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Foreign Investor Protection v. National Sovereignty: The Pros and Cons of Investor-State Arbitration

United States companies investing abroad stand to gain additional legal protections in the near future from two international treaties currently under negotiation intended to safeguard investments of United States investors in China and throughout much of the Asia-Pacific. These treaties would of course also extend greater legal protections to investors of other signatory countries in the United States. Public interest groups fear a threat to United States regulatory freedom by extending those same protections to foreign investors, despite the United States having never been found to have breached any of these international legal instruments. These concerns are felt in other countries also, because the rights and obligations these regimes create are reciprocal.

The Trans-Pacific Partnership (TPP) is a multilateral free trade agreement (FTA) currently under negotiation between the United States and 11 other countries throughout the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam). These 12 states account for around 40 percent of the world's GDP and close to one third of global exports. While discussions are on-going with respect to the precise scope and application of the TPP, according to an announcement on October 25, 2014 by the Australian trade minister, Andrew Robb, there is a push to conclude the treaty by the year's end. Such is its significance to U.S. investors that the Office of the U.S. Trade Representative has described the TPP as "the cornerstone of the Obama Administration's economic policy in the Asia Pacific." It remains to be seen, however, whether ultimately

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INSIDE

Philippe Selendy Featured in *Financial Times*: "The Man Who Took on Wall Street"

Quinn Emanuel New York-based partner Philippe Z. Selendy was recently featured in the world business newspaper, *Financial Times*, as "The Man Who Took on Wall Street." The story describes Mr. Selendy and his QE team, on behalf of the U.S. Federal Housing Finance Agency (as conservator for Fannie Mae and Freddie Mac), taking on virtually all the major Wall Street banks for their role in marketing the faulty residential mortgage-backed securities that led to the economic crisis in 2008. Mr. Selendy's innovative strategy led to the filing in 2011 of 18 separate complaints, asserting a combination of federal and state securities law claims against Goldman Sachs, JPMorgan Chase, Bank of America, and others. After repeated victories on potentially dispositive legal issues against a roster of leading national law firms, Mr. Selendy and his team has thus far helped secure recoveries of over $20 billion for the American taxpayer, with settlements achieved against 16 of 18 defendant banks and two actions still left for trial. Q

Vicki Maroulis Named One of The "Top Women In Tech Law" by *The Recorder*

The Recorder recognized Victoria Maroulis as one of the "Women Leaders in Tech Law." The article particularly highlighted her work in the ongoing "Smartphone wars" between Samsung and Apple, where she has represented Samsung for the past three years. Ms. Maroulis is co-managing partner of the firm's Silicon Valley office. Q

Quinn Emanuel Recognized by *The Legal 500 Asia-Pacific 2015*

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the U.S. is willing to bind itself to multilateral legal arrangements that in any way limit its legislative and regulatory discretion, in particular, by opening itself to potential legal claims brought by foreign investors in investor-state arbitration and agreeing to be bound by the resulting arbitral awards.

The TPP is intended to govern numerous aspects of international trade relations between member states and to supplement WTO rules largely unchanged since 1994. The investment chapter of the TPP will provide substantive legal protections for investors of each TPP state and in respect of their investments made in the territory of other TPP states. It is set to secure standards of treatment already widely found in bilateral investment treaties (BITs) or FTAs – including non-discrimination, minimum standards of treatment, rules on compensation for expropriation, and prohibitions on specified performance requirements that could distort trade and investments. Crucially for investors, at present it is likely to include provisions for binding investor-state dispute settlement.

China does not currently stand to be party to the TPP. It has labelled the TPP negotiations as part of a U.S. strategy to "contain" China by gathering together Pacific nations against China's interests. Suspicion may be easing, with Vice Minister of Finance Zhu Guangyao contemplating a TPP with China in it, recently stating that any trade bloc not including China would be "incomplete". But the challenge of securing legal protections at the international level for U.S. investments in China is not a new one. The U.S. and China, the world's two largest economies, have for some years been in negotiations about a potential U.S.-China BIT. The U.S. Department of the Treasury has said that such a treaty would be "an important step in opening China's economy to U.S. investment by eliminating market barriers, and levelling the playing field for American workers and businesses".

The advantages for investors that stem from the presence of bilateral and multilateral free trade and investment protection agreements cannot be doubted. Such treaties often provide the only means of legal recourse for investors abroad who fall victim to sovereign interference with the enjoyment of their investments. The recent high-profile *Yukos* arbitration, brought under the Energy Charter Treaty (ECT), a sector-specific multilateral trade and investment protection treaty, demonstrates the potential for private actors to use the international legal system of investment treaty protection to hold to account a superpower. The award in that case, against the Russian Federation, is by far the largest in history (USD 67 billion and counting). As noted by Quinn Emanuel partner (and former lead counsel to Yukos) Philippe Pinsolle, such an outcome would have been inconceivable before the era of bilateral and multilateral investment protection treaties.

In recent years, however, the system of investor-state arbitration has come under fire from some quarters. Among several criticisms, there is frequently perceived to be imbalance in a system that puts private commercial interests ahead of broader considerations of public policy, sovereign regulatory authority, and democratic legitimacy, at least in countries where the government has been democratically elected.

Concerns as to undue interference with a state's sovereign right to legislate have rarely been more apparent than in the on-going case of *Phillip Morris v. Commonwealth of Australia*. In that case, a Hong Kong-based subsidiary of Philip Morris brought a claim under the Australia-Hong Kong BIT in respect of tobacco plain packaging legislation introduced by the Australian government. Phillip Morris argues that the Australian legislation constitutes a prohibited "unreasonable and discriminatory" measure, an expropriation of its valuable intellectual property and goodwill, and a failure to provide for its investments "full protection and security" and "fair and equitable treatment" as guaranteed by the treaty.

Phillip Morris' claim has been met with criticism. The public health interest in anti-tobacco legislation hardly needs repeating. The notion that an unelected arbitral tribunal (in this confidential UNCITRAL proceeding, operating largely behind closed doors) should have the power to sanction a sovereign state for introducing legislation of this nature is considered unpalatable by many.

Claims brought against Germany by Swedish state-owned power company Vattenfall under the ECT have caused similar consternation. In 2009, Vattenfall challenged environmental restrictions imposed in respect of a multi-billion euro coal-fired power plant to be constructed along the banks of the Elbe River. Vattenfall argued that the City of Hamburg's environmental regulations targeted its investment and rendered the project economically unviable, in breach of Germany's investment protection obligations under the Energy Charter Treaty. In 2012 Vattenfall brought a second arbitration against Germany, also under the ECT, before ICSID. The second Vattenfall arbitration has been yet more controversial than the first. It concerns claims by the energy company for over EUR 3.7 billion in respect of the closure of two of its nuclear power plants. Germany argues that the closures are in furtherance of its post-Fukushima policy of phasing out nuclear energy by 2022.

The U.S. itself has also been subject to investment claims engaging similarly controversial questions of public policy. A well known example is the claim initiated in 1999 by Methanex, a Canadian chemicals manufacturer, based on alleged violations of Chapter 11 of the North American Free Trade Agreement (NAFTA), a FTA between the U.S., Canada and Mexico. The claim concerned environmental regulations enacted by the State of California banning the sale and use of the gasoline additive known as MTBE. Methanex was at the time the world's largest producer of methanol, a feedstock for MTBE. In a public award, the arbitral tribunal rejected Methanex's claims, siding with the U.S. government in stating that non-discriminatory regulations in the public interest should almost never be considered a compensable expropriation. That the U.S. won did little, however, to lessen the antipathy to these treaties, with many opposed to the idea that the *bona fides* of public regulation might ever be scrutinized by a privately-selected tribunal.

As well as giving rise to objections on the principle that legitimate environmental and public health measures enacted by sovereign governments ought not be second-guessed by international investment tribunals, these cases highlight concerns that foreign nationals might enjoy greater legal rights than nationals of the host state by virtue of their ability to bring treaty claims. Commentators have argued that in *Vattenfall* the rights provided to foreign investors in investment treaties surpassed those provided by the German Basic Law (*Grundgesetz*), and the careful balance achieved between private property rights and public welfare objectives. Further, it has been said that the investment protection system focuses exclusively on investors' rights or interests, with little regard to investors' responsibilities and obligations.

The debate is not taking place only in the U.S. Indeed, in recent years the European Commission has sought to bring about the termination of all BITs concluded between EU member states on the basis of their alleged incompatibility with an emerging harmonized body of European trade law. As recently as October 2014, Jean-Claude Juncker, president-elect of the European Commission, expressed hostility to the inclusion of investor-state resolution provisions in the Transatlantic Trade and Investment Partnership (TTIP), a FTA currently under negotiation between the EU and U.S. Juncker has stated that the Commission "will not accept that the jurisdiction of courts in the EU member states be limited by special regimes for investor-to-state disputes ... [there will be nothing in the TTIP] that will allow secret courts to have the final say in disputes between investors and states". Perhaps jaded by its experience in the *Vattenfall* cases, Germany has been particularly vociferous in its opposition to investor-state arbitration, despite the first ever BIT being one Germany negotiated with Pakistan in 1959.

The system of international investment treaty arbitration has many critics but its flaws should not detract from the invaluable role it serves in protecting investments abroad exposed to regimes with lesser standards of governance, or victim to the abusive exercise of sovereign power. The proper parameters of the substantive protections commonly available under investment treaties are subject to debate and continuous refinement as an increasingly coherent body of consistent jurisprudence emerges. What cannot be doubted, however, is that the system currently plays a significant role in establishing checks and balances on the otherwise unfettered exercise of sovereign power, especially in economies where the local courts do not offer a level playing field or tolerably familiar standards of justice.

Taking the *Yukos* case as an example, the arbitral tribunal held unanimously that the Russian Federation had breached its international obligations under the ECT by destroying the Yukos Oil Company and expropriating its assets. The arbitral tribunal found that "Yukos was the object of a series of politically-motivated attacks by the Russian authorities that eventually led to its destruction", the Russian Federation's aim being "to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate [Mikhail Khodorkovsky] who gave signs of becoming a political competitor". Yukos had previously been the largest oil company in Russia in terms of daily crude oil production. The arbitral tribunal found that state officials had arrested, imprisoned, and harassed Yukos employees, manufactured a false pretext for confiscation of Yukos's assets, and later transferred all of Yukos's assets to certain state-owned companies. For the claimants in the *Yukos* case, investment treaty arbitration provided a unique form of effective legal redress.

In 2007, Dutch investor ConocoPhillips initiated an arbitration against Venezuela before the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). The claimants had invested in major oil projects in Venezuela that were subsequently nationalized by the government of the late president Hugo Chavez. The expropriation took place without any offer of adequate compensation, whilst the investors were also subjected to discriminatory taxation measures. Amongst other things, the arbitral tribunal held that a sovereign state's taxation policy can under certain circumstances be subject to scrutiny under international investment law, despite this traditionally being seen in some quarters as a sovereign power beyond the reach of investment treaty tribunals.

The 2012 award in the *Occidental v. Ecuador* arbitration, brought by an American investor under the Ecuador-U.S. BIT, occasioned the then largest ever award by an ICSID tribunal at over USD 1.7 billion, plus interest. The dispute concerned the unlawful termination by Ecuador of a contract entered into with the claimants for the exploration, and development of an oilfield in the Ecuadorian Amazon. ExxonMobil enjoyed a similar success just this year in a case against Venezuela.

Yukos, *ConocoPhillips*, *Occidental* and *ExxonMobil* all highlight the potentially far-reaching impact and effectiveness of claims under investment protection treaties. Both the TPP and China-U.S. BIT stand to make foreign investment in the participating states a more enticing prospect. Put differently, it may reduce the costs of investing in those countries, both for investors who might otherwise seek greater levels of return to compensate for the lack of recourse in the event of sovereign misconduct, and for States, who need not offer as attractive terms to foreigners in order to attract their capital and know-how. The willingness of arbitral tribunals to deliver awards worth billions of dollars in circumstances where sovereign states might otherwise presume to act with impunity significantly levels the playing field between private investors and foreign governmental power. To this end, the draft investment chapter of the TPP aims to strike a balance between safeguarding investors' rights and protecting the rights of TPP countries to legislate in the public interest.

Nonetheless, it remains to be seen exactly what form the TPP's protections ultimately will take. It is still in doubt, for example, whether Australia will consent to the TPP's proposed investor-state dispute settlement procedures, given the announcement of recent governments that it no longer supports such procedures in its trade agreements.

Further, certain U.S. state legislators have expressed concerns in an open letter to the negotiators of the TPP, urging them to oppose the inclusion of investor-state arbitration provisions in the TPP. The open letter expresses a "particular concern about the impact on state regulatory, legal and judicial authority". It was concerns such as these that, in the 1990s, led to the U.S. ultimately not signing up to the ECT despite having been instrumental in its formation.

The U.S.-China Business Council (USCBC) has expressed strong support for the proposed U.S.-China BIT. In October 2014, 51 CEOs and members of the USCBC wrote to President Obama, urging his administration to "make the prioritization of a high-standard BIT between the United States and China a visible part of your visit to China in November and bilateral meeting with President Xi". Among other matters, the USCBC has urged the U.S. government to ensure that any treaty includes only a very limited list of so-called "excluded sectors", these being areas of the economy that the parties reportedly might agree to place beyond the scope of the treaty's coverage. The eventual conclusion of a U.S.-China BIT could have significant implications for trade and investment flows between the two countries.

Bilateral investment treaties concluded between economically powerful states and economically weak states can be seen as having asymmetrical effects. The more numerous and active investors of the more powerful state, often large multinational corporations, receive greater benefit than the numerically fewer and less well-resourced investors of the economically weak state. The *quid pro quo* for the economically weak state is the attraction of foreign investment and know-how, while the flow of investment from the weak state to the powerful state is often comparatively negligible. This cannot be said of the relationship between the U.S. and China, the world's two most economically powerful states. The terms of any eventual treaty will be carefully negotiated, with each wary of offering any net advantage to the other. Finalisation of the text and a signing ceremony would not be the end of the story, since most treaties only acquire force of law upon ratification. A BIT was negotiated between the U.S. and Russia and signed in 1991, for instance, but it was never ratified and brought into force.

Should either the TPP or the proposed U.S.-China BIT come to fruition, not de-clawed but fully equipped with investor-state arbitration, they will afford clients and the counsel who support them an additional layer of legal rights for their investments abroad and a forum in which to seek redress where otherwise there might be none.

Gelboim et al. v. Bank of America Corp. et al.: Supreme Court to Address Viability of Partial Appeals in Multi-District Litigations

Timing is everything. As any trial lawyer can tell you, the right to an appeal is important. But often, the right to a *speedy* appeal can be even more valuable. Under the final judgment rule, however, parties in federal court can appeal a ruling only after the district court has entered a final judgment. 28 U.S.C. § 1291. Courts apply this rule in the vast majority of cases, which involve a single or small group of plaintiffs suing a single or small group of defendants. As cases become more complex, however, the final judgment rule's bright-line application starts to fade. Parties to a class action, for instance, would have to wait until final judgment to appeal the grant or dismissal of class certification. Recognizing the potential significance of a class certification decision (and the harm that can in some cases flow from a delayed appeal), the Supreme Court carved out a right to request an immediate appeal of a class certification decision. Fed. R. Civ. P. 23(f). The Court has not yet created a similar mechanism for speedy appeal of major decisions in multi-district litigation, such as a grant of a motion to dismiss applicable only to certain plaintiffs. Lower courts have dealt with the issues in different ways, and, as a result, there is now a Circuit split as to whether partial appeals should be permitted in a MDL. The Supreme Court recently granted certiorari on this issue in *Gelboim v. Bank of America Corp.*, Case Nos. 13-3565, 13-3636, 2013 WL 9557843, 2013 U.S. App. LEXIS 26157 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 2876 (June 30, 2014) (No. 13-1174).

One approach, adopted by the Ninth, Tenth, and Federal Circuits, is to categorically prohibit partial appeals in a MDL until a final judgment as been rendered as to all actions *unless* the district court certifies an interlocutory appeal under Rule 54(b). *See, e.g.*, *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984); *accord Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (reasoning that applying a flexible standard "would lead to the same piecemeal review Rule 54(b) seeks to prevent"); *Spraytex, Inc. v. DJS&T & Homax Corp.*, 96 F.3d 1377, 1380 (Fed. Cir. 1996). In the First and Sixth Circuits, by contrast, courts allow a claimant dismissed from a consolidated action to appeal as of right without requiring the claimant to obtain certification under Federal Rule 54(b). *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972); *see also Kraft, Inc. v. Local Union 327, Teamsters*, 683 F.2d 131, 133 (6th Cir. 1982). A number of remaining courts—the Third, Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—apply a more flexible standard, evaluating each case individually. *See, e.g.*, *Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013); *United States* ex rel. *Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996); *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991); *Ivanov-McPhee v. Washington Nat'l Ins. Co.*, 719 F.2d 927 (7th Cir. 1983); *Ringwald v. Harris*, 675 F.2d 768 (5th Cir. 1982).

The Second Circuit, which rendered the *Gelboim* decision now before the Supreme Court, has adopted an approach similar to the Ninth and Tenth Circuits, applying a presumption of non-appealability that can be overcome only "in highly unusual circumstances." *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988). *Gelboim* involves the LIBOR manipulation scandal that broke in 2011, in which numerous banks have been implicated in manipulating the London Interbank Overnight Rate ("LIBOR"), a financial benchmark that represents the average interest rate banks charge one another for short-term loans. Plaintiffs throughout the country brought suit against numerous large banks that allegedly participated in LIBOR manipulation, including Bank of America, Barclays, Citibank, Credit Suisse, Deutsche Bank, J.P. Morgan Chase, and the Royal Bank of Scotland. Those actions were consolidated into a MDL before the Honorable Judge Naomi Reice Buchwald in federal court in New York. The plaintiffs brought RICO, antitrust, commodities manipulation, and various state law claims. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, slip op. at 2 (S.D.N.Y. Mar. 23, 2013). On March 23, 2013, Judge Buchwald dismissed many claims, including-the antitrust, RICO, and (in part) the commodities manipulation claims. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, slip op. at 3-4.

Following Judge Buchwald's ruling, those plaintiffs who had asserted *only* an antitrust claim were left with no surviving claim, and no ability to appeal since no final judgment had been entered across the cases in the MDL. *Gelboim v. Bank of America Corp.*, Case Nos. 13-3565, 13-3636, 2013 WL 9557843, 2013 U.S. App. LEXIS 26157 (2d Cir. 2013). Those plaintiffs sought Rule 54(b) certification, which Judge Buchwald denied. The Second Circuit denied their appeal. Plaintiffs then petitioned the Supreme Court to resolve the circuit split over partial appeals in consolidated actions, which, if decided in their favor, would allow the plaintiffs to seek review of the motion to dismiss.

In *Gelboim*, the petitioners argue that the Supreme Court should adopt the First Circuit standard—that plaintiffs ought to have a right, not subject to the district court's discretion under Rule 54(b), to promptly appeal an order dismissing all their claims. As petitioners have argued, had there been no MDL to begin with, they would have had the right to immediately appeal from the complete dismissal of their case simply as a matter of course. Petitioners maintain that they should not be denied this right merely because other parties have elected to pursue similar claims. Petitioners further argue that many MDLs involve numerous pending actions, and depriving individual parties of the right to promptly appeal the denial of their claims could entail extreme delays, which, as a practical matter, would leave many litigants with no meaningful appellate rights at all.

The *Gelboim* respondents argue that Rule 54(b) and Section 1292(b) of title 28 of the United States Code, which provides a statutory basis for trial court judges to allow interlocutory appeals, are the proper mechanisms for obtaining review in a partial appeal. They argue that these provisions are preferable because they allow the trial judge to decide whether an appeal would be more efficient given the particular facts and claims in any particular situation. Moreover, respondents argue, allowing already-dismissed claimants to immediately appeal risks prejudice to the remaining litigants. By permitting the party with the weakest case (whose claims were therefore dismissed) to first present a contested issue on appeal, there is an increased potential for creating unfavorable precedent for the remaining litigants.

This case presents the Court with an opportunity to resolve the circuit split, and clarify the application of the final judgment rule and Rule 54(b) in the MDL context. Oral argument is set for December 9, 2014. Q

Quinn Emanuel Recognized by *The Legal 500 Asia-Pacific 2015*

Quinn Emanuel and its attorneys have been recognized once again by *The Legal 500 Asia-Pacific*. In its 2015 edition, the publication ranked Quinn Emanuel in Dispute Resolution (Australia), in Dispute Resolution and Intellectual Property (international firms and joint ventures) (Japan), and as a foreign firm (South Korea). Six of Quinn Emanuel's attorneys were also honored individually:

Japan:

- **Ryan Goldstein**: Named a "Leading Lawyer" in the Japan Dispute Resolution category and a "Recommended Lawyer" in the Japan Intellectual Property category.
- **Wayne Alexander:** Named a "Recommended Lawyer" in the Japan Dispute Resolution and the Japan Intellectual Property categories.
- **Marc Weinstein:** Named a "Recommended Lawyer" in the Japan Dispute Resolution category.

Australia:

- **Michael Mills:** Named a "Leading Lawyer" in the Australia Dispute Resolution and Australia Insurance categories.
- **Michelle Fox:** Named a "Leading Lawyer" in the Australia Insurance category and a "Recommended Lawyer" in the Australia Dispute Resolution category.
- **Beau Deleuil:** Named a "Recommended Lawyer" in the Australia Dispute Resolution category.

White Collar Litigation Update

The Future of the Department of Justice's High Visibility Offshore Tax Evasion Initiative. On August 29, 2013, the U.S. Department of Justice ("DOJ") Tax Division announced the Program for Non-Prosecution Agreements and Non-Target Letters for Swiss Banks (the "Program"). The announcement of this unprecedented program was the culmination of the U.S. government's multi-year initiative to investigate and prosecute Swiss banks, bankers and third-party service providers, such as asset managers, lawyers and accountants, for aiding and abetting offshore tax evasion by U.S. taxpayers. This initiative started with the investigation of UBS AG, Switzerland's largest bank, which resulted in UBS entering into a Deferred Prosecution Agreement on February 23, 2009 and paying $780 million in fines and restitution to the DOJ and U.S. Securities and Exchange Commission ("SEC").

The investigation of UBS, enabled by the disclosures of a former UBS banker and whistleblower, marked the first time DOJ was able to penetrate the world's largest offshore banking jurisdiction's vaunted bank secrecy laws and obtain the names of undeclared U.S. taxpayers. To broaden its initiative beyond UBS, DOJ successfully used two principal avenues: (1) together with the U.S. Internal Revenue Service ("IRS"), it implemented the first of three Offshore Voluntary Disclosure Programs ("OVDP") for undeclared U.S. taxpayers. As of year-end 2013, over 40,000 U.S. taxpayers entered into the OVDP, providing detailed information about the banks and advisors who serviced and assisted them with keeping their undeclared assets hidden offshore. Through the OVDP, the U.S. government has recovered over $6 billion in unpaid taxes, interest, and penalties to date. (2) The DOJ obtained from UBS the names of banks to which thousands of its undeclared U.S. clients transferred their assets.

The wealth of information developed from these sources led to additional investigations of 14 banks in Switzerland since 2009. The most prominent example being Credit Suisse AG, Switzerland's second largest bank, which recently pleaded guilty and paid $2.8 billion in penalties and restitution to the DOJ, SEC, and New York Department of Financial Services. The U.S. Attorney's Office for the Southern District of New York also successfully prosecuted Switzerland's oldest private bank, Wegelin & Co., which led to the Bank's demise before it pleaded guilty and paid $74 million in fines and restitution in 2013. In addition, DOJ has prosecuted over 30 individual Swiss bankers, asset managers, lawyers, and other third-party service providers over the past six years.

The Program constitutes an effort by DOJ and the Swiss government to structure investigations of additional Swiss banks under a streamlined framework that provides for penalty payments and information regarding employees, third party service providers and, ultimately, client information from participating banks in exchange for Non-Prosecution Agreements. 106 Swiss banks joined the Program by December 31, 2013. The Program excludes individual bank employees and third parties, who remain at risk of prosecution.

Despite DOJ's efforts, it remains under substantial political pressure to deliver convincing results. Spearheaded by the U.S. Senate Subcommittee on Permanent Investigations, there has been heavy bipartisan criticism of DOJ's failure to identify more U.S. taxpayers hiding their assets offshore. In a report released February 26, 2014, the Subcommittee faulted DOJ for its lax enforcement efforts and failure "to utilize available U.S. legal means to obtain the names of tens of thousands of additional U.S. persons whose identities are still being concealed by the Swiss."

DOJ responded by indicating that it is using the Program as a pilot model for other jurisdictions that DOJ aims to target after Switzerland, including Singapore, Hong Kong, the Caribbean, and Luxembourg, all offshore jurisdictions with bank secrecy protections. The extensive information the Program and OVDP participants are providing will substantially aid DOJ in identifying and prosecuting additional banks and bankers in other jurisdictions and the U.S. taxpayers they serviced.

Class Action Litigation Update

Class Action Defense Menu: Statutes of Limitations Served Two Ways. The statute of limitations is an underutilized but potentially potent defense in many consumer class actions. The defense can be raised two ways. First, as in any lawsuit, defendants can argue the named plaintiff brought a stale claim. This involves a specific inquiry into the experience of the named plaintiff, whether his claim has expired, and if so, whether he reasonably and diligently sought to preserve his rights such that the so-called "discovery rule" is met. Second, defendants can argue in opposing class certification that statute of limitations issues create individualized issues that render certification inappropriate. Both tactics can be effective class killers.

Named Plaintiff-Specific Defense

Consumer class actions often relate to products that have been on the market for years but only recently become the subject of controversy. Thus, class actions routinely are brought years after the allegedly illicit activity began–for example, FDA-approved drugs accused of unlabeled side effects, natural foods that include a now out-of-vogue ingredient, and vehicles with allegedly dangerous properties, could all be in use for years before a plaintiff decides to sue. In such cases, the claim should be barred unless plaintiffs can rely on the "discovery rule," which "postpones accrual of a claim until the plaintiff discovers, or has reason to discover, the cause of action." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008) (internal quotations omitted).

Quinn Emanuel recently successfully asserted this defense on behalf of its client in *Plumlee v. Pfizer, Inc.*, No. 13-CV-00414-LHK, 2014 WL 4275519 (N.D. Cal. Aug. 29, 2014). Judge Lucy H. Koh of the Northern District of California granted Pfizer's motion to dismiss on statute of limitations grounds. The plaintiff claimed a medication did not work five years after she stopped taking it. The longest limitations period for her claims was four years. Judge Koh dismissed with leave to amend, giving plaintiff the opportunity to plead diligence and invoke the discovery rule. The plaintiff's amended complaint essentially alleged she had stumbled upon the information on which she based her complaint while watching a television show but had otherwise done nothing to satisfy her duty of diligence. Because plaintiff failed to show she "acted reasonably and diligently in preserving [her] rights," the discovery rule did not apply to toll the claims she had asserted on behalf of the class. *Id.* at *6-7. The case was dismissed without leave to amend. *Id.* At *9.

Rule 23 Predominance Defense

Class action defendants have a second opportunity to assert a statute of limitations defense in the context of class certification with respect to the issue of predominance. Under the right circumstances, defendants can show that calculating and applying the statute of limitations-not only to the named plaintiff but also the hundreds, thousands, or millions of absent consumer class members–presents so many individualized issues that certification is inappropriate. For example, assume a product has been on the market for years with the same ingredients. From time to time, there was public discussion about whether a particular ingredient is effective, harmful to the environment, or raises some other issue of public concern. For some reason, the issue suddenly becomes more prominent and lawsuits follow. The fact that the issue was publicly addressed in news reports or other public literature in the past may create a predominance defense, because it will be necessary to explore each class member's exposure to the prior publicity to determine if his or her claim is barred.

In *Thorn v. Jefferson-Pilot Life Ins. Co.*, for example, the Fourth Circuit affirmed denial of class certification, finding "because [the District Court] could not resolve [the] statute of limitations defense on a class-wide basis, issues common to the class did not predominate over individual ones." 445 F. 3d 311, 314 (4th Cir. 2006). Defendants had retained a historian to collect news reports published over the course of an entire century showing consumers might have known of their right to bring a claim, based on whether they had seen the reports. *Id.* at 316. Additionally, the expert showed plaintiffs could have learned of their claims through "numerous sources of information." *Id.* at 316. Given this history, the Fourth Circuit affirmed a holding that determining whether any given plaintiff had advance, actual or constructive knowledge of his or her claim–which would mean the statute of limitations had run–would require, essentially, individual trials. *Id.* at 327. Individual issues thus predominated and precluded certification. *Id.*

Even where the statute of limitations argument does not carry the entire load of defeating certification, it can be the straw that breaks the back of an otherwise marginal class. For instance, in *Corley v. Entergy Corp.*, the Eastern District of Texas criticized plaintiffs' damages formula and causation argument before noting that assessing whether individual class members' claims were timely, and whether tolling applied to their claims, was an analysis "not amenable to class treatment:" there were too many states at issue, each with different statutory lengths, and each depending on individualized facts for each plaintiff. 220 F.R.D. 478, 488 (E.D. Tex. 2004) *aff'd sub nom. Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350 (5th Cir. 2005). Similarly, in *Doll v. Chicago Title Ins. Co.*, a court denying certification found that applying the discovery rule to different class members would involve "facts unique to each class member," and that varying limitations laws among the 18 states created further individualized issues; for this reason and others, certification was inappropriate. 246 F.R.D. 683, 687-690 (D. Kan. 2007); *see also Rosen v. Chrysler Corp.*, 97-CV-60374-AA, 2000 WL 34609135 at *12 (E.D. Mich. July 18, 2000) (denying certification and finding statute of limitations defense would involve "assessment of complex individual facts").

Appellate Practice Update

Preview of the U.S. Supreme Court's October 2014 Term. The Supreme Court has begun its October 2014 Term with a docket featuring more constitutional and criminal law cases than business cases, but a few business cases before the Court this Term have received significant attention. For example, in *Young v. United Parcel Service* (No. 12-1226), the Court will consider whether, and in what circumstances, the federal Pregnancy Discrimination Act requires an employer that provides work accommodations to non-pregnant employees to provide similar accommodations to pregnant employees. In *Texas*

Department of Housing & Community Affairs v. Inclusive Communities Project (No. 13-1371), the Court will address whether so-called disparate impact claims can be brought under the Fair Housing Act, an issue of particular importance to the banking and insurance industries. Several other cases on the Court's docket have received less attention but involve issues that could significantly affect business litigation.

On the class-action front, the Supreme Court granted certiorari in *Dart Cherokee Basin Operating Co. LLC v. Owens* (No. 13-719), to address the pleading standard for removal of a class action filed in state court to federal court under the Class Action Fairness Act ("CAFA"). The plaintiffs sought additional royalty payments for oil and gas leases in Kansas and filed suit in Kansas state court. The defendant removed to federal court, alleging that the amount in controversy was at least $8.2 million, in excess of the $5 million required for removal under CAFA. The district court remanded the case to state court on the ground that the company did not provide evidentiary support for the amount-in-controversy at the time of removal, relying upon the Tenth Circuit's requirement of such evidence—apparently unique among the courts of appeals. The Tenth Circuit denied leave to appeal and, in a 4-4 split, denied a petition for rehearing *en banc*. The defendant filed a cert. petition and the Supreme Court granted review. Petitioner argues that the Tenth Circuit's stringent evidentiary requirement at the removal-petition stage is inconsistent with Congress's intent in enacting CAFA that a federal forum be broadly available for substantial class actions. Respondents argue that the removal statute requires proof of the amount in controversy by a preponderance of the evidence and a removing party cannot wait until the federal court's jurisdiction is challenged to provide such evidence. Such a requirement may be difficult to satisfy in some cases, as a removing defendant will not always have the information necessary to calculate the amount in controversy. It is unclear, however, whether the Court will reach the merits, since, as the questioning showed at oral argument, the only matter before the Tenth Circuit was whether to permit an appeal of the remand order, not whether the remand order was correct.

A major patent case pending before the Court is *Teva Pharmaceuticals USA, Inc., v. Sandoz, Inc.* (No. 13-854), in which the Court will address the Federal Circuit's practice of reviewing claim construction rulings *de novo*. Petitioner Teva prevailed in the district court against Respondent Sandoz's argument that the term "average molecular weight" in a patent for a drug used to treat multiple sclerosis was indefinite. The district court relied upon expert testimony in reaching its claim construction. On appeal, the Federal Circuit reversed, holding on *de novo* review that the term was indefinite as used in the patent. Petitioner argues that claim construction is an issue of fact, not law, because it involves a determination of how someone in the relevant field would construe the patent and thus the Federal Circuit's practice of reviewing claim construction rulings *de novo* is contrary to Federal Rule of Civil Procedure 52(b), which requires review of factual determinations for clear error. Respondents argue that, under *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), interpretive issues in claim construction are legal questions and thus *de novo* review is proper, just as when a court considers legislative facts in interpreting a statute. Alternatively, Respondents contend that even if claim construction involves some factual determinations subject to clear-error review, facts comprising the patent history and prosecution—and expert testimony interpreting such facts—should remain subject to *de novo* review. As *amici*, including Google, argued, requiring the Federal Circuit to defer to district courts could not only result in forum shopping and a lack of uniformity, but also could deprive the public of notice of a patent's scope.

Finally, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (13-435), the Court will consider whether liability under Section 11 of the Securities Act of 1933 may be based on a statement thought to be true at the time of its inclusion in the registration statement but later shown to be false. In this case, Omnicare, a provider of pharmacy-related services, offered 12.8 million shares of common stock for sale, stating in its SEC registration statement that it had complied with state and federal laws. Respondents purchased and then sold these securities and later questioned Omnicare's compliance with Medicare regulations prohibiting kickbacks from pharmaceutical companies. The district court dismissed the claim, ruling that a party may be liable under Section 11 only if it did not subjectively believe the information in the registration statement at the time it was filed. The Sixth Circuit reversed in relevant part, holding that a plaintiff bringing a Section 11 claim need not prove the registrant knew the statements were false. Omnicare argues that this holding conflicts with *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), in which the Court held that a statement of belief or opinion is not actionable unless it was not genuinely held. Respondents contend, *inter alia*, that a statement of opinion, even if subjectively held, could mislead investors. Were the Supreme Court to adopt the Sixth Circuit's interpretation, it would have significant practical effects for registration statements, imposing increased risk of liability for statements later deemed incorrect.

Another Microsoft Patent Invalidated

In Germany the firm represented Motorola Mobility in both infringement and nullity proceedings relating to a Microsoft patent describing a middleware software of the OS of a mobile device which takes care of all processing steps involved with sending and receiving overly long messages.

In September 2011, Microsoft filed infringement actions against Motorola entities with the District Court Munich I asserting infringement of this patent by Motorola phones and tablets running the Android OS. Motorola filed a nullity action with the German Federal Patent Court in order to get the patent revoked. The District Court Munich I entered an injunction against Motorola in May 2012. Microsoft immediately enforced the injunctive relief order.

In February 2014, Microsoft filed preliminary injunction motions with the District Court Munich I arguing infringement of a modified version of Motorola's devices. In May 2014, in a hearing before the Federal Patent Court, the firm convinced the court that the patent had to be revoked in its entirety because it was obvious over the prior art. Due to revocation of the patent by the Federal Patent Court, Microsoft withdrew its preliminary injunction motions. The decision of the Federal Patent Court is subject to appeal.

Appellate Victory for Samsung Electronics

The firm obtained a unanimous ruling from the U.S. Court of Appeals for the Ninth Circuit for Samsung Electronics, reinstating a major antitrust action against Panasonic and others that had been dismissed by the district court on statute of limitations grounds. In a published opinion, the Ninth Circuit ruled that Samsung's case was timely and allowed Samsung's federal, state, and equitable claims to proceed. The decision is a significant antitrust precedent, reaffirming the "continuing conspiracy" doctrine in antitrust cases.

The case involves secure digital (SD) memory cards, which are the dominant form of flash memory in the market today, used in nearly all cell phones and digital cameras. Samsung alleges that Panasonic formed a cartel with Toshiba and SanDisk to force a six percent royalty on all manufacturers and sellers of SD cards. As alleged in Samsung's complaint, the cartel began in the 1990s, and in 2003—outside the statute of limitations period—it imposed a six percent royalty on Samsung's sales of first-generation SD cards in a license agreement. The issue on appeal was whether allegations of the cartel's later conduct—including a 2006 meeting and subsequent imposition of a six percent royalty on manufacturers and sellers of a new, second generation of SD cards—restarted the statute of limitations.

Samsung filed suit in 2010, but the U.S. District Court for the District of Northern California twice dismissed its complaint on timeliness grounds. The district court ruled that all of the cartel's anticompetitive acts, as well as any anticompetitive injury, took place in 2003, and that the cartel's efforts to impose the six percent royalty in 2006 on the second generation of SD cards were merely an extension of the 2003 conduct as to the first generation of SD cards, pointing to the same six percent royalty the cartel imposed on both generations.

Samsung retained Quinn Emanuel to represent it in the appeal to the Ninth Circuit. The firm successfully argued that, no matter how the cartel's actions in 2006 are viewed, they are sufficient to restart the statute of limitations, making Samsung's suit timely. Specifically, the Ninth Circuit held that the cartel's 2006 conduct was independent enough from the 2003 license to trigger the "continuing conspiracy" exception to the antitrust statute of limitations, and that even if the 2006 conduct was merely enforcing the 2003 license agreement, the cartel's actions were still sufficient to trigger the same exception. The Ninth Circuit also ruled that Samsung could not have suffered damages in 2003 when it did not know it would enter the SD card market until 2006. The decision enables Samsung now to pursue its claims for antitrust damages and injunctive relief against Panasonic and the cartel.

Favorable Settlement of Allstate RMBS Lawsuits

In 2010 and 2011, Quinn Emanuel filed eight lawsuits for Allstate Insurance Company against Wall Street banks arising from Allstate's losses on residential mortgage-backed securities ("RMBS"). Like other institutional investors, Allstate invested in RMBS based on representations from the banks about the quality of mortgage loans underlying the securities. Over time, it became publicly known that the loans were overvalued and misrepresented by the banks, which prompted a crash in the RMBS market and led to enormous losses for investors like Allstate. Like fellow clients Federal Housing Finance Agency ("FHFA"), American International Group, The Prudential Insurance Company of America, Massachusetts Mutual Life Insurance Company, and MBIA Insurance Company, Quinn Emanuel brought a suite of lawsuits for Allstate against the banks that sold RMBS to the company.

Allstate filed lawsuits against Countrywide, GMAC and Residential Funding, J.P. Morgan, Citigroup, Deutsche Bank, Merrill Lynch, Credit Suisse, and Goldman Sachs. In its complaints, Allstate alleged common-law fraud, negligent misrepresentation, and in several cases, violations of the Securities Act of 1933. The complaints drew on internal emails and reports disclosed in federal investigations; confidential witnesses; a forensic analysis of the securities that Quinn Emanuel developed; and other sources which demonstrated the extent of misrepresentation underlying the securities and defendants' knowledge.

The Allstate cases were among the earliest RMBS fraud suits filed nationwide, and they were pioneering. We were able to quantify how many mortgage loans underlying each security misrepresented borrowers' residence and the property values, without access to mortgage loan files, using a retrospective quantitative analysis that we developed. That loan-level analysis, coupled with detailed security-by-security allegations and extensive facts, helped Allstate to defeat every motion to dismiss in every case that reached a decision. The many favorable Allstate court decisions, in turn, created helpful precedent for RMBS lawsuits that followed.

All but two cases were filed in New York state court. Defendants removed the cases to the Southern District, arguing that they were related to pending bankruptcies of third parties that originated some of the underlying loans in each case. The firm successfully achieved remand to state court in all but one case. The case against GMAC and Residential Funding was pursued in bankruptcy court after most of the defendants filed for Chapter 11 protection. Quinn Emanuel represented Allstate, Prudential, AIG, and MassMutual as creditors in the bankruptcy proceeding, eventually settling those claims.

Beginning in 2013, Quinn Emanuel and Allstate have settled all eight of the Allstate cases with defendants on mutually-agreeable terms, recovering enormous value for the company.

Victories for Leading Electronic Marine Navigation Equipment Manufacturer

Quinn Emanuel successfully concluded an ITC investigation and parallel district court cases for, a leading developer and manufacturer of electronic marine navigation equipment. A team of Quinn Emanuel lawyers in the Tokyo, Los Angeles and Washington, D.C. offices asserted four of its client's patents against three major marine electronics manufacturers. The asserted patents were directed to innovative ways of displaying and updating radar images, and to systems of networked multifunction displays and sensors that greatly improved the previous technology.

Working with multiple technical experts, the firm established a strong record of the respondents' infringing activities. The firm further demonstrated its clients' domestic industry with regard to the asserted patents. The firm developed all of this evidence through a global effort, with extensive discovery activity occurring in Japan, the United Kingdom, and in many cities throughout the United States. The respondents mounted a forceful defense, with particular emphasis on several purported prior art publications and systems which they claimed to be case-dispositive. Through intense depositions and motion practice, the firm barred one purported prior art system completely and exposed weaknesses in the remaining art. As a result of these efforts, the client achieved settlements with all three defendants on highly favorable terms. Q

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business litigation report

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