2.

In addition, we can anticipate attempts to amend the FRCP to expressly allow immediate interlocutory appellate review of the denial of dispositive motions in an MDL, likely on an expedited basis, as opposed to requiring a defendant to wait to appeal until a case has been tried to verdict and judgment entered. Such immediate appellate review could obviate the need to conduct massive amounts of expensive discovery – a prospect that is often used by plaintiffs to exert settlement pressure on a defendant.

Finally, with an increasing focus on litigation funding, we believe there will be more efforts to require parties to disclose the existence of any third-party litigation funding. This would allow the parties and the court to assess, among other things, (a) any potential conflicts of interest or related

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ethical issues, and (b) whether the litigation funder potentially has undue influence or control over the underlying litigation. Some courts have already begun requiring such disclosure, and more will likely follow. For example, the U.S. District Court for the Northern District of California has a standing order for all judges that requires disclosure of third-party litigation funding in class actions. The order requires each party to identify “any persons, firms, partnerships, corporations (including parent

corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding” and “[i]n any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.” See Standing Order For All Judges Of The Northern District Of California, Contents Of Joint Case Management Statement (effective Nov. 1, 2018), available [here](#). The judge overseeing the opioid MDL also issued an order requiring disclosure of all third-party funding in that matter. See *In re: National Prescription Opiate Litigation*, No 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018). The court’s order requires that any attorney in any MDL case that has obtained third-party contingent litigation financing must provide the court, for *in camera*

review, a letter describing the financing, two sworn affirmations (one from counsel and one from the lender) representing that the third party financing does not create any conflict of interest for counsel, undermine counsel's obligation of vigorous advocacy, affect counsel's independent professional judgment, give the lender control over litigation strategy or settlement decisions, or affect party control of settlement. Courts have taken varying approaches with respect to the scope of discovery relating to the disclosure of litigation funding. For example, the U.S. District Court for the District of Arizona ordered the disclosure of the identities of all persons or entities, other than counsel, with a fiscal interest in the outcome of the litigation, though the court held the agreements themselves were protected under the work product doctrine. See *Continental Circuits LLC v. Intel Corporation*, 435 F.Supp.3d 1014, 1023-24 (D. Ariz. 2020). Similarly, the court in the Valsartan NDMA Contamination litigation, while not requiring disclosure,

ordered that *in camera* review would be required to determine the scope of discovery of such agreements "if good cause exists to believe a litigation financier has control or input into plaintiffs' litigation decisions, including settlement, which would interfere with a plaintiff's control of his or her lawsuit and the attorney-client relationship, or other good cause exists for the review." See *In re: Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*, 405 F.Supp.3d 612, 620 (D.N.J. 2019).

State courts have also begun to focus on the issue of litigation funding. West Virginia and Wisconsin state courts have mandated disclosure of third-party financing agreements following recent statutory amendments. See W. Va. Code § 46A-6N-6 (Effective June 5, 2019) ("Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney

permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”); Wis. Stat. § 804.01(2)(bg) (“*Third party agreements*. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”). We expect this trend to continue in 2021.

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Landmark Securities Class Action Decision Expected From the United States Supreme Court

In December 2020, the United States Supreme Court agreed to review two potentially game-changing class certification issues in the context of securities class actions in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, No. 20-222.

The first issue is whether trial courts considering class certification may consider the materiality of alleged misstatements in deciding whether those statements had a “price impact,” as required for certification under the fraud-on-the-market theory of class-wide reliance. If the Supreme Court allows materiality-like arguments in opposing class certification, defendants would wield an important tool in attempting to defeat class certification, particularly where, as in the *Goldman Sachs* case, the claims are premised on “aspirational and generic statements of the sort virtually every public company makes.” The second issue concerns

shifting burdens of persuasion between plaintiffs and defendants on the critical “price impact” issue at the class certification stage. The *Goldman Sachs* appeal asks the Supreme Court to allocate the burden to plaintiffs, requiring them to show, by a preponderance of the evidence, price impact. The appellants argue that this approach would be consistent with Federal Rule of Evidence 301, which provides that the burden “remains on the party who had it originally . . . unless a federal statute provide[s] otherwise.” No statute “provides otherwise” under the federal securities laws.

Class certification is a pivotal point in securities litigation that can have significant consequences, particularly considering that many securities class actions settle following class certification and before trial. Thus, the *Goldman Sachs* appeal has been billed as “the most important securities case to come before the Court” in a number of years.

Federal Forum Provisions Continue to Curb Securities Act Litigation in State Courts

The Securities Act of 1933, which generally prohibits false and misleading statements in connection with securities offerings, provides for concurrent jurisdiction over claims arising under the Securities Act in both federal court and state court. Following a 2018 decision by the United States Supreme Court affirming that Securities Act cases filed in state court are not removable to federal court, there was an uptick in the number of Securities Act claims filed in state court, which in turn exposed corporations to the increased costs and risks of Securities Act litigation in multiple fora. To mitigate this risk, a number of corporations have adopted provisions in their corporate charters that require stockholders to file Securities Act claims exclusively in federal court and, in early 2020, the Delaware Supreme Court ruled that these so-called “federal forum provisions” are valid

and enforceable as a matter of Delaware law. Since the Delaware Supreme Court's decision, state court filings of Securities Act claims have dropped significantly, returning to pre-2018 levels. Moreover, several trial courts outside of Delaware have followed Delaware's lead and enforced federal forum provisions in Securities Act cases. While the enforceability of federal forum provisions may continue to be litigated, it appears that these provisions – whether included in an IPO charter or adopted by an amendment to an existing corporate charter or bylaws – are likely to be a potent tool for issuers in combating the risks (and increased costs) of Securities Act litigation in both state and federal court.

The Increase in Delaware Books and Records Inspections

Delaware courts have long encouraged stockholder litigants to use the “tools at hand” under Section 220 of the Delaware General Corporation Law to obtain information about alleged corporate wrongdoing by inspecting

corporate books and records before filing a lawsuit. Such inspections are subject only to a “credible basis” standard of review – the lowest standard of review under Delaware law. In recent years, books and records demands (and related litigation) have increased significantly, due in part to developments in Delaware corporate law that make it more likely that defendants will be able to invoke the protections of the business judgment rule at the pleading stage. *See, e.g., Khan v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (controlling stockholder transaction subject to business judgment review where it is conditioned from the outset on approval by disinterested and independent directors and a fully-informed vote of a majority of the minority stockholders); *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015) (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). In 2019, the Delaware

The Delaware Court of Chancery's decision in *Gilead* coupled with the low bar for stockholders to obtain an inspection will likely embolden stockholders and their counsel to continue to push more aggressively for documents, including emails, in response to their pre-litigation inspection demands.

Supreme Court held that broader document discovery, including email, may be obtained under Section 220 in appropriate circumstances. *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 756 (Del. 2019). Since then, books and records demands have taken on increased significance for Delaware corporations as

stockholders press for ever-expanding pre-litigation discovery through the statutory inspection process.

Further complicating the landscape for Delaware corporations, in December 2020, the Delaware Court of Chancery issued a decision in a books and records action brought by stockholders of Gilead Sciences, Inc., rebuking Gilead's "overly aggressive" defense of the action, which the court characterized as "epitomiz[ing] a trend," and granted the plaintiffs leave to seek attorneys' fees. Delaware corporations, of course, continue to have the right to defend books and records actions within the strictures of Section 220, and while the facts in the *Gilead* decision were arguably extreme, that decision coupled with the low bar for stockholders to obtain an inspection will likely embolden stockholders and their counsel to continue to push more aggressively for documents, including emails, in response to their pre-litigation inspection demands.

Continued Risk of M&A Litigation in Federal Court and State Courts Outside of Delaware

Following Delaware's condemnation of the practice of "disclosure-only" settlements to resolve merger litigation in early 2016, many pre-vote merger challenges have moved to federal court where plaintiffs typically assert disclosure claims under Section 14 of the Securities Exchange Act of 1934 (and related regulations promulgated by the Securities and Exchange Commission). Such suits are filed in connection with virtually every M&A transaction. In addition, these cases have also accompanied the recent boom in special purpose acquisition company ("SPAC" or "blank-check company") transactions, along with other stockholder litigation challenging SPAC transactions under the federal securities laws and state fiduciary duty law. Overall, we expect that public company M&A transactions of all types will continue to be at risk of drawing one or more strike suits under the federal securities laws.

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The Biden Administration Appoints White Collar Enforcers with a Track Record of Robust Enforcement

Experts agree that the Biden administration will bring renewed energy to enforcement in the area of white collar financial crime. While in 2020 prosecutions of white collar crime dropped to a 25-year low, President Biden has signaled renewed commitment to white collar enforcement through his appointments to lead key regulatory agencies.

In choosing Gary Gensler to lead the Securities and Exchange Commission (SEC), President Biden signaled his administration's commitment to tough regulation of the financial markets. Gensler earned a reputation as a Wall Street enforcer during his tenure as the chair of the CFTC from 2009 to 2014. Under Gensler's leadership, the CFTC filed a record number of enforcement actions, securing a record amount in fines. Gensler will undoubtedly bring the same vigor to

the SEC, resulting in a substantial uptick in SEC enforcement actions. Meanwhile, President Biden has signaled that he will afford Attorney General Merrick Garland wide latitude in directing the Department of Justice's (DOJ) activities. Garland demonstrated a willingness to tackle tough cases during his tenure as a prosecutor. While Garland's confirmation hearing testimony offered limited insight into his specific agenda for white collar crime enforcement, we expect that the DOJ will bring additional white collar cases in the coming year.

Legislative Developments Augur Robust Enforcement

Congress started 2021 passing legislation that arms the Biden administration with powerful new enforcement tools for combatting securities fraud and money laundering. Most notably, Congress passed the National Defense Authorization Act for Fiscal Year 2021 (NDAA), which granted the SEC statutory authority to seek disgorgement (disgorgement previously

was an equitable remedy) and extended the statute of limitations for seeking disgorgement for scienter-based securities laws violations to 10 years. The same legislation establishes a five-year limitations period for seeking disgorgement for violations that are not scienter-based and a 10-year statute of limitations for other forms of relief such as injunctions, bar suspensions, and cease-and-desist orders, regardless of scienter. Additionally, the legislation prescribes that the statute of limitations for disgorgement and remedies is tolled if a securities law violator is located abroad.

Additionally, the NDAA includes anti-money laundering reforms. Significantly, it requires business organizations incorporated in the U.S. (and foreign organizations registered to do business in the U.S.) to disclose their ultimate beneficial owners to the Treasury Department's Financial Crimes Enforcement Network (FINCEN). FINCEN can share the ownership information with any federal agency "engaged in national security,

FINCEN can share...ownership information with any federal agency “engaged in national security, intelligence, or law enforcement activity,”...enabling those agencies to overcome obstacles to tracing unlawful proceeds previously created by the use of anonymous shell companies.

intelligence, or law enforcement activity”, thereby enabling those agencies to overcome the obstacles to tracing unlawful proceeds previously created by the use of anonymous shell companies.

Foreign Corrupt Practices Act Enforcement

In 2020, Foreign Corrupt Practices Act (FCPA) enforcement remained robust. A few notable cases from 2020 illustrate a continuing trend towards large, complex cases involving cross-border cooperation:

- *Goldman Sachs*. In the largest-ever penalty paid to U.S. authorities in an FCPA case, The Goldman Sachs

Group Inc. and its Malaysian subsidiary Goldman Sachs (Malaysia) Sdn. Bhd. agreed to pay more than \$2.9 billion in a criminal penalty and disgorgement to U.S. civil and criminal authorities for its participation in a conspiracy to violate the anti-bribery provisions of the FCPA. Goldman Sachs admitted to participating in a five-year scheme to more than \$1.6 billion in bribes to various foreign government officials to earn hundreds of millions of dollars in underwriting fees in connection with its business with IMDB, a Malaysian state-owned fund created for domestic development projects. Two former

- Goldman executives also were charged: (1) Tim Leissner, former Southeast Asia Chairman and participating managing director of Goldman Sachs, pled guilty to conspiracy to commit money laundering and to violations of the FCPA, and (2) Ng Chong Hwa, former managing director of Goldman and head of investment banking for GS Malaysia, who is awaiting trial on similar charges.
- *Airbus*. In the largest resolution in a global foreign bribery case, Airbus SE agreed to pay more than \$3.9 billion in combined penalties to authorities in the U.S., UK, and France. In a highly-coordinated case between the DOJ, the Serious Fraud Office in the UK, and the Parquet National Financier in France, these various international regulators and prosecutors sought to hold Airbus accountable for a years-long campaign of bribery, false reporting, and conspiracy to violate fraud and export control laws. The DOJ emphasized that Airbus had used

these corrupt methods to procure U.S. military technology, which additionally posed a “national security threat to the U.S. and its allies.”

These cases illustrate the extent to which the DOJ has become adept at working cooperatively with the broader global community of regulators to prosecute corruption and score significant penalties. We expect that FCPA prosecutions will continue apace in 2021 and anticipate seeing more blockbuster cross-border prosecutions in the coming years.

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