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Extradition for U.S. Antitrust Crimes: An Anomaly or the New Normal?

In April 2014, Germany extradited Romano Piscioti, an Italian national, to the United States to face criminal charges related to his alleged participation in an international cartel in the marine hose industry. (Press Release, U.S. Dep't of Justice, First Ever Extradition on an Antitrust Charge (Apr. 4, 2014) ("April 4 Press Release").) Mr. Piscioti's extradition represented the first time that the Antitrust Division of the U.S. Department of Justice ("DOJ") had obtained the extradition of a foreign national solely based on antitrust charges. (*Id.*) It was clearly a landmark achievement for the DOJ. In his May 2015 testimony before the House Judiciary Committee, the Assistant Attorney General for the Antitrust Division, Bill Baer, took a firm stance: "Foreign

nationals do not escape responsibility when they conspire to injure American consumers from afar. We prosecute foreign companies and their executives, and seek extradition of foreign nationals who attempt to evade the jurisdiction of the U.S. courts." (Assistant Attorney General Bill Baer's Prepared Remarks Before the United States House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Laws (May 15, 2015).)

But more than one year after Mr. Piscioti's extradition, it remains unclear whether those proceedings were a watershed moment in extra-territorial U.S. antitrust enforcement or just an anomaly.

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Quinn Emanuel Wins *Chambers USA's* "Product Liability Practice Group of the Year" Award for the Second Consecutive Year

Quinn Emanuel was honored as "Product Liability Practice Group of the Year" at the 2015 *Chambers USA* Awards. This is the second consecutive year that the firm has received this recognition. The firm was selected for its innovative and successful work on behalf of Pfizer, Colgate, Forest Laboratories, State Farm, Koch Industries, Endo International, Intuitive Surgical, GAF Materials Corporation, and others. The Products Liability group has succeeded in some of the most significant matters in the nation, ranging from trial level victories to a unanimous decision in the U.S. Supreme Court and a hotly contested win in the U.S. Court of Appeals for the Fourth Circuit (en banc). Quinn Emanuel's superstar group of product liability lawyers includes Sheila Birnbaum, Mark Cheffo, and Faith Gay in New York, Mike Lyle and Eric Lytle in Washington, D.C., and many other practitioners in offices around the globe. [Q](#)

Kathleen Sullivan Named One of *The National Law Journal's* Outstanding Women Lawyers

The National Law Journal has published its list of Outstanding Women Lawyers, which includes a lineup of the most successful female attorneys working in law today. These honorees were selected from hundreds of nominations and were evaluated on their skills, leadership roles, performance in significant cases, and achievement of precedent-setting rulings. *The National Law Journal* described Kathleen Sullivan as "an uncommon combination of appellate courtroom star and academia standout." She was recognized for her representations of Samsung Electronics Co., Google Inc., Mattel Inc., and Shell Oil Co., as well as her recent victories before the U.S. Supreme Court, including "one that dramatically curbed the use of the Alien Tort Statute against corporations." Ms. Sullivan is the first—and to date only—female name partner at an Am Law 100 firm. [Q](#)

Dual Criminality, Extradition, and Antitrust Offenses

Extradition is a complicated process in any context, but the nuances of criminal antitrust laws outside of the United States make extraditions particularly difficult to obtain for antitrust charges. In any type of case, for prosecutors to extradite a foreign fugitive to face charges in the United States, there must be an extradition treaty between the United States and the country where the fugitive is located. If there is such a treaty in place, the requirements for obtaining extradition are determined by the terms of the treaty between the two countries.

Generally speaking, prosecutors must evaluate at least three threshold considerations before seeking extradition.

First, the charged offense must be one for which extradition is available. Extraditable offenses may be specifically identified in the underlying treaty or described by a formula set out in the treaty. For example, the extradition treaty between the United States and Germany provides that a criminal offense must be punishable by “deprivation of liberty for a maximum period exceeding one year” to be eligible for extradition. (Extradition Treaty, U.S.-Germany, art. 2, para. 2, cl. a, June 20, 1978, 32 U.S.T. 1485 (“Germany Extradition Treaty”).)

Second, under most treaties, the requirement of “dual criminality” must be satisfied before extradition can proceed. “Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations.” *United States v. Saccoccia*, 18 F.3d 795, 800 n.6 (9th Cir. 1994).

Finally, prosecutors must consider possible exemptions that apply to a particular fugitive under the governing treaty. Under some circumstances, even if the fugitive has been charged with an extraditable offense in the United States, extradition may not be available. For example, some countries, like Germany, have not agreed to extradite their own citizens to face criminal charges in the United States. (Germany Extradition Treaty, art. 7.)

The “dual criminality” requirement in most extradition treaties has historically created an obstacle to extraditions based on violations of U.S. antitrust laws. While criminal penalties have been attached to price-fixing and other “hard core” violations of the antitrust laws in the United States since the passage of the Sherman Act, similar conduct is not subject to criminal penalties in many other nations around the world. Consequently, antitrust charges alone will not

be enough to sustain an extradition request in many cases.

United States v. Norris

In recent years, to avoid the complications created by the “dual criminality” hurdle, U.S. antitrust authorities have demonstrated that they are willing to use alternative charges to pursue extradition of fugitives residing in countries where antitrust offenses do not satisfy the requirements for extradition. The first example of the successful pursuit of such an extradition request occurred in 2010, after a multi-year effort by the DOJ to extradite Ian Norris, the former CEO of Morgan Crucible PLC, from the U.K. to the United States. Mr. Norris was ultimately extradited to face obstruction charges arising from his alleged efforts to conceal his company’s involvement in a price-fixing conspiracy, but only after a multi-year battle in the United Kingdom. (Press Release, U.S. Dep’t of Justice, Former CEO of the Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010).)

In 1999, the U.S.-based subsidiary of Morgan Crucible received a grand jury subpoena seeking information regarding possible price fixing related to certain carbon products. According to prosecutors, when the company received the subpoena, Mr. Norris directed the destruction of documents and prepared “scripts” to ensure all employees who attended the meetings under investigation provided the same, exculpatory information to investigators. (*Id.*) In 2002, Morgan Crucible pleaded guilty to witness tampering and document destruction. (Plea Agreement, *United States v. Morganite, Inc., & The Morgan Crucible Company PLC*, No. 02-733 (E.D. Pa. Nov. 4, 2002).) At the same time, a U.S.-based subsidiary of Morgan Crucible pleaded guilty to fixing prices for certain carbon products. (*Id.*) Two years later, Mr. Norris—a British citizen—was indicted in Pennsylvania. He was charged with violations of the Sherman Act, for conspiracy to fix the prices of various carbon products, witness tampering, and obstruction of justice. (Indictment, *United States v. Norris*, No. 03-632 (E.D. Pa. Sept. 28, 2004).)

The DOJ initially sought to extradite Mr. Norris from the U.K. on all charges, including the charged antitrust offenses. (See Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Dep’t of Justice, Address Before The ABA Section of Antitrust Law Cartel Enforcement Roundtable, *An Update of the Antitrust Division’s Criminal Enforcement Program* (Nov. 16, 2005).) Ultimately, it achieved mixed

results. A lower court in the U.K. initially concluded that Norris should be extradited on both the charged antitrust and obstruction offenses. See *United States v. Norris*, [2005] UKCLR 1205. But after several appeals, and nearly six years of proceedings, the U.K. Supreme Court determined that Norris could only be extradited on obstruction charges because the alleged conduct underlying the indictment had occurred before a “cartel offense” was established under U.K. law. See *Norris v. United States*, [2008] UKHL 16.

In March 2010, Norris was extradited to face obstruction charges in the Eastern District of Pennsylvania. (Press Release, U.S. Dep’t of Justice, Former CEO of the Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010).) After a seven-day trial, a jury convicted him on one count of obstruction and acquitted him on all remaining counts. (Judgment Order at 1, *United States v. Norris*, No. DPAE2:03CR000632-001 (Dec. 10, 2010).) The court sentenced Mr. Norris to serve 18 months in prison and ordered him to pay a \$25,000 fine. (*Id.* at 2.)

The *Norris* extradition is noteworthy in two important respects. It was the first time that the DOJ had successfully extradited a foreign fugitive involved with a price-fixing conspiracy. But it also demonstrates the difficulties that U.S. authorities face when seeking to obtain jurisdiction over foreign antitrust fugitives. If Mr. Norris had not been subject to obstruction charges, he likely would have avoided extradition and may have escaped prosecution altogether. That same result would still hold for foreign antitrust fugitives in many other countries around the world today, including countries such as China, where antitrust offenses still do not carry criminal penalties. (Gregory C. Shaffer, Nathaniel H. Nesbitt, *Criminalizing Cartels: A Global Trend?*, 12 Sedona Conf. J. 313, 322 (2011).)

The tide, however, is gradually changing. Since 2000, a number of countries, including Ireland (Section 6 of the Competition Act of 2002), the United Kingdom (Section 188 of the Enterprise Act of 2002), and Australia (Competition and Consumer Act of 2010), have passed laws that impose criminal penalties for cartel offenses, increasing the number of countries around the world with criminal antitrust statutes to more than 30. (See generally Shaffer, *supra* at 315.) While the true impact of these new statutes remains to be seen, they have created new opportunities for U.S. authorities to prosecute foreign antitrust fugitives, even where similar actions would not have been possible in the past. Romano Piscioti’s extradition marks another step in the direction of

increased international antitrust enforcement and cooperation.

The Marine Hose Cartel

In May 2007, antitrust authorities around the world simultaneously raided the offices of the major suppliers of marine hoses, which are flexible rubber hoses used to transfer oil between tankers and storage facilities. During those raids, the DOJ arrested eight foreign executives and charged them with conspiracy to rig bids, allocate market shares, and fix prices for marine hoses sold in the United States and throughout the world. According to the DOJ, the marine hose conspiracy impacted the prices of hundreds of millions of dollars of marine hose sales between 1999 and 2007. (Press Release, U.S. Dep’t of Justice, Eight Executives Arrested on Charges of Conspiring to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose (May 2, 2007).)

Parker ITR Srl, an Italian supplier of marine hoses, was an alleged participant in the conspiracy. In February 2010, Parker entered a guilty plea in Houston, Texas, in which it agreed to pay a \$2.29 million fine and admitted its involvement in the conspiracy. (Plea Agreement, *United States v. Parker ITR S.R.L.*, No. H-10-75 (S.D. Tex. Feb. 8, 2010) (“Parker Plea Agreement”).) At the time, Parker was the fourth company to be charged for its role in the conspiracy. (Press Release, U.S. Dep’t of Justice, Italian Subsidiary of U.S.-Based Company Agrees to Plead Guilty for Participating in International Price-Fixing Conspiracy (Feb. 16, 2010).) As a condition of its plea agreement, Parker agreed to cooperate with the DOJ’s ongoing investigation into the cartel’s activities. (Parker Plea Agreement at 11-13.)

Romano Piscioti, an Italian citizen, was an executive at Parker between 1999 and 2006. He was “carved out” of the company’s plea agreement with the DOJ, which left him exposed to independent prosecution. Six months after Parker entered its guilty plea, Mr. Piscioti was indicted. The indictment alleged that Mr. Piscioti participated in meetings in which he and other co-conspirators agreed to rig bids for marine hose contracts and allocate shares of the marine hose market. (Indictment, *United States v. Piscioti*, No. 10-60232 CR-Cohn (S.D. Fla. Aug. 26, 2010).)

United States v. Piscioti Extradition Proceedings

While living in Italy, Piscioti was beyond the reach of U.S. antitrust authorities. In Italy, during the time period in which the marine hose cartel was active, cartel offenses did not carry criminal penalties. (See

Julian M. Joshua, Peter D. Camesasca, Youngjin Jung, *Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach*, 75 Antitrust L.J. 353, 397 (2008).) The extradition treaty between the United States and Italy requires dual criminality; therefore, Piscioti was safe from prosecution while he remained within Italian borders. (Extradition Treaty, U.S.-It., art. II, para. 1, Oct. 13, 1983, TIAS 10837.)

Consistent with its established practice for prosecuting foreign antitrust fugitives, the DOJ placed Mr. Piscioti on INTERPOL's "red notice" list, which is a list of wanted fugitives maintained by INTERPOL member nations. (See Scott Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, Address Before the 24th National Institute on White Collar Crime, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* (Feb. 25, 2010).) When fugitives on the list are detected entering an INTERPOL nation, they may be provisionally detained to facilitate potential extradition. (*Id.*) Accordingly, even if a fugitive is outside the reach of U.S. prosecutors while within his own country, he could face the risk of detention and arrest while traveling abroad.

Although Mr. Piscioti was indicted in 2010, his indictment was filed under seal. (Motion to Unseal the Indictment, *United States v. Piscioti*, No. 10-60232 (S.D. Fla. Aug. 1, 2013).) Because his indictment was filed under seal, Mr. Piscioti would not have known charges were pending against him in the United States. When traveling back to Italy in June 2013, Mr. Piscioti's itinerary included a layover in Germany. Once he landed in Germany, German authorities detained Piscioti. (See April 4 Press Release.) The DOJ promptly sought to extradite him to the United States to face charges arising from his alleged participation in the marine hose cartel. (*Id.*)

German authorities ultimately agreed that the extradition request was proper. Bid-rigging became a criminal offense in Germany in the late 1990s, just like it is in the United States. (See German Criminal Code, Section 298.) Therefore, the charges satisfied the dual-criminality requirement under the extradition treaty between the United States and Germany. And as an Italian, not German, national, Mr. Piscioti could not invoke the exception under the extradition treaty between the United States and Germany that exempts German citizens from extradition from Germany.

Germany extradited Mr. Piscioti to the United States in April 2014. (April 4 Press Release.) Three weeks later, he pleaded guilty and was sentenced to

serve a 24-month prison term. (Press Release, Dep't of Justice, Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy (Apr. 24, 2014) ("April 24 Press Release").)

Implications for the Future

The prosecution of individual defendants is clearly a point of emphasis under the DOJ's cartel enforcement program. Since 1999, more than 40 foreign nationals have served jail time in the United States for either participating in an international cartel or obstructing the investigation of an international cartel. (See Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, Address Before the 24th National Institute on White Collar Crime, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* (Feb. 25, 2010).) Most of those individual defendants, however, have voluntarily traveled to the United States for trial, or submitted to U.S. jurisdiction as a part of a plea agreement. (See Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address Before the ABA Section of Antitrust Law's 56th Annual Spring Meeting, *Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program* (March 26, 2008).) The Antitrust Division still has a very limited track record of successfully obtaining the extradition of foreign nationals who refuse to submit to U.S. jurisdiction.

The status of one of Mr. Piscioti's alleged co-conspirators in the marine hose case illustrates the difficulties U.S. authorities still face when prosecuting antitrust fugitives abroad. Uwe Bangert was the CEO of Phoenix AG, the parent of Dunlap Marine & Oil Ltd., another company that pleaded guilty for its role in the marine hose conspiracy in December 2008. (Plea Agreement, *United States v. Dunlop Oil & Marine Ltd.*, No. 08-60338-CR-Marra (S.D. Fla. Jan. 8, 2009).) In July 2007, Mr. Bangert was indicted in the Southern District of Florida for his alleged role in the marine hose cartel. (Indictment, *United States v. Bangert*, No. 07-60183 CR-Dimitrouleas (S.D. Fla. July 19, 2007).) Mr. Bangert, a German citizen, has remained a fugitive at-large since the time of his indictment while living in Germany. (April 24 Press Release.) Under the terms of the extradition treaty between the United States and Germany, Germany has no obligation to extradite German citizens. (Germany Extradition Treaty, art. 7.) In an ironic twist, Germany, the same country that extradited

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Southern District of New York Recognizes Bondholders' Rights Under Section 316(b) of the Trust Indenture Act

In lieu of proceeding through a chapter 11 bankruptcy, borrowers and their creditors usually prefer to restructure their debt agreements outside of court. Although they avoid the costs and delays of bankruptcy, out-of-court negotiations can be contentious, as the various parties may have divergent goals. For example, secured and unsecured creditors will likely differ with respect to the desired treatment of their respective types of debt. Even within classes of debt, creditors' interests—and willingness to compromise—may differ significantly. Unanimous agreement is difficult to achieve.

Non-unanimity is problematic under Section 316(b) of the Trust Indenture Act (“TIA”), 15 U.S.C. § 77ppp(b), which forbids impairing “the right of any holder of any indenture security to receive payment” of principal and, with limited exceptions, interest, in an out-of-court agreement without that holder's consent. In other words, for bonds that are governed by the TIA, a single “hold out” can prevent an out-of-court restructuring that is supported by the majority of other bondholders.

The TIA's prohibition on the impairment of individual creditors' *legal* right to payment is well-established. Less certain, however, has been the TIA's application to out-of-court restructurings that may have the *practical* effect of preventing bondholders from receiving full payment of principal and interest. The Southern District recently addressed this issue in *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014) (“Marblegate I”), and *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*, 2015 WL 3867643 (S.D.N.Y. June 23, 2015) (“Marblegate II”).

Key Facts

Education Management Corporation (“EDMC”), along with multiple subsidiaries including Education Management LLC (“EDLLC”) (together, “Defendants”), operates for-profit colleges in the United States. EDMC receives 80% of its revenue from federal funds; of critical importance, it loses eligibility for these funds if it files for bankruptcy. In 2014, it had outstanding over \$1.5 billion in debt (issued by EDLLC), including roughly \$1.3 billion in secured debt and \$200 million in unsecured notes issued pursuant to an indenture governed by the TIA. EDMC guaranteed the notes.

In 2014, EDMC's revenue dropped by 58%, its stock price dropped 95%, and it forecast additional financial problems. Because EDMC would have lost

80% of its revenue if it filed for bankruptcy, that was not an option. EDMC and the majority of its creditors instead negotiated a Restructuring Support Agreement (“RSA”). Under the RSA, unsecured noteholders were to receive roughly one-third value of their notes in the form of EDMC equity. The RSA also provided that any noteholders that did not consent to the deal would receive no payout at all. (Absent unanimous agreement, EDLLC would be divested of all assets, and EDMC would remove its guaranty over the notes, leaving nonconsenting noteholders with no avenue of recovery.) Although the holders of 90% of the notes agreed to the RSA, some holders did not, including hedge funds Marblegate Asset Management, LLC and Marblegate Special Opportunities Master Fund, L.P. (together “Marblegate”). Marblegate and another hedge fund (which eventually settled) sued Defendants, arguing that the RSA violated TIA Section 316(b), which reads:

Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder[.]

Rulings

Marblegate first moved to enjoin the RSA. Judge Failla of the Southern District of New York denied the motion, primarily because Marblegate failed to show harm. The Court determined that Marblegate would have been *worse off* had the Court enjoined the RSA: Marblegate could recover little or nothing in bankruptcy, and absent *any* restructuring, could recover at most roughly \$2.25 million of its \$14.6 million in notes before EDMC became insolvent. The Court further found that any harm would not be irreparable because, even if the parties executed the RSA (which would divest EDLLC and remove the EDMC guaranty), “broad principles of veil-piercing would enable the Court to facilitate a demand for payment from EDMC wherever within its corporate structure assets happen to be located.” *Marblegate I*, 2014 WL 7399041, at *13. Finally, neither the balance of the equities nor the public interest favored enjoining a \$1.5 billion restructuring based upon the objection of entities holding \$20 million in notes. *Id.* at *14.

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PRACTICE AREA NOTES

Trial Practice Update

Use of Video Testimony at Trial. There's an old saying that a picture is worth a thousand words, and a newer saying that a video is worth a thousand pictures. In our experience, this is especially true in jury trials, where members of the community from all walks of life may be called upon to determine spectacularly complicated disputes in which huge amounts of money, careers, a company's future, or even someone's liberty could turn on the outcome. Videotaped prior testimony can make or break parties', witnesses' and even lawyers' credibility and can be case-dispositive. In this internet age full of smart phones, social media and the like, it is beyond dispute that people receive and absorb most information visually and are not the readers or listeners they once were. People's comfort about making snap decisions about who is good, who is bad, who is believable and who is not, has elevated the importance and impact of the visual image of a witness that testifies at trial by videotape. It is striking how often even the most sophisticated litigants and witnesses regularly testify in deposition that the traffic light was green, but at trial have realized that they need the traffic light to have been red to prevail. Confronting adverse witnesses with contrary sworn testimony is as good as it gets for trial lawyers, but reading questions and answers from a transcript is far from optimal. The best cross-exams are sometimes as simple as pressing "play."

The original use of videotaping depositions was in personal injury matters where the treating physician would be deposed and recorded so as to avoid having the doctor wait around in a courtroom for full days to testify instead of attending to medical necessities. Soon the practice spread to certain third party expert witnesses for the same reasons. From there the practice gained momentum and was used to record a witness's testimony who, because of health concerns or other reasons, could not be relied upon to give his or her testimony live at a trial set sometime in the future. And in litigation involving witnesses residing in various states and even various countries, videotaping depositions became virtually standard practice because the deponents, many of whom were former employees of large companies, were outside the trial court's jurisdiction to compel attendance and would be unavailable. Video testimony has routinely become a substitute for trial testimony. *See* F.R.C.P. 30(4).

At trials, counsel expanded the use of video testimony from merely a substitute for testimony of an unavailable witness to impeachment of a witness called live to testify at trial. This was done by examining a deponent in an effort to make key points or admissions

which, if denied or minimized at trial, could be played to the jury on videotape right after the "live" question to demonstrate this conflict. F.R.C.P. Rule 32(a) states "any party may use a deposition to contradict or impeach testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence." Seeing this contradiction of the in-court testimony of a witness and that made earlier on videotape side by side has an immediate and effective impact on jurors. In accomplishing this effective examination, it becomes important that the questions on both the video and at trial be short, and that the answers sought to be impeached by the video deposition be indeed contradictory. Otherwise it may not be permitted.

In the present climate, a new use of a video deposition of the key witness has evolved. This is known as "impeachment by demeanor." Most commonly, trial counsel attempts to employ this tool by playing an unflattering visual to the jury of a key witness's testimony in opening statement so that this visual begins to have a negative effect on jurors at the very outset of the trial. This would include evasiveness on tough questions or conduct appearing insincere. Whether or not such use of deposition video is permitted is solely up to the discretion of the trial judge. The further away the video testimony is from key issues in the case, the less likely it will be permitted. The more central the testimony is to key issues, the better chance it may be allowed. Since the opening statement is to be based on "what the evidence will be at trial," a successful proponent of playing this excerpt must show its admissibility at trial (relevance, etc.) and be sure the excerpt is actually played during the trial. To prevent the playing of these video excerpts out of context, F.R.C.P. 32(a)(6) provides that, in those circumstances, "an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced"

Although the judge is the gatekeeper of the use of this "impeachment by demeanor" in the opening statement, the witness being deposed with the help of his counsel can minimize this risk through his or her conduct at the deposition. Over the years, certain mannerisms which negatively impact credibility have been recognized. A few examples include: (1) laying back or slumping in the witness chair; (2) swiveling from side to side or rocking back and forth; (3) constant drinking of water when asked pointed questions; (4) looking at the witness's counsel when tough questions are asked; (5) and the long, long pause before answering, "I don't recall." The jury believes that this lawsuit, which they are compelled to sit through, is the

single most important event in the witness's life as well, and even the highest level executive in the company is expected to have a reasonable response to all questions asked of him concerning this matter. All of these risks can be reduced through thorough deposition preparation, which does not only involve a discussion of what a deposition is and the witness's factual role in the case, but also spending time on minimizing the negative demeanor issues by emphasizing conduct which reinforces credibility. These would include leaning forward in your chair, looking at the questioner and responding to the question clearly and succinctly. Often this preparation may involve videotaping a witness during his preparation so he can see for himself his own demeanor and realize the impact that such demeanor could have. The goal should be for your witness to have the exact same demeanor at deposition as at trial, and on direct as on cross.

The preparation should also include a discussion of what the witness should wear at his videotaped deposition. The goal is always to look respectful, professional and credible. Experience shows that these goals can be hindered by even the most mundane things such as wearing plaids, stripes, busy ties or extravagant jewelry. It is preferable that the witness avoid wearing black or white clothing that can also be disruptive on the camera exposure. Solid colors such as blue are ideal.

Finally, it is essential that the witness maintain a professional and courteous tone and demeanor throughout the deposition no matter how bombastic or belligerent the questioner becomes. No doubt the questioner is seeking sound bites to play for the jury. This type of detailed deposition preparation can minimize the risks of a witness at trial being misjudged or misread by any inadvertent conduct at the deposition.

Trademark/Copyright Litigation Update

Federal Circuit Invalidates Apple's iPhone Trade Dresses as Functional. On May 18, 2015, the Court of Appeals for the Federal Circuit reversed a judgment of the Northern District of California that Samsung had diluted Apple's iPhone trade dresses. *Apple Inc. v. Samsung Electronics Co., Ltd. et al*, 786 F.3d 983, 996 (Fed. Cir. 2015). Applying Ninth Circuit law, the Federal Circuit held that the trade dresses are functional and therefore not protectable.

Apple had claimed both registered and unregistered trade dress protection for its iPhone products. The asserted trade dresses included elements such as the rectangular shape of the phones and the use of colorful square icons with rounded edges in the user interface.

Apple bore the burden of proving that its unregistered trade dress was non-functional, while Samsung bore the burden of production in showing that the registered trade dress was functional.

The decision is a significant one for what is often known as "product configuration" trade dress. The Federal Circuit explained that trade dress protection for the "physical details and design of a product" must be limited to those trade dresses that are "nonfunctional." *Id.* at 991. The Court noted that a product feature need only have *some* utilitarian advantage to be considered functional and that a trade dress, taken as a whole, is functional if it is "in its particular shape *because it works better in this shape.*" *Id.* (emphasis added).

In deciding that Apple had failed to prove the non-functionality of its unregistered trade dress, the Federal Circuit applied the Ninth Circuit's four-part test from *Disc Golf Ass'n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998): "(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of the design, and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture." 786 F.3d at 992. With respect to utilitarian advantage, the Federal Circuit explained that, under applicable Ninth Circuit standards, "the party with the burden must demonstrate that the product feature serves *no purpose* other than identification." *Id.* (emphasis in original). The Court then pointed out that Samsung had cited "extensive evidence in the record that showed the usability function of every single element in the unregistered trade dress." *Id.* at 993. With respect to the second *Disc Golf* factor, Apple had raised examples of claimed alternative designs, but its showing was insufficient because it failed to prove that they "offer *exactly* the same features" as the asserted trade dress. *Id.* Likewise, with respect to the third *Disc Golf* factor, the Federal Circuit explained that "if a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality." *Id.* After describing the substance of Apple's iPhone advertisements, the Court observed that "Apple fails to show that, on the substance, these demonstrations of the user interface on iPhone's touch screen . . . were not touting the utilitarian advantage of the unregistered trade dress" *Id.* at 994. Finally, with respect to the fourth *Disc Golf* factor, the Federal Circuit found that Apple cited no applicable record evidence showing that its unregistered trade dress was not relatively simple or inexpensive to manufacture. *Id.* In short, the Federal Circuit held that Apple failed to prove non-functionality for the unregistered trade dress on any of

the *Disc Golf* factors.

Turning to Apple's registered trade dress, the Federal Circuit first explained the significance of a federal trademark registration in the context of functionality analysis. As it noted, a federal registration constitutes prima facie evidence of non-functionality and therefore shifts the burden of production to the defendant to adduce evidence of functionality. *Id.* at 995. Once this presumption is overcome, however, the registration "loses its legal significance on the issue of functionality." *Id.* The Court then found that each of the elements claimed by the registered trade dress, including the design details in each of the icons on the iPhone's home screen, were functional. *Id.* Apple argued that Samsung had improperly disaggregated the registered trade dress into individual elements in analyzing functionality. In rejecting the point, the Federal Circuit observed that Apple could not explain how the arrangement it chose for these functional elements could negate their functionality. *Id.* Thus, the Court concluded that the uncontested evidence demonstrated the functionality of the registered trade dress and held that it was unprotectable as a matter of law.

Energy Litigation Update

Reserve Reports During the Oil Slump. The collapse of oil prices in the latter half of 2014 has led to SEC scrutiny of exploration and production (E&P) company compliance with rules regarding the calculation and reporting of proved reserves. Litigation in that respect could well be on the horizon. That is because oil and gas reserves in the ground are an E&P company's most valuable assets. Reliable estimates of proved reserves are critical to investors and lenders. In addition to supporting valuation, proved reserves secure loans and are the subject of loan covenants. Increased proved reserves lead to increased borrowing capacity. In addition, proved reserves have a direct impact on income statements because increased proved reserves decrease the depletion, depreciation, and amortization expense (DD&A) that must be recognized in a given reporting period under E&P accounting rules.

Under the SEC rules, "proved reserves" are defined as quantities that "can be estimated with **reasonable certainty** to be **economically producible** . . . under existing economic conditions" before the contractual right to operate expires. 17 C.F.R. § 210.4-10(a)(22) (emphasis added). "Reasonable certainty" means "a high degree of confidence that the [reported] quantities will be recovered," or "at least a 90% probability" if probabilistic methods are used. *Id.* at § 210.4-10(a)(24). A reserve is economically producible if it "generates revenue that exceeds, or is reasonably expected to exceed, the costs of

the operation." *Id.* at § 210.4-10(a)(10).

"Proved **developed** reserves" are "reserves that can be expected to be recovered . . . [t]hrough existing wells and existing equipment and operating methods or in which the cost of the required equipment is relatively minor compared to the cost of a new well." *Id.* at § 210.4-10(a)(6)(i). "Proved **undeveloped** reserves" (PUDs) are associated with new wells on undrilled acreage and/or a "relatively major expenditure" on additional equipment. *Id.* at § 210.4-10(a)(31). To book PUDs for undrilled locations, there must be a "development plan . . . indicating that [the locations] are scheduled to be drilled within five years, unless the specific circumstances justify a longer time." *Id.* at § 210.4-10(a)(31)(ii). Under current market conditions, compliance with the five-year PUD rule may become an issue.

After natural gas prices collapsed in 2008, the SEC initiated investigations to determine the impact market conditions had on E&P companies' intent to develop natural gas reserves and whether actual or potential changes in plans had been disclosed to investors. The same questions may be asked now about compliance with the five-year PUD rule, particularly if a prolonged slump results in significant reserves write-downs or performance fails to meet expectations.


After the oil price collapse, E&P companies laid off thousands of workers, idled hundreds of drilling rigs, and slashed capital spending. Unconventional drillers (*i.e.*, shale drillers), which must constantly drill new wells to replace the reserves from wells that deplete rapidly, have focused on their best wells and wrung costs out of their budgets by drilling faster and cheaper—reducing the break-even commodity price needed to establish proved reserves. Many have delayed completion of drilled wells to avoid completion costs (up to 60% of the well cost), effectively storing oil in the ground until prices recover. Some companies have benefitted from higher-price hedges. But, these hedges are starting to roll off and there is a limit to how much costs can be reduced. If market conditions remain the same for an extended period or deteriorate, some E&P companies, particularly highly leveraged companies operating in basins with higher break-even pricing, will face significant distress.

By the time 2014 reserve numbers were reported, companies were already slashing their 2015 capital budgets. Presumably, this meant that development of some PUDs would be deferred beyond 2015. If deferral pushed planned development beyond the five-year window, changed economic conditions will not excuse the delay under the SEC rules. Moreover, if the year-end plan was to drill the delayed wells within the five


year window but after 2015, the company may have assumed improved pricing or costs reductions and that the company would have the capability to drill both the deferred wells and the wells that were otherwise scheduled to be drilled post-2015 in the later period. These assumptions may be challenged, particularly if they have no historical precedent or deviate materially from peer assumptions.

The stakes are high for the industry, which to date has been shored up by a remarkable access to capital. Since the price collapse, North American E&P companies have raised over \$13 billion in 30 separate secondary equity offerings. Public debt offerings and private equity have generated tens of billions more. It is remarkable, say some observers, that such a dramatic drop in oil prices was followed by so much capital rushing into the industry. Some industry observers believe that this money has come from generalists investing in a

distressed sector expecting to reap profits from a near-term recovery. Yet, as prices dropped again in early July, a near-term recovery appears unlikely. Credit and equity markets for the weaker operators are drying up, which should lead to financial distress and investor losses.

In this environment, year-end 2014 plans for developing reported PUDs will be scrutinized. Moreover, if it has become apparent that those plans must change materially, disclosure issues may arise, particularly in connection with the many public offerings that continued to reference the year-end 2014 reserve reports. Identifying a possible change in plans as a risk factor is not sufficient if it was obvious that the risk will be realized. As companies calculate and report their reserves for 2015, they should carefully consider whether their assumptions are overly aggressive and deviate from historical operating precedent or peer assumptions. 

“Demystifying the U.S. Jury Trial” Program Presented in Rio de Janeiro and São Paulo, Brazil


The firm recently conducted U.S.-style mock jury trial programs in Rio de Janeiro and São Paulo, Brazil. The events were attended by approximately 250 general counsels, CEOs, and business leaders from top Brazilian companies, including Banco Bradesco, Ultrapar Participações, BTG Pactual, and Chevron Brazil. The events were co-sponsored by Federação das Indústrias do Estado do Rio de Janeiro (FIRJAN) and Confederação Nacional da Indústria (CNI). As far as the firm is aware, these were the first ever U.S.-style mock jury trials to be presented in Brazil. These programs in Rio de Janeiro and São Paulo follow on the heels of the firm’s successful mock jury trials in Tokyo, Tel Aviv, Beijing, Taipei, Seoul, and Zurich. The firm will present a mock jury program in Mexico City this fall. 

(lead article continued from page 4)

Mr. Piscioti, has no obligation to extradite one of his alleged co-conspirators who has been charged with identical crimes.

Nonetheless, the DOJ appears committed to seeking the extradition of fugitives involved with antitrust crimes wherever possible. Shortly after Romano Piscioti was extradited to the United States to face the charges pending against him, the DOJ obtained the extradition of John Bennett from Canada on fraud charges arising from an alleged bid-rigging scheme surrounding EPA Superfund sites. (Press Release, U.S. Dep’t of Justice, Canadian Executive Extradited on Major Fraud Charges Involving a New Jersey Environmental Protection Agency Superfund Site (Nov. 17, 2014).) While the alleged conduct at issue, bid-rigging, clearly implicated the antitrust laws, Mr. Bennett and his company were charged with fraud. Again, just like in the *Norris* case, the DOJ demonstrated it was willing to pursue alternative charges to prosecute individuals involved in conduct

that may have also violated U.S. antitrust laws.

As the treatment of cartel-related offenses in the United States and the treatment of the same conduct in other countries continues to converge, the “dual criminality” prong of more extradition treaties will likely be satisfied. Consequently, the number of countries in which extradition for antitrust crimes will be available to U.S. prosecutors will continue to expand. As a practical matter, however, there are still a large number of countries where antitrust offenses do not carry criminal penalties, and in virtually every country with a criminal antitrust enforcement regime, the United States has yet to extradite an antitrust fugitive successfully. Thus, the political sensitivities surrounding extradition of foreign nationals and the evolving approach to antitrust enforcement around the world may continue to impede United States prosecutors’ extradition efforts, at least in the near future. 

VICTORIES

Patent Trial Victory for Everlight Electronics

On April 22, 2015, the firm achieved a complete victory for Everlight Electronics Co., Ltd. over Nichia Corporation in the Eastern District of Michigan following a two-week jury trial. The jury found that Nichia's U.S. Patent Nos. 5,998,925 and 7,531,960 were invalid as obvious and separately found that certain claims of the '960 patent were also invalid for lack of enablement.

Nichia is the world's largest manufacturer of LEDs and has a large portfolio of patents. Nichia has aggressively asserted its patent portfolio against most of the major LED manufacturers. Everlight is a much smaller Taiwanese LED manufacturer which began increasing its sales of white LEDs. In the face of this increased competition from Everlight, Nichia began threatening Everlight's customers with patent infringement.

To protect its customers from Nichia's threats, Everlight commenced an action seeking a declaratory judgment that two Nichia patents, U.S. Patent Nos. 5,998,925 and 7,531,960, were invalid, not infringed and/or unenforceable. Nichia quickly counterclaimed with assertions of infringement of these two patents. Both patents relate to white LEDs made by mixing a blue LED with a yellow phosphor to make white light. Nichia's "white light" LED patents are considered among Nichia's most valuable patents and allegedly have been widely adopted by the LED industry. Nichia's infringement allegations included hundreds of Everlight's LED products sold for a variety of applications.

After the Court bifurcated issues of damages and willfulness as well as equitable issues, a two-week jury trial limited to invalidity and infringement commenced on April 7, 2015. As declaratory judgment plaintiff, Everlight presented its invalidity case first. Everlight's expert successfully explained to the jury how the claimed inventions of the two Nichia patents were nothing more than the next logical step in LED technology after the development of an efficient blue LED.

Following presentation of Everlight's invalidity case, Nichia presented its infringement case and its rebuttal to Everlight's invalidity case. Based on the strength of its cross-examination of Nichia's expert, Everlight made the strategic decision to forego its non-infringement rebuttal case and move right to closing arguments. By doing so, Everlight was able once again to focus the jury on its core invalidity arguments. The jury's verdict fully vindicated this strategy and Everlight is now free to sell its white LED products without further interference from Nichia.

Patent Victory for Cisco

Quinn Emanuel Germany successfully defended Cisco in proceedings for alleged patent infringement. On February 11, 2015 the Appellate Court Karlsruhe, Germany handed down its decision in the matter of *Linksmart Wireless Technology LLC v. Deutsche Telekom*, confirming full dismissal of the case for lack of infringement. Linksmart, accused all public internet hotspots maintained by Deutsche Telekom in Germany (e.g., on trains, airports, etc.) to infringe the German part of its European Patent EP 1 076 975 B1 on a "User specific automatic data redirection system" for controlling internet traffic.

As Cisco supplied part of the accused infrastructure to Deutsche Telekom, it decided to join the infringement proceedings as a third party intervenor to support Deutsche Telekom. Quinn Emanuel led by Dr. Marcus Grosch convinced the Appellate Court to confirm full dismissal of the case as established by the District Court. The decision is subject to a further appeal.

\$430 Million Victory in Foam Antitrust Case

On May 19, 2015, Quinn Emanuel and its co-counsel in *In re Polyurethane Foam Antitrust Litigation*, 10-md-2196 (N.D. Ohio) publicly announced six settlements, totaling \$275 million, with the remaining defendants in that price-fixing class action. Combined with previous settlements in the case, we achieved over \$430 million for our clients, a certified class of direct purchasers of flexible polyurethane foam. This total amount represents more than 50% of the class's highest damages estimate (described by the Court as the "best case scenario") and more than 80% of the class's alternative damages estimate. In the world of antitrust class actions, such a level of recovery is nearly unheard of.

Flexible polyurethane foam is a type of cushioning product that is widely used in, among other things, furniture, mattresses, carpet underlay and automobile seats. In 2010, after the Department of Justice announced an investigation into price fixing practices in the polyurethane foam industry, Quinn Emanuel and several other firms filed class actions on behalf of a putative class of direct purchasers of flexible polyurethane foam. After those cases were centralized in the Northern District of Ohio, Quinn Emanuel was selected as one of two co-lead counsel.

The six final settlements came on the eve of trial, which was scheduled to begin on March 31, 2015. In the four and a half years leading up to that moment, the firm won numerous victories against a bevy of the nation's most well-known law firms. Among other

things, we defeated the defendants' multiple motions to dismiss; undertook wide-ranging discovery and prevailed on numerous critical discovery disputes; achieved an early settlement with, and significant assistance from, a defendant that had been granted amnesty by the Justice Department; won certification of a nationwide class of direct purchasers, and then defeated the defendants' Rule 23(f) petition to have the Sixth Circuit review the grant of class certification; with very limited exception, defeated defendants' motions for summary judgment across the

board; prepared the case for a jury trial and won several critical evidentiary rulings in the weeks before opening statements; and defeated the defendants' petition for certiorari to the Supreme Court seeking review of the class certification ruling.

The settlements have since been preliminarily approved and are scheduled for a final fairness hearing on October 9, 2015. [Q](#)

(Noted with Interest continued from page 5)

The ruling in *Marblegate I*, however, was by no means a defeat for Marblegate. To the contrary, although the Court denied Marblegate's request for an injunction, the Court raised serious questions as to whether the RSA violated Marblegate's rights under TIA Section 316. The Court held that the TIA's purpose would be served by protecting individual holders' rights when a majority agrees to modifications that "effect an involuntary debt restructuring." *Id.* at *19. The court explained, "where a debt reorganization that seeks to involuntarily disinherit the dissenting minority is brought about by a majority vote, that violates the fundamental purpose of the Trust Indenture Act." *Id.* *Marblegate I* was relied upon a few weeks later by Judge Scheindlin of the Southern District of New York, who denied a motion to dismiss claims challenging under TIA Section 316 the release of a parent guarantee. *MeehanCombs Global Credit Opp. Funds, LP v. Caesars Entertainment Corp.*, 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015).

EDMC then executed the RSA (modified to retain the guaranty of Marblegate's notes pending the outcome of the Court's ultimate ruling on the merits). On June 23, 2015, the Court issued its decision on whether the RSA had violated TIA Section 316(b). That decision hinged on the Court's choice between the parties' competing interpretations of TIA Section 316(b). Defendants had urged the Court to find that TIA Section 316(b) applies solely to the holder's *legal* rights, and not the holder's *practical* avenues of recovery. Under Defendants' interpretation, the RSA could therefore remove Marblegate's ability to recover from EDLLC (by divesting its assets) and EDMC (by removing its guarantee), as long as the RSA did not destroy Marblegate's right to bring a (pointless) suit to recover principal and interest that EDLLC could not afford to pay.

The Court disagreed with Defendants' position, finding that TIA Section 316(b) entitles bondholders not merely to the legal right to sue, but to the substantive, practical right to recover. In its prior order denying the preliminary injunction, addressing Marblegate's likelihood of success

on the merits, the Court had concluded that TIA Section 316(b) is "substantive rather than formalist" and "simply does not allow . . . a debt reorganization outside the bankruptcy process to effectively eliminate the rights of nonconsenting bondholders." *Marblegate I*, 2015 WL 7399041 at *21. In its second opinion, which exhaustively detailed the TIA's legislative history, the Court reiterated its earlier provisional holding: "[T]o interpret Section 316(b) as protecting merely the right to sue for payment, and not any substantive right to *receive* such payment, would be unfaithful to the text and the drafting history." *Marblegate II*, 2015 WL 3867643 at *11. The Court found that because EDLLC was already fully divested of its assets, removing the EDMC guaranty would "sever the final avenue for Marblegate's recovery" and thus "enfeeble the Trust Indenture Act." *Id.* at *13. Refusing to do so, the Court ordered EDMC to "guarantee any past and future payments of principal and interest to Marblegate." *Id.* at *14.

The ruling raises interesting issues. By refusing to consent, Marblegate obtained full value on its notes, more than was likely possible through either restructuring or bankruptcy. At first glance, therefore, the Southern District's ruling might disincentive bondholders to consent to any out-of-court restructuring that offers less than 100% value. Indeed, the Court itself recognized "the potentially troubling implications of the Trust Indenture Act in rewarding holdouts [and] its arguable obsolescence given the expense and complexity of modern bankruptcy." *Id.* at *13. However, the Court also recognized that "courts should give effect to the purpose of the [TIA], and not allow minority bondholders to be forced to relinquish claims outside of the formal mechanisms of debt restructuring." *Id.* at *12.

How the *Marblegate* decisions will affect the ability of parties to reach unanimous agreement on out-of-court restructuring deals thus remains to be seen. Debtors and creditors alike will be well advised to keep an eye on the issue. [Q](#)

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business litigation report

quinn emanuel urquhart & sullivan, llp

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