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The Implications of the United States Supreme Court's *Murphy v. NCAA* Decision on Legalized Sports Betting

On May 14, 2018, the United States Supreme Court paved the way for the expansion of legalized sports gambling with its decision in *Murphy v. Nat'l Collegiate Athletic Ass'n,* 138 S. Ct. 1461 (2018). In *Murphy*, the Court held that the Professional and Amateur Sports Protection Act ("PASPA")—the federal law that for over twenty-five years prohibited states from passing any new laws authorizing gambling on professional or amateur sporting events—was an unconstitutional violation of states' rights. With the prohibitions of PASPA no longer in place, the expansion of legalized sports betting is already underway: Within weeks of the decision, the first legal sports bets in the United States (outside of Nevada) were taken in Delaware and New Jersey. Other states will follow. This article examines the potential legal implications of the *Murphy* decision on sports betting in the United States.

Background on the* Murphy *Decision

Congress enacted PASPA in 1992 to prevent the spread of legal sports gambling beyond any state that already allowed it at that time. Instead of preventing individuals from betting on sporting events, Congress prohibited the states from legalizing sports gambling by declaring it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. 28 U.S.C. § 3702. At the time, Nevada was the only state that allowed widespread betting on individual sporting events. Delaware, Oregon, and Montana allowed very limited forms of sports betting such as sports pools or NFL parlay betting.

This status quo was maintained for over two decades, even as the explosion of the internet

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INSIDE

Richard C. Smith Named Among Most Influential Black Lawyers of 2018 by *Savoy Magazine*

Washington, D.C. partner Richard C. Smith has been named among Savoy Magazine's "2018 Most Influential Black Lawyers" in its recent issue featuring the "best of the best" Black lawyers in the United States. The publication's list highlights attorneys who have achieved outstanding results and are widely recognized for their influence in the legal field. Mr. Smith has also been named one of the Top 100 Black Lawyers by the National Black Lawyers organization from 2015 to 2018. Q

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

Juan P. Morillo, Kevin Johnson, and Charlie Verhoeven were named "Litigation Trailblazers" by *The National Law Journal*. Mr. Morillo was ranked for White Collar, Regulatory, and Compliance and Mr. Johnson and Mr. Verhoeven for Intellectual Property. The publication received hundreds of nominations for each practice area, and selected those who are achieving extraordinary success in their field. Q

Maaren Shah and Luke Nikas Named to *Benchmark Litigation*'s "40 & Under Hot List"

New York partners Luke Nikas and Maaren Shah have been named to *Benchmark Litigation*'s "40 & Under Hot List" for 2018. Mr. Nikas was ranked for General Commercial Litigation and Ms. Shah was ranked for Appellate, Financial Services, and General Commercial Litigation. This annual list recognizes outstanding lawyers ages 40 and under achieving significant success in the U.S. and Canada. Q transformed illegal sports betting. No longer did individuals have to place bets with local bookies; they could open online accounts with international bookmakers taking in hundreds of billions of dollars annually. In 2012, New Jersey decided that sports gambling revenue could revive the struggling economy of Atlantic City and create new jobs for its citizens and passed legislation authorizing sports betting in New Jersey casinos and horse racing parks, acts expressly prohibited by PASPA. The four major professional sports leagues (Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League), along with the National Collegiate Athletics Association, filed a civil suit in federal district court to enjoin New Jersey from allowing betting on their sporting events, as permitted under a separate provision of PASPA. The district court entered an injunction, *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013), and the Third Circuit affirmed. *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 230 (3d Cir. 2013). Following this decision, New Jersey attempted to frame its legislation as a repeal of its existing sports gambling laws, an approach that was again rejected by both the district court and Third Circuit. *Nat'l Collegiate Athletic Assn. v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014); *Nat'l Collegiate Athletic Assn. v. Governor of N. J.*, 832 F.3d 389 (3d Cir. 2016) (en banc).

After a six-year legal battle, the Supreme Court reversed, endorsing New Jersey's argument that PASPA was an unconstitutional violation of the "anti-commandeering" principle, a principle that recognizes the limits of Congressional authority over the states and their ability to pass laws. The Court concluded that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States,* 505 U.S. 144, 166 (1992)). After noting that "the Constitution confers upon Congress the power to regulate individuals, not States," the Court concluded, "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own." *Id.* at 1479, 1484-85.

Will Congress Act to Replace PASPA?

As the Supreme Court noted, its decision presents Congress with a choice of either passing a new law regulating individuals' ability to participate in sports gambling directly or leaving regulation of sports betting to the individual states. Senator Orrin Hatch, one of the original authors of PASPA, has already indicated that he will introduce legislation to replace PASPA, which he believes is necessary to "protect honesty and principle in the athletic arena." Press Release, Sen. Orrin Hatch, Hatch Lays Groundwork for New Sports Betting Legislation (May 14, 2018) (available at https://www.hatch.senate.gov/public/index.cfm/2018/5/hatch-lays-groundwork-for-new-sports-betting-legislation). How much any proposed legislation would attempt to limit the spread of gambling is a critical question that interested parties will want answered sooner rather than later.

Public opinion on gambling has shifted towards a more tolerant view since the passage of PASPA in the early 1990s. Nearly every state now operates a lottery; legal casino gambling that was once confined almost exclusively to Las Vegas and Reno has now spread to a majority of states, the internet has made illegal sports gambling with off-shore providers easily accessible to anyone with a computer or smartphone, and games like daily fantasy sports and office NCAA March Madness bracket pools have blurred the lines between what separates acceptable from harmful gambling. *See* U.S. Census Bureau, Table, Income and Apportionment of State-Administered Lottery Funds: 2016, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk; Csilla Horvath & Richard Paap, *The Effect of Recessions on Gambling Expenditures*, 28 J. Gambling Stud. 703 (2014). Any new legislation is likely to reflect this shift and thus attempt to regulate, rather than ban, gambling. In addition to clearing the legislative process, however, any new federal regulation would face a number of challenges, addressed in turn below.

Competing Interests

States, leagues, and gambling providers are already moving quickly to secure positions favorable to their interests, with many already enacting legislation to allow gambling at the state-level, leaving the federal government to play catch-up. Several states are already taking bets under new sports gambling laws, including New Jersey and Delaware, which started accepting sports bets at casinos within their states in June 2018. Mississippi began taking sports bets in its casinos on August 1, 2018. Approximately a dozen other states are either considering legislation or have enacted legislation authorizing sports gambling but have yet to start actively taking bets. *See* Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN.com, updated Aug. 1, 2018, http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states.

Despite their opposition to New Jersey's pre-*Murphy* efforts to legalize sports gambling, the sports leagues have shown an increased willingness to accept expanded sports gambling and the additional revenue opportunities it could provide. The NBA and its commissioner Adam Silver have been at the forefront, while the NFL and NCAA have shown the most reluctance to increased sports betting. The NBA even recently agreed to a partnership with MGM Resorts International, making MGM the league's "official gaming partner" and giving MGM access to official NBA data. Press Release, National Basketball Association, MGM Resorts International Becomes Official Gaming Partner of NBA, July 31, 2018, http://www.nba.com/article/2018/07/31/mgm-resorts-international-becomes-official-gaming-partner-nba-official-release.

Some form of federal regulation would almost certainly be preferred by the sports leagues, as it would lead to a more uniform framework and would likely include at least minimum protections for the sports leagues, including possibly an "integrity fee," which the leagues have consistently supported. Integrity fees operate as a tax on all bets taken by a sportsbook that would be paid to the leagues to be used for monitoring gambling activity on their events and educating their athletes about gambling. Integrity fees have traditionally been unpopular with many constituents, most notably would-be sportsbook operators. In some states, proposed legislation has included integrity fees as high as one percent of *total* wagers, not just on wagers that the sportsbook wins, an amount that is likely untenable for sportsbook operators, given that this could amount to more than twenty percent of a typical sportsbook's revenue of four to five percent of total wagers. *See* Matt Bonesteel, *Sports Gambling "Integrity Fee" Supporters Are Not Doing Themselves any Favors*, Wash. Post (May 22, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?noredirect=on&utm_term=.51c3691a9b63.

Role of the States

The role of individual states will need to be clarified, especially now that states have started to allow sports gambling. As with lotteries and casino gambling, decisions to allow sports gambling have generally been left to the individual states since *Murphy*. Regardless of the extent of federal legislation, state lawmakers will have to consider a number of questions that will factor into their decision to allow sports betting in their state, and to what extent it will be accessible to consumers. These factors include an assessment of how sports betting would impact professional and amateur teams in their state, how sports gambling would fit into their existing legal gambling (which may include commercial and/or tribal casinos), and whether to allow mobile sports betting.

Impact on Teams and Schools

One of the greatest concerns with expanded sports betting is the impact it could have on athletes, particularly on amateur athletes such as NCAA student-athletes. In the past, the NCAA has refused to allow states with legal sports gambling to host certain marquee sporting events, in order to limit its proximity to betting, which prompted Oregon to eliminate its sports lottery game in 2007 to attract NCAA tournament games. *See* Whitney Woodworth, *Could U.S. Supreme Court Ruling Bring Sports Betting Back to Oregon?*, Statesman Journal (May 14, 2018), https://www.statesmanjournal.com/story/news/2018/05/14/could-u-s-supreme-court-ruling-bring-sports-betting-back-oregon/608908002/. Professional leagues had taken a similar approach. Until 2017, no MLB, NBA, NFL, or NHL professional sports franchise had been located in Las Vegas, despite franchises in a number of smaller markets. That has changed now, as the Vegas Golden Knights joined the NHL this past season and the NFL's soon-to-be-former Oakland Raiders have announced a plan to move into a new football stadium near the Las Vegas Strip in 2020. It is unclear whether this expansion will continue as legal gambling spreads to other states, or how a state's gambling laws could impact teams in various leagues or organizations.

State gambling legislation should also be closely monitored by team and player representatives to assess the impact it will have on franchises and athletes who operate within the state. One area that should be of particular note to NCAA teams is the disparate interests of states in protecting student-athletes at state-run public universities on one hand, and increasing state revenue via legal sports gambling on the other.

Relationships With Existing Gambling Operators

States must also consider the ramifications of expanded sports betting on existing casino operations within their state and the impact on established business relationships. States will face a number of questions, such as whether to limit sports betting to in-person wagers at existing casinos or allow new standalone sportsbooks and whether to limit mobile betting licenses to existing licensed casino operators or allow licensing of new operators.

Certain agreements between states and American Indian tribes could also be implicated by these decisions. Tribes in a number of states, including California, Connecticut, and Mississippi, have monopolies or near-monopolies on offering certain types of casino gambling or games through long-standing agreements with the state. A number of these tribes have expressed their belief that legal sports gambling falls under the language of these existing exclusivity agreements and that granting others the right to conduct sportsbook operations would violate these exclusivity agreements and entitle the tribes to withhold as much as several billion dollars in slot machine revenues annually from the states. Kevin Draper, et al., *Indian Tribes Dig In to Gain Their Share of Sports Betting*, N.Y. Times (May 21, 2018), https://www.nytimes.com/2018/05/21/sports/sports-betting-indian-casinos.html. California and Connecticut have yet to authorize legal sports gambling as they negotiate with the tribes. The influence of the tribes and the language of these agreements will certainly impact what legislation these states can enact and how widespread sports gambling will be in these states.

Mobile Betting

Mobile sports betting has already been available to customers located within Nevada since 2010. Improvements in the accuracy of geolocation and geofencing technology have allowed mobile betting service providers to ensure that only people located in Nevada could place bets on their mobile devices. As of this writing, Nevada is still the only state where bets can be placed on a mobile device. However, New Jersey has already approved mobile sports betting and is expected to start taking bets in early August 2018. Press Release, State of New Jersey, *Governor Murphy Signs Sports Betting Legislation*, June 11, 2018, https://www.state.nj.us/governor/news/news/562018/approved/20180611b_sportsBetting.shtml. Mobile betting providers, including both DraftKings and FanDuel, the two largest daily fantasy sports providers, already have partnership deals in place with New Jersey casinos to be their mobile sports betting platform. Other states are expected to follow suit.

The availability of mobile betting provides two distinct differences from in-person betting in casinos. First, and most obviously, mobile betting makes sports gambling more accessible to consumers. Bets can be placed from anywhere, including at home or at a live sporting event, without the need to drive to a casino. Second, mobile betting greatly expands the betting options available to consumers. "Live betting" or "in-play betting" can offer gamblers the ability to wager on many individual events within games and can also offer up-to-the-second odds on certain outcomes within the games, whereas the available options in physical sportsbooks are more limited and less fluid.

Changes to the Business of Sports

Regardless of the laws eventually passed by Congress or state governments, the way sporting events are sold to consumers and experienced by fans is certain to change. While gambling on sports had largely been an unacknowledged reality throughout most of the sports broadcasting era, the gambling implications of certain events will likely be much more freely discussed by commentators during telecasts. Additionally, advertising and sponsorships by betting services and data providers will likely be ubiquitous on broadcasts and in stadiums and arenas, where these companies can directly reach their target audience of sports fans.

As the NBA's recent deal with MGM highlights, access to up-to-the-minute information and performance data will be critical for both gaming providers and customers alike, as each side seeks to have as much data as possible at its disposal in order to make informed wagers. This intense interest in data could raise potential privacy issues as athletes seek to protect and control the rights to their individual health and performance data. In particular, the right to prevent the disclosure of certain health issues of athletes, especially college student-athletes, could raise significant legal issues.

Other Ramifications of the Murphy *Decision*

The Supreme Court's unambiguous anti-commandeering language in the *Murphy* opinion could have implications for other areas of law where states have been at odds with the federal government, particularly in fields where Congress seeks to impose more restrictive laws than some states, such as immigration and marijuana law. States seeking to avoid federal regulations could try to advance New Jersey's successful anti-commandeering arguments from *Murphy* to obtain greater autonomy over these and other issues.

Conclusion

With the elimination of PASPA, expanded sports gambling is here to stay. Given the historical popularity of illegal sports betting and the large sums of money wagered illegally each year, it will quickly become a significant sector of the economy – legal and otherwise.

Similar to the expansion of state lotteries and casino gambling in the 1980s and 1990s, once it begins, the majority of states are likely to take part. Although some states may resist legalization due to concerns over the harm that legal sports gambling could cause its citizens, abstention will prove challenging for states that begin losing potential revenues from wagering by its citizens to neighboring states that offer legal sports betting. As sports gambling becomes more accepted in the United States, many states are also likely to allow mobile betting, rather than restricting betting to casinos. In the midst of this revolution, the leagues, governments, and sportsbooks and gaming providers will all seek to protect and grow the products they have developed and the people they represent. New conflicts—and new law—are certain to develop.

France: Adoption of Trade Secrets Law

On June 21, 2018, the French Senate finally passed a law that creates a specific regime for the protection of trade secrets, a legal concept that, until now, had remained undefined in the country. This law, which was the subject of over four months of parliamentary discussions, results from France's legal obligation to comply with the Directive 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and commercial information against unlawful obtaining, use and disclosure before June 9, 2018. This tight calendar and the failure of the last attempt to introduce a protection of trade secrets (The Macron Act of 2015) led the deputies of the National Assembly supporting the law to propose a bill containing the exact same wording as the European directive.

An animated parliamentary debate and subsequent constitutional review (see Decision No. 2018-768 DC of July 26, 2018) ultimately led to the adoption of a law that became effective August 1, 2018 (subject to the adoption of implementation decrees for the application of certain provisions). While remaining similar to the European legislation, it specifically responds to the needs of French companies to have (I) a clear definition of trade secrets and (II) adequate procedural tools and civil remedies. Nevertheless, it unfortunately lacks a criminal law provision, which would have the ability to deter economic operators from fraudulent misappropriation of sensitive economic information (III).

A Much-Needed Protection

One of the main objectives of European Directive 2016/943 is to harmonize Member States' legislation on trade secrets, in order to limit the risk of "fragmentation of the internal market" and to "lower the incentives for businesses to undertake innovation-related cross-border economic activity" because of their reluctance to invest in a country that does not guarantee good protection of their strategic information.

Until now, France was off-track since existing legislation provided no definition of trade secrets, even though France is bound by Article 39.2 of the WTO TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights), which requires its members to take effective measures to protect trade secrets.

Although preexisting French law did not define the notion of trade secrets, it did recognize its existence in national provisions and case law (See for instance, Article L. 463-4 of the French Commercial Code relating to the production of exhibits containing trade secrets before the national Competition Authority). Companies wanting to ensure the protection of their sensitive information had to juggle with fragmented and often unsuitable provisions, in order to find a legal basis for an action. This usually took the form of either a contractual claim where the parties had inserted a clause protecting trade secrets, or a tort claim on the basis of unfair competition or parasitism, or sometimes even a criminal complaint relying on the offenses of theft or breach of trust.

By adopting a law that provides a clear definition of trade secrets and an array of measures to preserve it, France is at last offering its companies greater legal certainty.

Sound Procedural and Civil Remedies

The new law creates a Title V within Book I of the French Commercial Code entitled "De la protection du secret des affaires," which is subdivided into three main chapters relating to the object and conditions of the protection of trade secrets (1), legal proceedings that may be launched against infringements of trade secrets (2), and procedural measures for their protection that civil and commercial courts may order in the course of legal proceedings (3).

1. *Definition of Trade Secrets*

The new Article L. 151-1 of the Commercial Code defines the notion of trade secrets by taking up the three criteria provided for by the European Directive. First, it must be information which is not, in itself or because of the configuration of its components, generally known or easily accessible to persons familiar with this type of information because of their sector of activity. Second, it has to have a real or potential commercial value because of its secret nature. Lastly, it must be the subject of special measures intended to ensure its secret nature. If these three cumulative conditions are met, then the information will be eligible for protection under the new trade secret provisions.

Article L. 151-2 reproduces the European legislation by defining the legitimate holder of a trade secret as "one who has lawful control over it," while Article L. 151-3 then specifies the various lawful methods of obtaining this secret, which are the discovery or independent creation as well as the study of a product already distributed on the market, which therefore includes reverse engineering cases.

Furthermore, the new provisions list the cases in which the obtaining, use, or disclosure of trade secrets are illicit. This includes any information obtained without the consent of the legitimate holder of the secret, whether it results from unauthorized access to a document or material containing the trade secret, a breach of an obligation not to disclose the secret, or inappropriate conduct contrary to commercial practices. The marketing of products resulting from an infringement of secrecy is also considered to be an unlawful use of secrets, where the person marketing

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them should have known that the trade secret was obtained unlawfully.

Finally, the new legislation enshrines certain exceptions to provided by the Directive. In addition to the general exception that a secret is not enforceable in the event of a disclosure ordered or foreseen by national and international law, in litigation trade secrecy yields to the exercise of the right to freedom of expression and communication, including freedom of the press and freedom of information. Neither can one use a trade secret to prevent the disclosure in good faith of a misconduct, a reprehensible act or an illegal activity for the purpose of protecting public interests. This provision explicitly refers to the protection of whistleblowers as defined by the Sapin II Act of December 9, 2016. Moreover, employees and staff representatives are also protected when the acquisition of a trade secret results from the exercise of employees' right to information, or the legitimate exercise of the functions of staff representatives.

2. *Legal Action Against Infringement of Trade Secrets*

In order to give real effectiveness to the legal protection created, the new law has provided the Commercial Code with comprehensive civil remedies and procedural measures specially adapted to the specific nature of trade secrets.

Civil courts will now have the power to order – including under penalty and at the expense of the perpetrators of the infringement – any measure likely to put an end to the infringement of the trade secret, such as the prohibition of the continued use of the secret, the prohibition of production and marketing of products resulting from an infringement or the destruction of any document containing the secret.

Alternatively, the law allows the Courts to allocate compensation to the victim instead of the measures mentioned above (Article L. 152-5 of the Commercial Code). This scenario would apply when the infringer did not know that the use of the trade secret was unlawful and where the payment of compensation therefore appears to be the reasonable and proportionate measure.

With respect to compensation for injury caused by the infringement of trade secrets, it is provided that the calculation of damages shall take into account the loss of profit and any other loss suffered by the injured party including his moral injury. The compensation for the loss suffered will also have to include the loss of an opportunity. This provision replaces the European text, which provides that compensation for the infringement should include the profits and investment savings made by the offending party. In doing so, French lawmakers intended to align the compensation regime with the legal provisions on copyright infringement and to facilitate the work of future victims and judges by enabling them to rely on the principles of reparation already developed with regard to infringement of intellectual property rights (see the Report of the Senate parliamentary session of June 21, 2018).

The main contribution resulting from the parliamentary debate is the inclusion of a provision aimed at discouraging dilatory and abusive proceedings – an option the European Directive left to Member States. Article L. 152-6 thus grants courts the power to order any party who brings a dilatory or abusive action on the basis of the new provisions to pay a civil fine of up to 20% of the damages requested (or €60,000 absent such a request). In doing so, the Parliament wanted to address the concerns of civil society and journalists about SLAPP proceedings initiated by big corporations that could use the new law to prevent the disclosure of sensitive information concerning them, but whose disclosure would be legitimate for the public's right to information.

3. *Procedural Measures to Protect Trade Secrets*

Chapter III of the law deals with procedural adaptations to preserve secrets. It allows a judge to decide that the hearing will take place behind closed doors. The judge may, in addition, redact the written judgment to protect the secret or alone be given access to a document containing it or limit the communication thereof. Finally, Article L. 153-2 imposes a general obligation of confidentiality on each person (parties, legal representatives, lawyers, etc.) who accessed a document or the content of a document considered to be covered by trade secrecy.

Absence of Criminal Provisions

French parliamentarians have chosen not to create a specific criminal offense against the fraudulent use of trade secrets, thereby depriving companies of a mechanism capable of deterring attempts at economic espionage. Yet they had the possibility of doing so, since Article 1 of the European Directive states that it is of minimal application and cannot prevent Member States from legislating for a more extensive protection of trade secrets.

This omission is perhaps the most surprising aspect of the new law. During the last attempt to offer a legal framework to protect trade secrets, a crime of violation of trade secrets had been foreseen by the Macron Act of 2015.

In the course of the parliamentary discussions of the present law, the Senate also introduced a crime of misuse of protected economic information for exclusively economic purposes (see the Report of the Senate parliamentary session of April 18, 2018). Having as actus reus "the deliberate circumvention of protective measures intended to preserve the secret nature of the information", this offense was punishable by three years' imprisonment and a fine of €375,000 (see the Bill of the Senate relating to the protection of trade secret of April 18, 2018).

The explanation for this omission in the final text can be found in the opposition of the National Assembly

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Bankruptcy & Restructuring Litigation Update

Intellectual Property Licenses in Bankruptcy – Growing Uncertainty Regarding Bankruptcy's Effect on Trademark Licenses. The bankruptcy of a counterparty to an intellectual property license may present serious challenges. Not only are there monetary issues—such as unpaid royalties—but also material, unsettled questions as to the continued exploitation of the intellectual property itself.

The federal courts of appeal are sharply divided as to whether a debtor-licensee of intellectual property may continue to use the IP by "assuming" the license, if the non-debtor licensor does not consent. *See In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 72 (Bankr. S.D.N.Y. 2007) (discussing conflicting authorities).But just as much uncertainty exists for non-debtor licensees of trademarks, whose right to exploit the intellectual property may be cut off by a bankrupt licensor or its trustee "rejecting" the license in the licensor's bankruptcy. Although licensees of patents and copyrights are entitled to special protections from the effects of rejection under the Bankruptcy Code, *see* 11 U.S.C. § 365(n), it is uncertain whether similar protections are afforded to trademark licensees.

This was the licensee's fate in *Mission Product Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389 (1st Cir. 2018), in which a divided panel of the First Circuit Court of Appeals held that the debtor's rejection of an agreement containing a trademark license terminated the non-debtor licensee's rights to the trademark. The licensee has petitioned the U.S. Supreme Court for certiorari to resolve conflicts among the federal courts of appeal as to the consequences of rejection of a trademark license.

Tempnology held patents and trademarks relating to chemical-free cooling fabrics it had developed. In 2012, Tempnology entered into an agreement with Mission, pursuant to which it granted to Mission non-exclusive trademark and patent licenses, along with distribution rights. The parties' relationship soon soured, along with Tempnology's financial condition. Tempnology filed for chapter 11 bankruptcy in 2015 and immediately filed a motion in the bankruptcy court to reject its agreement with Mission, which the court granted.

Bankruptcy Code § 365 permits a trustee or chapter 11 debtor-in-possession to assume or reject "executory contracts," which are contracts under which material performance remains owing by each party. *See* 11 U.S.C. § 365(a). The power to assume or reject is "a multipurpose elixir for use in nursing a business back to good health." *In re Thinking Machines Corp.*, 67 F.3d 1021, 1024 (1st Cir. 1995). The trustee or debtor-in-possession may choose assumption if continued performance of the contract would be beneficial to the debtor's bankruptcy estate, in which case the contract essentially remains in place as if there were no bankruptcy. *Id.* Alternatively, they may choose rejection as "an emetic to purge the bankruptcy estate of obligations that promise to hinder a reorganization." *Id.*

Tempnology and Mission disputed the effect of Tempnology's rejection of the agreement. Although rejection generally does not, in itself, terminate the contract, the non-debtor counterparty usually cannot compel specific performance from the trustee or debtor-in-possession. Instead, the counterparty is relegated to the status of a creditor whose claim may be discharged for pennies on the dollar. The Bankruptcy Code, however, contains an express exception to the general rule for certain "intellectual property" licensees, including those of patents and copyrights. If the trustee or debtor-in-possession rejects a license covering the debtor's patent or copyright, the licensee can elect either (1) to treat the license as terminated, in which case the licensee is relieved of all future obligations, but can no longer exploit the license, or (ii) to treat the license as effective, including payment of royalties to the debtor, but without the benefit of any ongoing performance by the debtor (such as continuing product support). 11 U.S.C. § 365(n).

Congress enacted § 365(n) in 1988 in reaction to court decisions that held a debtor-licensor's rejection of an intellectual property license completely terminated the rights of the licensee. *See Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985). But Congress purposely excluded trademarks from the definition of "intellectual property" in 11 U.S.C. § 101(35A), "to allow the development of equitable treatment of this situation by bankruptcy courts." S. Rep. No. 100-505, 100th Cong. 2d Sess 5 (1988).

In light of § 365(n), Tempnology acknowledged that Mission could elect to treat its rejected patent license as continuing to be in effect. As to the trademark license and distribution agreement, however, Tempnology argued that Mission's rights terminated upon rejection. The bankruptcy court agreed with Tempnology, but the Bankruptcy Appellate Panel reversed in part, holding that Mission still had the right to use Tempnology's trademarks and trade names post-rejection. On further appeal, the First Circuit affirmed the bankruptcy court's holding in a 2-1 decision, concluding that "the rejection left Mission with only a pre-petition damages claim in lieu of any obligation by Debtor [Tempnology] to further perform under either the trademark license or the grant of exclusive distribution rights." 879 F.3d at 392.

As to Mission's distribution rights, the First Circuit held that although § 365(n) protects a licensee's right to use a patent, it does not protect the right to sell a product merely because that right appears in a contract that also contains a license to use intellectual property. Although Mission had an exclusive right to distribute certain products, that was not the equivalent of an intellectual property license, and thus was not within the scope of § 365(n).

As to Mission's trademark license, the First Circuit majority opinion noted the split of authority resulting from Congress' exclusion of trademarks from the Bankruptcy Code's definition of "intellectual property." One line of cases holds that a debtor-licensor's rejection of a trademark deprives the licensee of any further rights under the license. These courts have reasoned by negative inference that because Congress did not protect trademark licenses when enacting § 365(n), it intended for *Lubrizol*'s holding to govern when a debtor-licensor rejects a trademark license—in other words, rejection terminates the trademark licensee's rights.

Other courts have reached a contrary result, holding that rejection of a trademark license does not result in its termination, but rather is the equivalent of a breach under non-bankruptcy law. *Sunbeam Prods v. Chi Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012). These courts reason that, while such "rejection converts a debtor's duty to perform into a liability for pre-petition damages, it leaves in place the counterparty's right to continue using a trademark licensed to it under the rejected agreement." 879 F.3d at 402. As a result, the licensee may elect to disregard the debtor-licensor's rejection (i.e. breach), and continue using the trademark for the remainder of the license's term.

The First Circuit majority rejected the *Sunbeam* approach, holding that it "entirely ignores the residual enforcement burden it would impose on the debtor just as the [Bankruptcy] Code otherwise allows the debtor to free itself from executory burdens." 879 F.3d at 404. The *Sunbeam* approach "would allow Mission to retain the use of Debtor's trademarks in a manner that would force Debtor to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks, thereby diminishing their value to Debtor." *Id.* at 403. The First Circuit thus adopted "the categorical approach of leaving trademark licenses unprotected from court-approved rejection, unless and until Congress should decide otherwise." *Id.* at 404.

The majority also rejected the approach advocated by Judge Torruella in his dissent, which would have required the bankruptcy court to fashion an equitable remedy based on "the terms of the Agreement, and non-bankruptcy law." *Id.* at 407. The majority held that the dissent's approach "invites further degradation of the debtor's fresh start options," and "has the added drawback of imposing increased uncertainty and costs on the parties in bankruptcy proceedings." *Id.* at 404.

Although not directly addressed by the First Circuit in *Tempnology*, there exists yet another line of cases in which courts have ruled in favor of trademark licensees by finding that the license was not an executory contract subject to rejection. These decisions have relied on the fact that at least one of the parties to the license had substantially performed its obligations prior to the bankruptcy, a circumstance that was not present in *Tempnology*. *See, e.g.*, *Lewis Bros. Bakeries, Inc. v. Interstate Brands Corp. (In re Interstate Bakeries Corp.*), 751 F.3d 955 (8th Cir. 2014) (en banc); *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010). This line of cases may provide some trademark licensees with relief, even in the First Circuit. However, it might be argued that the logic underlying these opinions does not comport with the First Circuit's discussion of the importance (i.e., materiality) of the parties' respective ongoing burdens to protect the quality of the trademark that may exist under a license. *See* 879 F.3d at 404.

Potential Supreme Court Review. Mission has filed a petition for a writ of certiorari before the U.S. Supreme Court seeking review of the First Circuit's opinion. According to the petition, the First Circuit's decision "worsen[ed]" the existing circuit split on the licensee's rights following a debtor-licensor's rejection under § 365 of the Bankruptcy Code. The petition urges the court to adopt the holding in *Sunbeam* and other cases that allow the licensee to elect whether it will disregard rejection and continue use of the license. The petition is scheduled to be considered at the Court's September 24 conference. Although the granting of certiorari is rare, this case may be of interest to the Court due to the importance of the issue and the conflicting circuit decisions.

Congressional Action. In 2013, legislation was introduced in the U.S. Senate (S. 1720) and House (H.R. 3309) to codify the result of *Sunbeam* by extending the Bankruptcy Code § 365(n) protections to trademark licensees. The same legislation also would have codified the result of *Jaffe v. Samsung Electronics Co.,* 737 F.3d 14 (4th Cir. 2013), which held that § 365(n) protects the rights of patent licensees within the United States, even when patent licenses have been terminated in a foreign insolvency proceeding.

H.R. 3309 passed the House by a vote of 325 to 91 in December 2013, but never passed the Senate. In May 2014, Senator Patrick Leahy, the sponsor for S. 1720, announced that he was taking the bill off the Senate agenda because there was not a clear consensus for passing the bill into law. The broader bill was more controversial because it involved a large reform to the patent system by changing rules and regulations surrounding patent infringement lawsuits in an attempt to reduce the number of patent infringement lawsuits. Although the House bill was reintroduced in 2015, there has not been any indication that Congress plans to retake the issue in the current Congressional term.

Until Congress or the Supreme Court acts to clarify existing law on the trademark licensee's rights following a bankruptcy, parties to the licenses will continue to face great uncertainty.

EU Litigation Update

Improved Judicial Review of EU Commission Decisions?

The record of success in challenging EU Commission (EC) Article 102 infringement decisions in recent years has been woeful especially since the EU General Court's 2007 judgment in Microsoft v. Commission. The contrast with the judicial record on appeals against decisions under the EU Merger Regulation or Article 101, is striking.

The cause of this phenomenon was summarized in Microsoft where the Court noted that where "complex economic assessments" were involved, judicial review is restricted merely to "checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers." It held that if the EC's decision is based on "complex technical appraisals, those appraisals are subject to only limited review by the Court", as a result of which it cannot substitute its own assessment of matters of fact for that of the EC.

The limited prospects of successful judicial review of EC Article 102 decisions, due the deference given to whatever could be labelled as matters of "complex economic assessments" has resulted in corporations under investigation having an incentive to settle with the EC by agreeing to Article 9 commitments, even when there were strong grounds to defend the case.

Is there now, due to recent case law developments and indications from the Bench, a prospect of a more intense judicial review of EC infringement decisions such that the incentive to settle cases due to a lack of confidence in the intensity of judicial review at appellate level has changed?

In September 2011, the European Court of Human Rights (ECtHR) delivered judgment in the Menarini case, holding that because of the severity of competition law sanctions, they were equivalent to those imposed under the criminal law. Although an administrative body could impose fines, such a finding had to be capable of being challenged before an independent and impartial Court having full jurisdiction to review the decision. In the particular case, the ECtHR held that the appeal Court in question was not limited to simply verifying lawfulness. Rather, the Court also had to assess whether the administrative authority made proper use of its powers, whether its decision had been substantiated and proportionate, and even to check the administrative authority's technical findings.

The Menarini case has been relied on by the EU Courts in cases such as KME and Chalkor which considered the degree and intensity of judicial review that was required in competition cases to ensure that the Menarini principles were respected and that the EC's decision was reviewed by a Court having the requisite full jurisdiction. While the Court recognized that, as regards complex economic assessments, the EC has a margin of discretion, that does not mean that the EU Courts must refrain from reviewing the EC's interpretation of information of an economic nature. Instead, the EU Courts must assess whether the evidence relied on is factually accurate, reliable and consistent as well as whether that evidence contains "all the information which must be taken into account to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it". Furthermore, "in carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts."

The requirement to undertake a higher standard of judicial review set out in KME and Chalkor has been upheld and further evolved in the Court of Justice's subsequent judgments including Galp, Mastercard and Intel. In the recent en banc Intel judgment, the CJEU ruled that "the General Court must examine all of the applicant's arguments," including both factual and economic evidence to assess the validity of the EC's findings.

The impact of this new case law has been felt in other competition law appeals, for example, Kone, Schindler and Mastercard. The Vice President of the General Court, Judge van der Woude stated: "After the judgment in Mastercard, I'm not aware of any other judgment by or under which the General Court may have said that there is a margin of appreciation in complex economic matters."

In conclusion, the impact of the incorporation of the Charter on Fundamental Rights into EU law has had a substantial impact on the intensity and quality of judicial review before the EU Courts. The previous deference given to the EC's decisions where its reasoning could be labelled as comprising matters of complex economic assessment seems to be in the process of being rolled back. How far this process will go is as yet unclear, but in light of the recent case law calling for an in-depth review of the facts and an assessment all the evidence put forward, whether or not of an economic nature, there may now be a much better prospect of securing a more thorough and detailed judicial review on appeal of EC decisions in all competition cases, especially Article 102 cases. There are a number of major Article 102 appeals in the Court's docket so we shall have wait and see how this development plays out.

Major Appellate Victory for Pacific Gas and Electric in Wildfire Case

California utilities face increasing and potentially crippling litigation exposure from wildfires. This exposure has caused utilities like Pacific Gas and Electric Company (PG&E) to suffer lost market capitalization and lower credit ratings. But on July 2, 2018, the firm obtained a notable appellate victory for PG&E in the California Court of Appeal for the Third District, which held that PG&E could not be held liable for punitive damages for the 2015 Butte Fire in Calaveras and Amador Counties. The decision eliminated a potential multi-billion-dollar threat against the company, and its stock price rose on the news.

PG&E runs an extensive, state-of-the-industry vegetation management program, spending $190 million a year to inspect, trim and remove dangerous trees along its 135,000 miles of powerlines. Its contracts with the tree companies that carry out that work require the contractors to comply with detailed government and industry arboricultural and fire prevention standards in training and supervising their employees.

Despite these efforts, the 2015 Butte wildfire in Calaveras and Amador Counties started when a gray pine tree came into contact with one of PG&E's powerlines. Over 2000 plaintiffs sued PG&E, seeking over $1 billion in compensatory damages. The plaintiffs also sought potentially even greater amounts of punitive damages, asserting that PG&E was aware of the risk of wildfires but had failed to undertake adequate mitigation efforts.

PG&E argued that, in light of its risk management efforts, it could not be liable for punitive damages under California law, which requires clear and convincing evidence of "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights and safety of others." The trial court rejected most of plaintiffs' arguments, but allowed the punitive damages claims to proceed on the unprecedented theory that "conscious disregard" could be shown by improper reliance on independent contractors to honor their contractual commitments.

The firm then filed a petition for a writ of mandate to the Court of Appeal. Such petitions seek extraordinary relief and are rarely granted. But the Court of Appeal granted the petition and issued a unanimous, published decision reversing the trial court and directing entry of judgment that PG&E could not be held liable for punitive damages.

The Court held that PG&E could not possibly be found to have consciously disregarded the risk of tree-related wildfires in light of its extensive vegetation management efforts. In so doing, the Court expressly rejected the plaintiffs' argument that an unsuccessful risk management policy necessarily shows conscious disregard warranting punitive damages. The court sharply contrasted PG&E's efforts with other cases where corporate defendants had deliberately disregarded known risks like that of rollovers in certain makes of cars.

In addition to saving PG&E from the threat of billions of dollars in additional damages, this decision makes significant new California law. It will protect all companies that institute risk management programs from the threat of punitive damages should those programs fall short, which will encourage companies to initiate and continue such salutary programs in the future.

Complete Victory for USC in Arbitration Against Former Head Football Coach Steve Sarkisian

On June 21, 2018, the firm won a complete victory for the University of Southern California ("USC") after a seven-day arbitration against its former head football coach, Steve Sarkisian. USC terminated Sarkisian for cause in October 2015 after several public incidents involving Sarkisian's use of alcohol. Sarkisian—upon completing an inpatient rehabilitation program for alcoholism—sued USC on a variety of claims including breach of contract, disability discrimination, failure to engage in the interactive process under California's disability discrimination laws, failure to provide reasonable accommodations for his disabilities, breach of the implied covenant of good faith and fair dealing, retaliation, and violation of the Family Medical Leave Act.

Sarkisian contended that he suffered from alcoholism while the head coach for USC (as well as depression and anxiety). Alcoholism is a protected disability under both federal and state laws, which require employers to provide reasonable accommodations for their employees' disabilities. Sarkisian claimed in the arbitration that, despite his alcoholism, he was fully capable of performing the essential functions of his head coaching job and merely required a 30-day leave to seek inpatient treatment. Sarkisian additionally claimed that he in fact asked USC for time off to seek treatment, only to be fired the next day while on his way to rehab. In the words of his complaint, Sarkisian "pleaded with his boss . . . to give him time off to get the help he needed. Rather than express any concern or willingness to accommodate this request from a man whose history with USC goes back 23 years . . . [and] while Mr. Sarkisian was on a plane travelling to get the help he needed, [USC] notified Mr. Sarkisian by email that he had been fired." Sarkisian also alleged that his "for cause" termination violated the terms of his multi-year coaching contract. Sarkisian sought tens of millions of dollars from USC in this high-profile dispute, which garnered significant media attention.

At the outset, the firm successfully moved to compel arbitration of Sarkisian's claims (originally filed in Los Angeles Superior Court). In arbitration, after extensive discovery and a seven-day hearing, the Arbitrator ultimately ruled in favor of USC on each of Sarkisian's claims, determining that USC's termination of Sarkisian was both supported by the language of Sarkisian's contract and not in violation of any disability discrimination laws. Accordingly, Sarkisian is not entitled to any payment from USC. Following the arbitration award, the Superior Court confirmed it and entered judgment in USC's favor. Q

(Noted with Interest continued from page 6)

and the Government, which considered the new civil provisions sufficient to meet the needs of companies, on the assumption that it is already possible to punish fraudulent appropriation of trade secrets through other criminal offenses (see the Report of the Senate parliamentary session of April 18, 2018).

However, existing offenses only imperfectly cover the potential misappropriations, in part because data protected by trade secrecy is essentially immaterial and therefore not suited to offenses created long before the advent of the information society.

For instance, if the offense of theft makes it possible to punish the misappropriation of confidential documents (Article 311-1 of the French Criminal Code), it is necessary for the stolen trade secret to be a "thing" and be materialized through a physical medium (USB key, paper document, etc.). Without this physical medium, the offense may not be prosecuted, as case law and the majority doctrine consider that intangible assets not protected by an intellectual property right cannot be appropriated. Similarly, the offense of breach of trust (Article 314-1 of the French Criminal Code), which represses the misappropriation of something given for a specific purpose and is sometimes used to prosecute the substitution of sensitive data by employees, will also be difficult to characterize in the absence of a physical medium. This is because the definition of the material element of the offense also refers vaguely to a "thing."

Other offenses, which at first may appear more adequate, have proven ineffective in punishing fraudulent breaches of trade secrecy, such as the offense of disclosure of a manufacturing secret (Article L. 1227-1 of the French Labor Code), which punishes only the disclosure of the secret by an employee and not its exploitation, or economic espionage (Article 411-6 of the French Criminal Code), which is punished only if it benefits a foreign State and harms the interests of the nation (thus excluding purely commercial appropriations).

French lawmakers may have been inspired by the US Economic Espionage Act (18 U.S.C. § 1831 et seq.). This law which was enacted in 1996 adopts a very similar definition of trade secrets and criminally penalizes its theft for economic purposes. The offense has three elements: (1) misappropriation of information (by stealing, taking it without authorization or by fraud and deception), (2) knowledge that the misappropriated information is a trade secret, and (3) the fact that this information actually is a trade secret (18 U.S.C. § 1832). To establish the offense, the prosecution will also have to prove the criminal intent by showing that the defendant planned to obtain an economic advantage from the theft and injure the owner of the trade secret (18 U.S.C. § 1832). Trade secret theft is punished by a sentence of up to ten years of imprisonment and fines can reach up to $5,000,000 or three times the value of the trade secret if the offense is committed by an organization (18 U.S.C. § 1832).

It appears however that the offense of theft of trade secrets is rarely prosecuted because of budget constraints, the complexity of trade secret investigations and the fact that the victims will often rely on civil remedies, either at the state level or at the federal one (Federal Prosecution of Trade Secret Theft, Quinn Emanuel Business Litigation Report). It should be noted that the recently-passed Defend Trade Secret Act of May 2016 (18 U.S.C. § 1836, et seq) has created a federal civil cause of action for trade secret misappropriation, making it easier for plaintiffs to bring their trade secret claim in federal courts.

France would nevertheless benefit from having similar criminal provisions. The mere deterrent effect of criminal prosecution – which has previously been observed by Quinn Emanuel with its American clients – explain its existence. Practice has also shown that civil and criminal proceedings can be complementary for protecting trade secrets. When a public prosecutor is reluctant to pursue an offense relating to the misappropriation of trade secrets, either because it is complex or by lack of financial means, the evidence that can be obtained through a prior civil suit may induce them to charge offenders with trade secret theft.

The law on the protection of trade secrets is definitely a step in the right direction because it will allow companies to better defend themselves against the risk represented by the appropriation of commercial information. The creation of a specific criminal offense on the model of the U.S. Economic Espionage Act would however have been preferable in order to reach the highest level of protection for businesses. Q

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