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French Anti-Corruption Law Reform

Despite signing the OECD anti-corruption Convention in 1997, France has long been perceived as lacking necessary tools for domestic and international anti-corruption enforcement, particularly in comparison to the US Foreign Corrupt Practices Act of 1977 ("FCPA") or the UK Bribery Act of 2010 ("UKBA"). The perception that France is lax on corruption was underscored by the fining and monitoring of several French corporations under the FCPA in the recent past (e.g., Alcatel, Alstom, and Technip).

This perception may soon change. On December 9, 2016, France enacted Law No. 2016-1691, entitled "*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*" (Transparency, Fight against Corruption, and Economic Modernization Act, which is dubbed "Sapin II" after its primary advocate, the French Minister of Finance, Mr. Sapin (the "Sapin II Act" or "Sapin II"). Although some decrees accessory to the Sapin II Act have yet to be adopted by the executive branch, the act came into effect on December 10, 2016 (save for Article 17 regarding compliance programs, which will become effective on June 9, 2017).

The Sapin II Act constitutes a major shift in French anti-corruption law as it has ambitions to elevate French anti-corruption law to the best international standards through five main changes: it extends the extraterritorial reach of French anti-corruption laws (I), creates a new anti-corruption body replacing the former anti-corruption body with extended powers (II), introduces an obligation to implement anti-corruption corporate compliance programs (III), improves protection for whistle-blowers (IV), and implements a system of deferred prosecution agreements (V).

(continued on page 2)

INSIDE

Quinn Emanuel Partners Named "Litigation Trailblazers" by the *National Law Journal*

Dan Brockett, William Burck, and Charles Verhoeven were named "Litigation Trailblazers" by the *National Law Journal*. This award recognizes attorneys who have been innovative and changed the way law firms do business. Q

Construction Disputes Practice Leader James Bremen Joins Quinn Emanuel

James Bremen has joined the firm as partner and chair of the firm's construction practice. James is based in the London office and will divide his time between London and Qatar. He was previously a partner at Herbert Smith Freehills and has over fifteen years of experience with some of the world's largest construction disputes. He has represented clients in construction claims matters in more than twenty-five countries, under LCIA, ICC, and UNCITRAL rules and in the oil and gas, power, and major infrastructure sectors. He has over ten years of experience advising the State of Qatar and the Kingdom of Saudi Arabia on major infrastructure projects and disputes. He also regularly represents clients in Malaysia and the CIS countries, among other emerging markets. He is recognized by many of the leading legal directories, including, *Who's Who Legal, Global Arbitration Review, Super Lawyers,* and *Chambers & Partners*, which notes his "prodigious construction disputes practice." One source describes him as "the most experienced and skilled construction litigator in Qatar, if not the region." He is the author of *Global Arbitration Review*'s guides to construction arbitration in Qatar and Saudi Arabia. Q

I. Extension of Reach for French Anti-Corruption Regulation

The Sapin II Act provides for a clear expansion of French jurisdictional powers to prosecute corruption-related offenses committed abroad or involving foreign officials.

First, Sapin II creates a new offence known as "*trafic d'influence d'agent public étranger*" (influence peddling with respect to a foreign public official).

Second, Sapin II facilitates the prosecution of corruption offences committed abroad by stating that French anti-corruption laws should fully apply to acts of foreign corruption by French and foreign persons either residing or doing business in France:

> *"French law shall apply in all circumstances to the following offenses [relating to corruption] committed abroad by a French national or by a French resident or a person exercising all or some of its economic activities on French territory. (as translated from the original French text)"*

Third, and most importantly, Sapin II eliminates prior requirements that had constrained French prosecutors by requiring that a foreign corruption offence be successfully prosecuted in the foreign jurisdiction before French authorities could intervene.

In light of these changes, French authorities will now be able to take a more active role in prosecuting corruption acts committed abroad. This should be of particular concern to international corporations active in France, as they now face potential French law liability for corruption acts committed outside of France.

II. Creation of a New Anti-Corruption Authority with Extensive Powers

Article 1 of the Sapin II Act created a new French Anti-Corruption Agency, named the *Agence Française Anticorruption* ("AFA"). It is placed under the joint supervision of both the Ministries of Justice and of Finance. The AFA replaces the previous *Service Central de Prévention de la Corruption* ("SCPC") (Central Service for the Prevention of Corruption). Article 2 of the Sapin II Act subsequently provides the AFA with extensive powers to detect and sanction corruption acts. The AFA will profit from various mechanisms to gather evidence, especially in relation to the new anti-corruption compliance programs [on compliance programs, *see also* below, III]. A *Commission des Sanctions* (Sanctions Commission) is also created within the AFA. Pursuant to Article 17, this Sanctions Commission is vested with disciplinary powers, including the ability to fine companies not in compliance with French anti-corruption laws. Nonetheless, public prosecutors still have the final say on whether or not to prosecute corruption offenders, as they remain solely in charge of judicial action.

In addition, Article 3 of the new Act states that the AFA will issue recommendations in the future, with the aim of helping companies comply with French anti-corruption law. Interestingly, it is specified that these recommendations should vary depending on the size of the companies in question and the types of risks identified.

Finally, the French government has emphasized that the AFA should be provided with additional means in comparison to the former SCPC agency. According to the Ministry of Finance's press release, the AFA will have 70 employees and an annual budget of EUR 10-15 million; to compare, the current SCPC staff number is 16. While it remains to be seen whether the AFA will be staffed and funded as announced, such an increase in resources clearly shows France's intent to intensify its anti-corruption enforcement.

III. Implementation of Corporate Compliance Programs

Before the Sapin II Act, French or France-based companies were under no obligation to take proactive steps to prevent corruption. The introduction of mandatory compliance programs for corporations of a certain size is thus another major shift in French anti-corruption law. Pursuant to Article 17 of Sapin II, anti-corruption compliance programs will be required as of June 9, 2017 for both (i) French companies employing 500 or more employees and having a turnover above EUR 100 million and (ii) all subsidiaries of parent companies incorporated in France affiliated with a group of 500 or more employees in total and a consolidated turnover above EUR 100 million. Some 2,000 companies are expected to be implicated and Article 17 specifies that corporate officers will be responsible for implementing the anti-corruption plans. These plans would notably include: an internal code of conduct providing for disciplinary sanctions and corporate investigations in cases of wrongdoing; a reporting system enabling employees to report information regarding suspected wrongdoing [i.e., a sort of *whistle-blowing line*—on this issue, see below, IV]; a risk-mapping system (with updates every two years); a third-party risk assessment (i.e., due diligence on clients, suppliers and intermediaries); internal and external accounting controls; and training programs for employees most exposed to corruption risks.

Non-compliant corporations will be exposed to injunctions from the AFA and, in case of persisting non-compliance, fines reaching up to EUR 1 million

(EUR 200,000 for individuals). In addition, Sapin II will allow the AFA to publish the sanctions issued against the non-compliant corporations.

IV. Improved Protection for Whistle-Blowers

Whistleblower protection programs, rewarding and protecting individuals who take action to report corruption, are well-known in the United States. However, such programs are a relatively new feature in France. In this context, Chapter II of the Sapin II Act, labelled "*Protection of whistleblowers,*" is remarkable, as it introduces a very strong protection framework for individuals reporting a potential violation of anti-corruption laws or a "*serious threat or damage to the public interest.*"

Article 9 of the Sapin II Act requires relevant companies to guarantee confidentiality and protect the identity of the whistleblowers, while Article 10 prohibits employer retaliation against whistleblower employees. In addition, Article 7 offers immunity from criminal prosecution to whistleblowers and provides for a mechanism of conditional financial assistance to whistleblowers.

However, the new French whistleblowing regime applies only to disinterested parties with firsthand knowledge of the facts, since Article 6 defines a whistleblower as an individual "*reporting selflessly and acting in good faith […] with personal* knowledge [of the facts]." This means that French law does not protect or incentivize whistleblowing by implicated parties, or individuals with secondhand knowledge of the facts.

Finally, Article 13 states that any person who is found to have created an "obstacle" to whistleblowing may be fined EUR 15,000 and given a prison sentence of up to one year—further evidence of Sapin II's high concern with the protection of whistleblowers.

V. Introduction of Deferred Prosecution Agreements in French Law

Amongst the most controversial features of the Sapin II draft bill was the introduction of an Anglo-Saxon style deferred prosecution agreements to French criminal law. Such prosecution agreements, as defined by the UK's Serious Fraud Office, are understood as "*an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organization meets certain conditions. DPAs can be used for fraud, bribery, and other economic crimes. They apply to organizations, never individuals.*" The controversy was in regards to the specific nature of deferred prosecution agreements, i.e., a negotiated settlement whereby a company, without pleading guilty, agrees to a combination of monetary sanctions and compliance measures, which was perceived as "too commercial" for French criminal law. Despite having been removed at some point during the legislative process, deferred prosecution agreements were nonetheless later reintroduced in the final version of the Sapin II Act, under the label of *Convention Judiciaire d'Intérêt Public* (which may be literally translated as "judicial agreement of public interest," i.e., a French Deferred Prosecution Agreement ("DPA")).

Article 22 of the Sapin II Act enables French prosecutors to offer a DPA "*as long as no public proceedings have been initiated*" (as translated from the original French) without any admission of guilt on the part of the suspected company. DPAs are not allowed for individuals, such as employees or corporate officers, who may still be subject to criminal prosecution for their own violations even if their company has entered into a DPA.

A DPA can only be concluded under certain conditions. The agreement must include one or more of the following obligations for the suspected company pursuant to Article 22: payment of a fine to the French treasury, capped at 30% of the turnover; implementation of an AFA-monitored compliance program for up to 3 years; and payment of additional compensation to identified victims.

Importantly, the Sapin II Act provides that a DPA proposal accepted by the suspected company must be reviewed by a judge and subject to a public hearing that may be attended by victims of the corruption act. Following the hearing, the court may validate or deny the DPA. Afterwards, the private party to the DPA has a final right to retract its consent. Upon satisfactory performance of its DPA obligations, the company will be relieved of any criminal prosecution for the underlying facts. DPA will nonetheless be published on the AFA's website, which may result in adverse publicity.

Takeaways

The Sapin II Act contains a number of new anti-corruption instruments largely inspired by US and UK law. As such, Sapin II is undoubtedly a move towards more active anti-corruption enforcement in France. At first glance, corporations may deplore that Sapin II adds an additional burden for ensuring compliance. Nonetheless, the knowledge that French companies are now subject to enhanced domestic anti-corruption oversight may serve to enhance their reputation in the international arena and therefore reduce the number of corruption cases brought by US authorities against French companies operating internationally.

The Court That Created *Frye* Moves to Rule 702/*Daubert Standard*

In the twenty-three years since the Supreme Court issued its seminal opinion on the admissibility of expert witness testimony, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), approximately 40 states have embraced *Daubert* and its progeny—leaving behind the 90-year-old *Frye* test that had previously dominated the field. *Frye v. U.S.*, 293 F. 1013 (D.C. 1923). In October 2016, the slowly shrinking club of stalwart *Frye* jurisdictions lost its founding member when the District of Columbia's highest court—which created the *Frye* test—determined (*en banc*) that the District should move from *Frye* to Rule 702/*Daubert*. *Motorola, Inc., et al. v. Murray, et al.*, 147 A.3d 751, 757 (D.C. 2016).

Frye *v. Rule 702—A Distinction with a Difference*

The distinction between *Frye* and Rule 702/*Daubert* matters as much as it always has—a fact perfectly illustrated by the *Murray* case. In *Murray*, the trial court was considering whether plaintiffs' expert witnesses should be permitted to opine that cell phone use can lead to adverse health effects, including brain cancer. *Murray v. Motorola, Inc.*, 2014 WL 5817891, at *1 (D.C. Super. Aug. 8, 2014). "[F]ollowing a four-week evidentiary hearing, the court ruled that some, but not all" of the plaintiffs' expert testimony would be admissible under the District of Columbia's *Dyas/Frye* standard but "most, if not all" of that expert testimony "would probably be excluded under the Rule 702/*Daubert* standard." *Murray v. Motorola, Inc.*, 2014 WL 5817890, at *1 (D.C. Super. Aug. 28, 2014). The trial court compared the *Frye* standard to the Rule 702/*Daubert* standard and concluded: "[I]f a reliable, but not yet generally accepted, methodology produces 'good science,' *Daubert* will let it in, and if an accepted methodology produces 'bad science,' *Daubert* will keep it out; conversely, under *Frye*, as applied in this jurisdiction, even if a new methodology produces 'good science,' it will usually be excluded, but if an accepted methodology produces 'bad science,' it is likely to be admitted." *Murray*, 2014 WL 5817891, at *11 (D.C. Super. Aug 8, 2014). Thus, the trial court certified a question for the District of Columbia Court of Appeals of "whether the District of Columbia should adopt Federal Rule of Evidence 702 (or a revised *Frye* standard) for the admissibility of expert evidence." *Murray*, 147 A.3d at 752.

On appeal, the Court considered the history of the *Frye* and Rule 702/*Daubert* standards and the benefits of each. The D.C. Court of Appeals established the *Frye* test in 1923 in the context of deciding whether to admit the results of an early version of a lie-detector test. *Murray*, 147 A.3d at 752-53 (citing *Frye v. U.S.*, 293 F. 1013 (D.C. 1923)). The D.C. Court of Appeals later refined the test for admitting expert testimony as follows: (1) the subject matter "must be so distinctively related to some science, profession, business or occupation *as to be beyond the ken of the average layman*"; (2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference *will probably aid the trier in his search for truth*"; and (3) expert testimony is inadmissible if "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert." *Murray*, 147 A.3d at 753 (quoting *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977)).

The Court explained that the third criterion of *Dyas/Frye* "begins—and ends—with a determination of whether there is *general acceptance of a particular scientific methodology*, not an acceptance, beyond that, of particular study results based on that methodology." *Id.* (quoting *Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C. 1979) (emphasis added)). However, *Dyas/Frye* is criticized as "antiquated and out-of-step with modern science." *Murray*, 147 A.3d at 756. Critics say *Frye* results in unqualified jurors deciding which scientific theories to apply. *Id.* Further, general acceptance of a particular methodology does not vary from case-to-case, and *Frye* does not permit a court to evaluate "whether the testimony offered in a particular case is reliable." *Id.* at 753, 756. Therefore, the *Frye* test has been accused of "exclud[ing] scientifically reliable evidence which is not yet generally accepted, and admit[ting] scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny." *Id.* at 756 (citation omitted).

In 1993, the Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, holding the "general acceptance" test from *Frye* had been superseded by the Federal Rules of Evidence. *Murray,* 147 A.3d at 753-54 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Under *Daubert* and subsequent Supreme Court decisions, the Rule 702/*Daubert* test is a "flexible" inquiry, where the trial judge acts as a "gatekeeper" and is permitted to evaluate not only the expert's methodology "but also [] the application of that methodology in a particular case." *Id.* at 754-56. An expert's "conclusions and methodologies are not entirely distinct from one another" and "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to

admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." 147 A.3d at 755 (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)). However, critics of Rule 702/*Daubert* argue the test produces inconsistent results and allows "unqualified judges [to] evaluate the work of scientists" and "invad[es] the province of the jury." *Id.* at 756.

Ultimately, the District of Columbia Court of Appeals decided to adopt the Rule 702/*Daubert* test: "We conclude that Rule 702, with its expanded focus on whether reliable principles and methods have been reliably applied, states a rule that is preferable to the *Dyas*/*Frye* test. The ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike."
147 A.3d at 757. "The goal is to deny admission to expert testimony that is not reliable, but to admit competing theories if they are derived from reliable principles that have been reliably applied." *Id.* The court decided against simply revising the *Frye* test. *Id.* By adopting the Rule 702/*Daubert* test, which is already being used in a majority of jurisdictions, the court noted there is a pre-existing body of precedent from which the D.C. courts can "learn." *Id.*

What's Next

The D.C. Court of Appeals held that the Rule 702/*Daubert* standard should be applied to the trial of "any civil or criminal case in which the trial begins after" October 20, 2016. 147 A.3d at 758-59. Thus, the strategy for D.C. cases currently being litigated should be re-evaluated where expert testimony previously admissible under *Frye* may be vulnerable under *Daubert*, and vice versa.

Meanwhile, the debate continues in the remaining *Frye* jurisdictions. Last year, the Missouri legislature passed a bill that would have required state courts to follow the Rule 702/*Daubert* standard, but the bill was vetoed by the Missouri Governor. And in 2013, the Florida legislature passed a statute requiring a move from *Frye* to *Daubert*. *See* 2013 Fla. Sess. Law Serv. Ch. 2013-107 (H.B. 7015) (West). The Florida Supreme Court is granted authority over procedural rules by the Florida state Constitution, *see* F.S.A. Const. Art. 5 § 2(a), and will decide whether to accept or reject the change—a decision expected sometime in 2017. Q

PRACTICE AREA NOTES

Life Sciences Litigation Update

Recently Amended FDA Rules Can Affect Settlements in Pharmaceutical Litigations. After more than thirteen years of bureaucratic analysis and rulemaking, the U.S. Food and Drug Administration recently implemented its new rules governing the submission and approval of generic drug products and related pharmaceutical patent litigations under Title XI of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA"). (81 Fed. Reg. 69,580 (codified at 21 C.F.R. §§ 314, 320).) Effective December 5, 2016, the FDA's final rule is designed to "reduce unnecessary litigation, reduce delays in the approval of 505(b)(2) applications and [Abbreviated New Drug Applications ("ANDAs")] that are otherwise ready to be approved, and provide business certainty to both brand name and generic drug manufacturers." (81 Fed. Reg. 69,580.) While some revisions codified longstanding FDA practices, others were created to capture developments in case law or to facilitate compliance with and enforcement of the Federal Food, Drug, and Cosmetic Act ("FD&C Act"). Of particular note are certain provisions of the final rule that touch upon: (i) generic exclusivity in light of settlement agreements between patent holders and generic pharmaceutical companies; and (ii) New Drug Application ("NDA") holders' requests to delist patents from the *Approved Drug Products with Therapeutic Equivalence Evaluations*, or the "Orange Book."

With respect to settlement agreements, the final rule clarifies the impact that settlement agreements and consent decrees have on patent certifications in 505(b)(2) applications and ANDAs. The prior FDA rule only required 505(b)(2) applicants and ANDA holders to change Paragraph IV certifications (asserting non-infringement or invalidity of the relevant patents) to Paragraph III certifications (acquiescing in the validity of the patent and tacitly admitting that their proposed generic product would infringe if marketed without a license) when a court entered "final judgment" of patent infringement against the 505(b)(2) or ANDA applicants and the applicants had failed to obtain a judgment of patent invalidity. The previous rule, however, did not expressly specify whether ANDA and 505(b)(2) applicants were required to submit

amended certifications following the execution of settlement agreements or consent decrees containing findings of infringement. The final rule eliminates this gap, requiring that ANDA and 505(b)(2) applicants amend their certifications from Paragraph IV to Paragraph III when a court signs and enters a settlement order or consent decree that includes a finding of patent infringement, absent a finding of invalidity. (*See* 21 C.F.R. §§ 314.50(i)(6)(i), 314.94(a)(12)(viii)(A).) That said, a tension exists within the final rule, such that ANDA and 505(b)(2) applicants who have settled and through the course of the settlement have obtained a license to particular patents may not be required to amend their certifications to those patents. This tension is further explored in the FDA's January 2017 draft guidance entitled "180-Day Exclusivity: Questions and Answers," which states that "[a]n [ANDA] applicant potentially may retain eligibility for 180-day exclusivity even . . . if sued, the case is resolved, for example, through settlement that allows the applicant to enter the market before the patent expires" and provides that "an ANDA applicant's agreement that the [exclusivity bearing] patent is valid and would be infringed in the course of securing a license" does not require the applicant to change the Paragraph IV certification to a Paragraph III certification. "180-Day Exclusivity: Questions and Answers," at pp. 10 (question 12), 19 (question 30), *available at* http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM536725.pdf. Note that if a settlement order or consent decree is signed and entered *without* a finding of infringement, however, then it may be appropriate for the ANDA or 505(b)(2) applicant to continue to maintain its Paragraph IV certification(s).

Another update relevant to settlements relates to the 180-day period of generic market "exclusivity" that may be available to the first party submitting a substantially complete ANDA challenging the patent position of a branded drug, and what happens to that period of exclusivity in the event that the challenged patents are removed or "*delisted*" from the Orange Book either through expiration or invalidation. The final rule codifies the FDA's current practice of not removing a patent or patent information from the Orange Book until any 180-day exclusivity based on the patent has been expired or extinguished. (*See* 21 C.F.R. §§ 314.50(i)(6)(ii), 314.94(a)(12)(viii)(B).) An NDA holder who determines that a patent or patent claim no longer meets the statutory requirements for listing (such as if there has been a judicial finding of invalidity for a listed patent, from which no appeal has been or can be taken) must promptly notify the FDA to amend the patent or patent information. The FDA is required to remove the patent or patent information from the Orange Book if there is no first-filer eligible for 180-day exclusivity based on the submission of a Paragraph IV certification. If the NDA holder's request is for the delisting of an exclusivity-bearing patent, however, then the FDA must keep the patent or patent information listed in the Orange Book until the 180-day exclusivity period of a first-filer based on that patent has expired or has been extinguished. Accordingly, under the final rule and consistent with current practices, a first-filer will not lose its first-filer status on account of an NDA holder's request to delist an Orange Book listed patent where that patent is the basis of a first filer's 180-day exclusivity.

The FDA's new rulemaking does not expressly contain new rules directed to the 180-day exclusivity forfeiture provisions enumerated under section 505(j)(5)(D) of the FD&C Act. However, the FDA's comments published during the course of public comment and rulemaking do indicate the FDA's interpretation that an ANDA applicant's commercial marketing of an "authorized generic" drug—most commonly defined as an approved, branded drug that is marketed as a generic product without the brand name on its label—will trigger the running of any period of 180-day generic exclusivity to which an ANDA applicant might otherwise have been entitled. (*See* 81 Fed. Reg. 69582, 69592-93.) As the FDA's comments note, the FDA will determine whether additional rulemaking relating to 180-day exclusivity is necessary in the future. (*See* 81 Fed. Reg. 69584.) In the interim, the FDA has provided additional perspectives concerning 180-day exclusivity in its draft guidance, "180-Day Exclusivity: Questions and Answers."

Securities and Structured Finance Litigation Update

Continuing Circuit Split Puts "Tolling" of Statutes of Repose Back on U.S. Supreme Court's Agenda. The U.S. Supreme Court is again set to weigh in on the reach of its decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), after the Court dismissed its prior grant of certiorari on the issue.

As discussed in greater detail in our July 2014 practice update titled "U.S. Supreme Court to Review Tolling of Securities Act Claims," *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554. The Second Circuit held in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 101 (2d Cir. 2013), that the class action "tolling" rule set forth in *American Pipe* does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933. In March 2014, the Supreme Court granted certiorari to

the *IndyMac* plaintiffs because that decision conflicted with a decision from the Tenth Circuit, which had ruled that American Pipe *does* apply to Section 13's statute of repose. *See Joseph v. Wiles*, 223 F.3d 1155, 1167-68 (10th Cir. 2000). In September 2014, the Supreme Court withdrew certiorari after the parties settled the *IndyMac* case.

The Circuit Courts continue to be split on the issue. In 2016, the Sixth Circuit joined the Second Circuit in holding that *American Pipe* does not apply to statutes of repose. *See Stein v. Regions Morgan Keegan Select High Income Fund*, 821 F.3d 780 (6th Cir. 2016). The Second Circuit has also applied its own *IndyMac* decision in recent cases to again conclude the *American Pipe* rule does not reach statutes of repose. *See In re Lehman Bros. Sec. and ERISA Litig.* (*California Public Employees' Ret. Sys. v. Moody Investors Serv.*), 655 Fed.Appx. 13 (2d Cir. 2016); *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016).

In September 2016, the plaintiffs in *CalPERS* and *SRM* filed petitions for writ of certiorari on the issue of whether *American Pipe* applies to statutes of repose. On January 13, 2017, the Supreme Court granted certiorari to the *CalPERS* plaintiffs, on the same question the Court was previously prepared to address in *IndyMac*:, whether *American Pipe* applies to the 1993 Act's statute of repose. As discussed in our June 2014 update, how the Supreme Court addresses the scope of *American Pipe* may have a significant impact on the fortunes of investors, as well as securities issuers and underwriters.

Evidence Law Litigation Update

New York Court of Appeals Holds That the Common Interest Doctrine Applies Only to Litigation Matters. This year, in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 80, 2016 N.Y. Lexis 1649 (N.Y. June 9, 2016), New York's highest court clarified the scope of the "common interest" doctrine, under which attorney-client communications remain privileged if they are disclosed to a third party who shares a common legal interest with the client and the communication furthers that common legal interest. In *Ambac*, the New York Court of Appeals held that the doctrine applies only where the parties' common interest is in pending or anticipated litigation, and not to other common legal interests.

As discussed in our July 2015 practice update, the *Ambac* litigation involved a dispute over insurance policies issued on certain residential mortgage-backed securities by Ambac Assurance Company to Countrywide Home Loans. Ambac alleged that Countrywide misrepresented the quality of the loans underlying the bonds and argued that, because of a merger between Bank of America ("BOA") and Countrywide, BOA was responsible for Countrywide's liabilities. BOA withheld from discovery hundreds of documents relating to its merger with Countrywide, arguing that its attorney-client communications in the documents fell under the common interest doctrine, because Countrywide and BOA shared a common legal interest in the success of the merger.

The trial-level Supreme Court ruled against BOA, holding that the doctrine did not apply because the parties did not reasonably anticipate litigation at the time of the merger. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 651612/2010, 2013 N.Y. Misc. LEXIS 4570, at *2-3 (Sup. Ct. N.Y. Cnty. Oct. 16, 2013). On BOA's interlocutory appeal, the Appellate Division, First Department unanimously reversed. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129 (1st Dep't 2014). The appellate court held that while other New York courts had imposed a pending-or-anticipated-litigation requirement, the Court of Appeals had not ruled on the issue. The First Department held that the "better approach" was to reject the requirement, as most federal courts have done, and stating that the purpose of the doctrine—"to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"—applied with equal force in the absence of litigation.

In a split decision, issued on June 9, 2016, the Court of Appeals reversed. The court rejected the First Department's reasoning, holding that when "two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information," such that applying the common interest doctrine "promotes candor that may otherwise have been inhibited." The court distinguished this situation from parties like BOA and Countrywide who shared a common legal interest in a commercial transaction. "Put simply," the court wrote, "when businesses share a common interest in closing a complex transaction, their shared interest in the transaction's completion is already an adequate incentive for exchanging information necessary to achieve that end." Moreover, the court reasoned, abandoning the pending-or-anticipated-litigation requirement "could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only non-legal or exclusively business interests to protect."

Judge Rivera dissented, joined by Judge Garcia. Judge Rivera wrote that "the privilege should apply to private client-attorney communications exchanged during the course of a transformative business enterprise,

in which the parties commit to collaboration and exchange of client information to obtain legal advice aimed at compliance with transaction-related statutory and regulatory mandates." Judge Rivera observed that the attorney-client privilege itself can be invoked without pending or anticipated litigation, and argued that such a requirement not be necessary to protect that privilege through the common interest doctrine. Moreover, Judge Garcia observed, "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct." In a footnote, the majority noted that the New York legislature "is free to consider the alternative arguments articulated by the dissent and to expand the common interest exception as other state legislatures have done."

The *Ambac* court explicitly did not decide the full scope of the common interest doctrine. It stated: "We need not decide in this appeal what it means to share common legal interests in pending or anticipated litigation. We hold only that such litigation must be ongoing or reasonably anticipated, and the exchanged communication must relate to it, in order for the common interest exception to apply." Consequently, in future litigation governed by New York law, one can expect litigants to dispute what it means to "reasonably anticipate" litigation and whether the contemporaneous evidence shows that the parties had that expectation at the relevant time.

Product Liability Update

California Courts Reject Speculative Evidence of Exposure to Asbestos from Contaminated Talc. In a new wave of asbestos-related personal injury litigation, plaintiffs allege that they were exposed to talc-containing products that were possibly contaminated with asbestos. A line of recent California court decisions may, however, signal a sea change in the type of proof that is required for plaintiffs in such cases to avoid summary judgment.

Applying the settled principle in California that the "mere possibility" of exposure to asbestos does not raise a triable issue of fact, three separate trial court judges granted summary judgment to talc defendants. *See DePree v. BASF Catalysts LLC,* No. RG12659674, 2013 WL 8103815, at *1-3 (Cal. Super. Ct. Alameda Cnty. Oct. 12, 2013); *Unterleitner v. BASF Catalysts LLC*, No. RG15778755 at 4 (Cal. Super. Ct. Alameda Cnty. February 3, 2016); *Fields v. Ford Motor Co.*, No. RG15754936 (Cal. Super. Ct. Alameda Cnty., Aug. 2, 2015). The first of these trial court decisions, *Depree v. BASF Catalysts*, was recently affirmed on appeal.

In Traditional Asbestos Litigation, Defendants Typically Prevailed on Summary Judgment Only Where the Plaintiff Failed to Provide Product Identification. In the first wave of asbestos-related personal injury litigation, the plaintiffs' bar targeted companies as defendants that mined and distributed raw asbestos fibers and companies that designed, made and sold products that intentionally incorporated asbestos to resist heat or bind other materials. Epidemiology studies demonstrated that certain occupationally exposed cohorts—such as insulators and pipefitters—were suffering asbestos-related diseases, such as mesothelioma, at alarmingly high rates. In this first wave of asbestos litigation, the defendants did not dispute that products they intentionally designed to contain asbestos were "defective." The plaintiffs were, therefore, able to get to a jury simply by identifying an asbestos-containing product from which they claimed they were exposed to visible dust.

Once Companies Began Making and Selling a Non-Asbestos-Containing Variant of the Same Products That Previously Incorporated Asbestos, California Courts Required Plaintiffs to Do More than Merely Identify a Product by Name to Avoid Summary Judgment. As the health risks associated with exposure to asbestos became widely known, most companies that designed, made and sold traditional asbestos-containing products, like insulation and gaskets, began producing another variant of the same product that no longer contained asbestos as a component. In cases where a plaintiff sued a company that was responsible for making and selling both asbestos-containing and non-asbestos containing variants of the same products, courts concluded that the plaintiff was required to do more than simply identify the product by name and allege exposure to visible dust from that product to get to a jury.

In a series of four California Court of Appeal decisions, the Courts uniformly held that a plaintiff cannot avoid summary judgment with evidence of exposure to a product where only some, but not all, of the products in the accused product line asbestos. *See Collin v. Calportland Company* (2014) 228 Cal. App.4th 582, 595 (affirming summary judgment in favor of defendant that made asbestos-containing and non-asbestos-containing versions of a product, because plaintiff could not "present evidence that would allow a reasonable trier of fact to find [it] more likely than not that" the plaintiff was exposed to the asbestos-containing variant."); *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078 (evidence that some, but not all, of a product contains asbestos insufficient to defeat summary judgment because such evidence establishes only a "possibility" that the plaintiff was exposed to the asbestos-containing variant); *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1105

("[e]vidence that creates a dwindling stream of probabilities that narrow into conjecture" cannot defeat a motion for summary judgment.); *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1237 ("Mere speculation or conjecture about exposure to asbestos . . . is insufficient to demonstrate the existence of a triable issue of fact to preclude summary judgment."). Thus, where the evidence adduced demonstrated a "mere possibility" of exposure to asbestos, the claims failed as a matter of law.

Applying Settled California Law to the New Wave of Asbestos-Related Personal Injury Litigation Involving Talc-Containing Products, Claims Involving the Mere Possibility of Exposure to Asbestos from Contaminated Talc Also Fail as a Matter of Law. In a new wave of litigation filed against companies that mine, process and distribute raw talc and companies that design, make and sell consumer products that contain talc, *none* of the products at issue was formulated to contain asbestos. Instead, plaintiffs allege that they were exposed to products that contained talc and that talc was occasionally and sporadically contaminated with asbestos. Because such products were never designed to include asbestos as an ingredient, and because not every, or even most, of the talc-containing products were contaminated with asbestos, multiple courts have required the plaintiff to do more than merely identify a talc product by name and claim exposure to visible dust from that product to get to a jury.

Absent direct evidence that one or more of the talc-containing product containers used by the plaintiff were actually contaminated with asbestos, or circumstantial evidence that *all,* or at least most, of the accused talc-containing products were contaminated with asbestos, a jury could not conclude that a talc company was responsible for the plaintiff's asbestos-related disease without impermissibly resorting to conjecture and surmise. Under California law, courts have begun finding that such claims fail as a matter of law.

For example, in *DePree v. BASF Catalysts LLC*, No. A140681, 2016 WL 1039497 (Cal. Ct. App. Mar. 15, 2016) (unreported), the plaintiffs alleged that Plaintiff John Depree had developed mesothelioma from exposure to an auto body filler product called Bondo. The product was formulated to contain 20 to 40% talc but no asbestos as an ingredient. *Id.* at *1-2. Relying on the opinions of a geology expert, the plaintiffs claimed that the talc used in Bondo was contaminated with asbestos. *Id.* at *3, *8-10. However, plaintiffs could not present evidence that any can of Bondo actually used by Mr. Depree contained asbestos, or that any talc shipped to defendant ever contained asbestos. The court recognized: "The question before us is not whether plaintiffs produced evidence from which a jury could conclude Mr. DePree was exposed to Bondo containing Emtal talc. Instead, the question is whether plaintiffs produced evidence from which a jury could conclude—without speculating—that Mr. DePree was exposed to Bondo containing asbestos-contaminated Emtal talc." *Id.* at *11 (emphasis in original). Relying on established California case law the court held: "In the absence of evidence that all or even most of the talc was contaminated with asbestos, plaintiffs could show only a possibility of asbestos exposure," and "such a possibility is insufficient to support a finding in plaintiffs' favor on the issue of causation." *Id.* at *1. The court emphasized that "at best" the evidence before the trial could have permitted an inference that "some" of the talc at issue contained asbestos and it was "possible" plaintiff was exposed to a can or cans of Bondo containing asbestos-contaminated talc. *Id.* at *12 (emphasis in original). Consistent with the quartet of California Court of Appeal decisions involving products where only some variants contained asbestos, the possibility of exposure to asbestos from a talc-containing product is insufficient as a matter of law to create a disputed issue of material fact.

The *DePree* decision also comports with California case law concerning exposure to other materials that were allegedly contaminated, rather than formulated, with a toxin. For example, in *Miranda v. Bomel Const. Co., Inc.* (2010) 187 Cal. App. 4th 1326, the plaintiff alleged that he contracted "Valley Fever" from contaminated soil stockpiled in the defendant's vacant lot next to his office. *Id*. at 1328. The trial court granted summary judgment because the plaintiff had no evidence that his disease was caused by contaminated soil on the defendant's lot as opposed to another source and because the plaintiff had presented no evidence that the soil on the defendant's lot was actually contaminated. *Id.* at 1337, 1344. In affirming the trial court's decision, the Court of Appeal observed that cases involving exposure by contamination must be distinguished from cases involving exposure to products intentionally designed to contain asbestos where defendants "acknowledge the products under their control contained asbestos." *Id.* at 1339. The Court of Appeal concluded that in a contamination case, the plaintiff must prove the specific product or substance to which she was exposed actually contained the disease-producing toxin.

Conclusion. Under California law, where there is no direct evidence of asbestos in the product the plaintiff actually used, a plaintiff cannot defeat summary judgment merely by showing that some, but not all, of a defendant's product contained asbestos. The recent application of this law to the novel issue of exposure to talc-containing products is an important—and logical—development.

VICTORIES

U.S. Supreme Court Victory for Consumers Against Visa and MasterCard

The firm obtained an important victory in the U.S. Supreme Court on behalf of a plaintiff class of consumers challenging price-fixing of ATM access fees by Visa, MasterCard, and the big banks. This is an antitrust action brought pursuant to Section 1 of the Sherman Act on behalf of a proposed class of consumer plaintiffs who have been charged artificially inflated, supra-competitive fees to access the money in their bank accounts when making cash withdrawals from ATMs using debit cards issued by the defendant banks. Quinn Emanuel has been appointed co-lead interim class counsel for this proposed class, who allege that the ATM Access Fee rules agreed to and perpetuated by the ATM network and bank defendants constitute unreasonable restraints on trade in that they required these collusively-set, higher prices.

The district court granted the defendants' motion to dismiss, holding that the complaints lacked adequate facts to establish concerted activity under Section 1. The D.C. Circuit reversed, holding that the allegations—that a group of retail banks fixed an element of access fee pricing through bankcard association rules—describe concerted action sufficient for a Section 1 claim. The defendants filed a petition for certiorari in the Supreme Court, proposing the following question presented: "Whether allegations that members of a business association agreed to adhere to the association's rules and possess governance rights in the association, without more, are sufficient to plead the element of conspiracy in violation of Section 1 of the Sherman Act . . . ." They argued that the allegations of the banks' membership and participation in the Visa and MasterCard associations and adherence to their rules did not show concerted action, relying on a supposed conflict on this issue between the D.C. Circuit and the Ninth Circuit's decision in *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008).

The Supreme Court granted certiorari, but defendants in their merits briefs focused on a new argument: that Visa and MasterCard each constituted a single entity for purposes of the antitrust laws, and thus the member banks could not have used Visa and MasterCard to conspire in violation of Section 1. Along with co-counsel, Quinn Emanuel drafted the merits brief for the consumer plaintiffs. The firm insisted that the defendants had improperly changed their arguments from those that they had made in support of their petition. The firm also explained that the defendants' new argument was meritless under *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), where the Supreme Court held that the NFL was not a single entity for antitrust purposes and that their member teams could therefore conspire in violation of Section 1.

Before oral argument was set to occur, the Supreme Court dismissed the petition for certiorari as improvidently granted. The Court's stated reason for doing so was that "[a]fter having persuaded us to grant certiorari on th[e] issue" stated in the question presented, "petitioners chose to rely on a different argument in their merits briefing." The dismissal of a petition as improvidently granted (a "DIG" in Supreme Court parlance) is a rare outcome, occurring only a few times per year. In addition to being a cautionary tale for those thinking of switching arguments in the Supreme Court after a grant of certiorari, the dismissal means that the D.C. Circuit's opinion stands. The case will therefore go forward in the district court, where Quinn Emanuel will continue to represent the consumers there as co-lead counsel.

New York Appellate Division Victory for Assured Guaranty

The firm won an important appeal in the New York Appellate Division, First Department for client CIFG Assurance North America, Inc. (now known as Assured Guaranty) allowing it bring a claim for common law misrepresentation, as informed by Section 3105 of the New York Insurance law in a $100 million-plus case arising from CIFG's insurance of two collateralized debt obligation vehicles ("CDOs"). The decision has been widely reported. *See, e.g.*, Jason Grant, *Insurer Gets Second Chance at Bank Accused of Dumping 'Toxic' Mortgage Securities*, N.Y.L.J. (Nov. 30, 2016).

CIFG's suit alleges that Bear Stearns, recognizing that it owned risky mortgage-backed securities, sought to off-load them onto unsuspecting innocent investors by repackaging the securities into two CDOs. To market the CDOs, Bear Stearns sought financial guaranty insurance concerning the senior-most tranche of the notes. CIFG agreed to provide the insurance based on certain representations, such as that the collateral in the CDO would be selected by an independent collateral manager, and not by Bear Stearns, which had an incentive to off-load its risky assets onto the CDO and the investors in the CDO.

However, at the request of Bear Stearns, CIFG

did not directly insure the CDOs' obligations to make payments on the notes. Instead, an affiliate of CIFG (known as a "transformer") entered into a Credit Default Swap ("CDS") with the noteholders, and CIFG issued a guaranty insurance on the transformer's obligation to the noteholders.

The two CDOs ultimately defaulted and CIFG had to pay more than $100 million to discharge its obligations. CIFG brought suit in New York Supreme Court, alleging claims for misrepresentation, as informed by Insurance Law Section 3105, and another claim for fraud, on the grounds that, contrary to its representations, Bear Stearns was involved in selecting the collateral in the CDO. Unlike claims for fraud, claims for misrepresentation informed by Insurance Law 3105 do not require scienter or fraudulent intent; even an innocent misrepresentation can support liability.

The trial court dismissed CIFG's misrepresentation claim *with prejudice*, reasoning, among other things, that Bear Stearns could not be an "applicant" within the meaning of Section 3105 given the transformer structure of the transaction. In an issue of first impression, the First Department held that the transformer structure could be sufficient "to show that Bear Stearns was an 'applicant,' within the meaning of Insurance Law Section 3105." The First Department also rejected the argument that Insurance Law 3105 requires a written application for insurance.

The First Department also rejected Bear Stearns' alternative claim that the misrepresentation claim is time-barred, holding that claims for misrepresentation sounding in Insurance Law 3105 are subject to a six year statute of limitation. The First Department noted that although a three-year statute of limitation applies to misrepresentation, if a misrepresentation claim alleges fraud, then a six year limitations period applies. The First Department also held that Insurance Law Section 3105 did not create a new cause of action, but rather codified common law principles, such that claims brought under the Section are not subject to three year limitations period for claims developed by statute.

Quinn Emanuel continues to represent Assured Guaranty in this and other matters.

Presidential Pardon Granted in Pro Bono Victory

In 1989, Serena Nunn was convicted by a jury in federal court in Minnesota of criminal charges related to a conspiracy to distribute cocaine. At her sentencing hearing, United States District Court Judge David Doty told Ms. Nunn that his heart went out to her because of the lengthy sentence that he was required to impose on her under the then-mandatory Sentencing Guidelines. She received a 16-year sentence without the possibility of parole, despite her age at the time of arrest (19 years old), her subordinate role in the offense vis-à-vis her boyfriend, and her status as a first-time, non-violent offender.

In 1997, one week after being sworn into the California Bar, Quinn Emanuel partner Sam Sheldon met with Ms. Nunn and agreed to represent her pro bono regarding her request for a presidential commutation of sentence. President Clinton then commuted her sentence in 2000, after she served 11 years in federal prison. Ms. Nunn's commutation was strongly supported by Judge Doty as well as the then-Minnesota Governor and Minnesota Attorney General.

Following her release from prison, Ms. Nunn graduated college from Arizona State and then law school from the University of Michigan. Both President Clinton and Judge Doty wrote letters of support for her admission to law school. Ms. Nunn is currently a state public defender in Atlanta, GA.

Quinn Emanuel then represented Ms. Nunn pro bono with her petition for a presidential pardon. On December 19, 2016, President Obama granted Ms. Nunn a pardon.

Very few people leave federal prison and are able to accomplish what Ms. Nunn has in life—obtaining a bachelors and juris doctorate degrees and going on to become a state public defender. In the past 70 years, there have been only three known federal prisoners that have received both a presidential commutation of sentence and a presidential pardon, and Quinn Emanuel is extremely proud to have now represented one of them. Q

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business litigation report

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