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Defining Sexual Harassment: The State of the Law

Litigation involving sexual harassment, in a variety of forms, emerged as a recurring headline in 2017 and shows no sign of slowing in 2018. The increase in sexual-harassment claims coincides with the widespread and still-burgeoning social movement that has encouraged victims of sexual harassment to come forward and declare that they, "too," have been victimized.

There are many steps that companies can take to limit the exposure they may face from incidents of sexual harassment in the workplace. Among them, employers should stay abreast of the changing landscape of the legal exposure they may face from sexual harassment claims; implement policies and promote business cultures that minimize the prospect that such claims will ever be raised in their companies; and prepare themselves to address such claims when they are raised, including by conducting prompt and fair investigations into the allegations and managing any public-relations fall-out.

Quinn Emanuel has significant experience advising and assisting employers with all manner of legal concerns regarding sexual-harassment litigation—including by helping employers avoid facing such claims and mitigate their exposure when they arise. Based on our experience, we present below some instructive background and practice pointers that we hope will be useful in managing litigation risks from sexual harassment claims.

Claims Commonly Raised by Alleged Victims of Sexual Harassment

Alleged victims of workplace harassment have a litany of legal theories at their disposal to seek damages and other remedies against employers of alleged harassers. The most well-known among these is Title VII, 42 U.S.C. § 2000e, *et seq*.—the chief federal employment discrimination statute. Although Title VII's language does not explicitly address "sexual harassment," it includes protections against sex discrimination, and it has been long settled that sexual harassment is an actionable form of sex discrimination.

Broadly speaking, a Title VII plaintiff may pursue damages against an employer under different theories

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INSIDE

The National Law Journal Names Quinn Emanuel to 2017 "Appellate Hot List"

The National Law Journal has once again named Quinn Emanuel to its "Appellate Hot List." The firm was selected based on its several major appellate victories. Among other achievements, the article cites the firm's win in the first U.S. Supreme Court design patent case in more than 120 years for client Samsung Electronics. This marks the eighth time in ten years the firm's appellate group has been ranked on the publication's "Hot List." Q

Quinn Emanuel Ranked Number One Litigation Firm in Latin America

The firm was once again ranked as the number one firm in Latin America for both Litigation and for its FCPA & Fraud practice by *Latinvex* in its 2017 Latin America: Top Law Firms rankings. The firm was also ranked in the top 20 for its Arbitration practice. *Latinvex* rankings are based on value, prominence and scope of work, as well as references from clients and peers. Juan Morillo and David Orta were selected by *Latinvex* for Latin America's Top 100 Lawyers 2017 in FCPA & Fraud and Arbitration & Litigation, respectively, because of their recent record of major victories and new business in Latin America, as well as their rankings by other publications such as *Chambers* and *Legal 500*. Q of liability, depending on whether or not the alleged harasser was a supervisor. If the alleged harasser was not the alleged victim's supervisor, then the employer can be liable for the harassment only under principles of common law negligence—when the employer knew or should have known of the harassment but failed to take corrective action.

By contrast, if the alleged harasser was the alleged victim's supervisor, then the employer can face *respondeat superior*, or vicarious liability, for the harassment, regardless of whether the employer knew or should have known about it. The harshness of this rule has come to be somewhat mitigated by what is known as the "*Faragher/Ellerth* affirmative defense," which affords a safe harbor to employers who prove that they exercised reasonable care to prevent and correct any sexually harassing behavior, and that the complaining employee unreasonably failed to take advantage of the preventative or corrective opportunities offered by the employer. *Helm v. Kansas*, 656 F.3d 1277, 1285 (10th Cir. 2011).

Traditional remedies under Title VII include injunctive relief, reinstatement of employment if the plaintiff was terminated, back pay, and front pay in some cases. Both compensatory and punitive damages are also available in intentional discrimination claims brought under Title VII—sexual harassment claims included. Accordingly, sexual harassment plaintiffs typically seek compensatory damages for the emotional distress and humiliation that they suffered due to the harassment. The amount of compensatory damages that may be awarded in Title VII cases is subject to a cap depending on the size of the employer: $50,000 for employers with between 14 and 100 employees; $100,000 for employers with between 101 and 200 employees; $200,000 for employers with between 201 and 500 employees; and $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3). To be awarded punitive damages, a plaintiff must show that the employer exhibited malice or a reckless indifference to the federally protected rights of the plaintiff. Punitive damages are subject to the same value caps as compensatory damages. *Id.*

In addition to federal causes of action, it is common for plaintiffs in sexual harassment cases to assert state-law claims in the same suit, or to forgo Title VII claims altogether in favor of more generous state-law remedies. States have their own laws against sex discrimination, which are nearly uniformly interpreted to forbid sexual harassment, similar to Title VII. However, it is important to note that many state statutory claims of sexual harassment allow for significantly higher compensatory and punitive damages than Title VII (which has caps on those damages, as well as a higher standard—malice or reckless indifference—for punitive awards). For example, in 2012, the West Virginia Supreme Court of Appeals upheld a punitive damages award of $500,000 against an employer because of the "reprehensibility" of the employer's conduct in failing to adequately address complaints of sexual harassment—which amount is well above the Title VII cap on punitive damages for even the largest employer. *CSX Transp., Inc. v. Smith*, 729 S.E.2d 151 (W. Va. 2012). As discussed more fully below, some states expand the coverage of anti-discrimination laws by including more protected classes than included in Title VII. Moreover, many states, such as California, do not offer defenses like the *Faragher/Ellerth* affirmative defense, and thereby essentially impose strict liability for harassment by a supervisor. *See State Dept. of Health Servs. v. Superior Court*, 79 P.3d 556, 562 (Cal. 2003).

Sex discrimination is not the only legal theory relied upon by sexual harassment plaintiffs, though it is the most common. Other theories may include (i) assault and battery, depending on the severity of the harassment and whether it became physical; (ii) intentional or negligent infliction of emotional distress, depending on the availability of those claims in the forum state; (iii) invasion of privacy, which is a tort recognized under many states' constitutions or statutory schemes; and (iv) retaliation, if an adverse employment action is taken against an employee who makes a complaint about harassment, on the grounds that there is no legitimate, non-retaliatory reason for the action.

Claims That May Be Raised by Alleged Perpetrators of Sexual Harassment

Recent litigation trends demonstrate that employers today often face a "Catch-22" situation that requires them to take prompt and vigorous actions to safeguard the rights of the alleged victims of harassment, while also being careful not to expose themselves to liability to the alleged perpetrators of the harassment. Such claims by employees who have been accused of harassment typically arise from the employer's investigation of, or other response to, the allegations of harassment. Claims brought by alleged harassers may include defamation, invasion of privacy, intentional or negligent infliction of emotional distress, breach of contract, or denial of due process for public sector employees. It is not uncommon, for example, for the subjects of workplace investigations—whether founded or not—to sue the employer for defamation based on statements made during or about the investigation.

To prevent exposure to liability based on defamation, employers should be on the watch to prevent employees from making false or defamatory statements about the target of an investigation. Toward that end, employers should keep the allegations and statements made during the investigation as confidential as possible, disclosing information only as needed to conduct the investigation and take any required remedial or corrective action. To further protect themselves, companies should also avoid making premature judgments about the outcome of an investigation or characterizing or labeling an employee's conduct (such as by referring to it as "sexual harassment") without sufficient basis to do so.

Special employment arrangements create additional issues. For example, employees who benefit from a contractual guarantee that they will be fired only "for cause" may have a breach-of-contract claim against an employer whose investigation into alleged harassment is insufficient. Similarly, unionized employees enjoy several additional rights, including the right to have a union representative present during workplace investigations. Breach of that right can lead to liability entirely separate from the alleged incident of sexual harassment. And government employers should be cognizant that they are affording employees with adequate procedural due-process protections under the United States Constitution and any due process provisions of the applicable state constitution.

All of this is to say that, in seeking to proactively protect an alleged victim of harassment, an employer should take care not to expose itself to other forms of liability. "No good deed goes unpunished," as they say, and the same holds true for overly aggressive, even if well-intentioned, responses to allegations of sexual harassment.

Preventing Harassment and Protecting the Company

The single best way to avoid liability for sexual harassment is to prevent it from occurring. The most well-protected employers are those that are not merely reactive in the face of sexual harassment allegations, but also proactive in preventing them from occurring, including by instituting strong preventive policies and discouraging a culture that tolerates harassment. Not only can the prevention of harassment reduce workplace discord and an employer's exposure to liability, but having in place a meaningful prevention policy may allow employers access to powerful defenses against harassment lawsuits. Some states even impose an affirmative duty on employers to take all reasonable steps to prevent harassment, with the failure to do so giving rise to an independent claim. *See* Cal. Gov't Code § 12940(k).

The Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with enforcing federal anti-discrimination law, 42 U.S.C. § 2000e-4, recommends that workplace anti-harassment policies contain at least the following: (i) a prohibition against harassment; (ii) protection from retaliation; (iii) an effective complaint process; (iv) confidentiality; (v) an effective investigative process; and (vi) assurance of immediate and appropriate corrective action. *See* EEOC Guidance, "Vicarious Employer Responsibility for Unlawful Harassment by Supervisors" (June 18, 1999).

In addition to the foregoing, employers should provide regular training programs to their employees. An effective training program should include more than mere gender-sensitivity training. In particular, some workplace bullying, even when not overtly sexual or gender-discriminatory in nature, has been found to establish a hostile work environment sufficient to support a Title VII sexual harassment claim. *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840 (9th Cir. 2005). For example, if a workplace "bully" disproportionately targets members of a protected class, even if the bullying does not seem to be based on the protected characteristic, courts have found this to be sufficient for Title VII plaintiffs to show a link between their protected class and the harassing conduct. *Id.* Hence, in addition to training their employees not to use discriminatory language or slurs, companies may also include training on how to recognize and prevent bullying.

Employers should also stay abreast of the myriad and often-changing laws in the specific states in which they operate. Employers doing business in California, for example, should be aware that, on January 1, 2018, a new law went into effect that requires employers to include in their mandatory sexual harassment prevention training program for supervisors the prevention of discrimination and harassment based on gender identity, gender expression, and sexual orientation. Cal. Gov't Code § 12950.1. Although California has protected transgender individuals since 2003, when the state outlawed discrimination against transgendered people in housing and employment, it did not require employers to include transgender rights in sexual harassment training programs. As of this writing, California is one of 19 states with laws explicitly protecting transgendered people from discrimination and harassment, the others being Colorado, Connecticut, Delaware, Washington, D.C., Hawaii, Illinois, Iowa, Main, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New

York, Oregon, Rhode Island, Utah, Vermont, and Washington.

Under California's new law, employers with 50 or more employees (such that they are subject to California's mandatory sexual harassment training requirement) will need to ensure that their programs include prevention training designed to protect transgendered and other LGBT individuals. Moreover, covered employers must now display a poster created by the California Department of Fair Employment and Housing regarding transgender rights; the poster is available on the Department's website.

Investigating Allegations of Harassment

As noted, employers can be liable for sexual harassment perpetrated even by non-supervisors if they knew or should have known about the harassment but failed to take adequate steps to address it. *See* 29 C.F.R. § 1604.11(d). Most, if not all, states permit negligent hiring, retention, or supervision claims against employers who have reason to believe one of their employees poses a threat but fail to take remedial action. When responding to an employee's complaints, employers should carefully consider what steps, if any, are necessary to investigate and put a stop to any harassment.

Employers should consider using in-house or outside counsel to conduct the investigation. Doing so increases the likelihood that the results of the investigation will be protected by attorney-client privilege and work-product protection. One pitfall of relying entirely on in-house counsel, however, is the possibility that in a subsequent litigation arising from the investigation (or the actions taken pursuant thereto), they will be viewed as biased in favor of the company, thus potentially negating the desired protections afforded by an investigation.

While an investigation conducted by counsel may be subject to privilege, employers should be aware that, in some circumstances, employers may not be able to maintain the confidentiality of the investigation. In particular, the National Labor Relations Board recently held that, under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), employers cannot have an across-the-board policy forbidding employees from discussing workplace disciplinary investigations because it is considered interference with the employees' Section 7 rights to self-organize and engage in concerted activity. *See In re Banner Health System*, 362 NLRB No. 137 (Jun. 26, 2015). According to two of the three members of the Board panel, employees have a right under Section 7 of the NLRA to discuss pending workplace disciplinary investigations involving themselves or other employees. Employers may only restrict discussions among employees about workplace investigations if the employer can show that it has a substantial or legitimate business justification that outweighs its employee's Section 7 rights. It is not yet clear how this new principle might apply to sexual harassment investigations, which have long been thought to require the strictest of confidentiality and discretion.

Quinn Emanuel will continue to monitor developments in this area to ensure that it offers the most up-to-date advice to its clients regarding carrying out workplace harassment investigations.

How We Can Help

Navigating the issue of sexual harassment has always been tricky and sensitive, and it is even more-so now in this turbulent period. But companies are not helpless; they are in a unique position to enforce a culture and policies that are intolerant of inappropriate behavior for the protection of all of their employees and themselves. In doing so, however, they should be cognizant of the complexities of federal versus state harassment law, and also careful to balance the competing interests of both the alleged victim and the alleged perpetrator of harassment.

With years of experience and dozens of success stories, Quinn Emanuel is well equipped to assist its corporate clients in formulating and implementing an effective strategy for avoiding and, if necessary, responding to accusations of harassment in the workplace. Our employment litigation team includes some of the leading employment lawyers in the nation who stay on the cutting-edge of developments in the law. Our world-class investigations team can oversee and conduct efficient, fair, and neutral workplace investigations to avoid any appearance of bias. And, because accusations of sexual harassment often result in negative publicity about the employers of accused harassers, our crisis-management team stands ready to help mitigate any harm to the company from adverse media exposure. When these attributes of our practice are combined with our trial expertise in the event that harassment claims must be litigated, few firms offer as comprehensive of a service package as we do.

Attaching Debts Due Under Letters of Credit in the UK

Introduction

The case of Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64 involved Taurus Petroleum Ltd. ("Taurus"), a Geneva-based oil trading company, and the State Oil Marketing Organisation of Iraq ("SOMO"). Disputes between the parties arose out of a series of contracts for the sale of crude oil and LPG and were referred to arbitration. Taurus obtained a partial final award against SOMO for just over US$8.7 million. When SOMO failed to honor the award, Taurus commenced enforcement proceedings by way of interim third party debt orders and orders for the appointment of a receiver in respect of funds due to be received by SOMO under two letters of credit. The orders were granted ex parte and a series of appeals followed, culminating in the Supreme Court's decision in October last year. The decision is significant because it overturned a Court of Appeal authority going back more than 35 years; namely, Power Curber International Ltd. v National Bank of Kuwait SAK [1981] 3 All ER 607 ("Power Curber"), which held that, in contrast to the rule for debts generally, the situs of a debt arising under a letter of credit was the place of payment against documents (in this case, New York, which would have deprived the English courts of jurisdiction), rather than the place where the debt is situated. The new position under Taurus v SOMO is that the situs of the debt arising under a letter of credit is consistent with that of any other kind of debt. In this case, it was held to be England since the issuing bank was domiciled in London.

Background

When SOMO failed to pay the sums due under the arbitration award, Taurus applied to the High Court for leave to enforce the award as a judgment under section 66(1) of the Arbitration Act 1996. Having heard that a Shell entity, Shell International Eastern Trading Company ("Shell"), had purchased two parcels of crude oil from SOMO in an unrelated sales transaction and was due to make payment for these parcels under letters of credit, Taurus sought interim third party debt orders under CPR 72 against the issuing bank under the letters of credit, Crédit Agricole SA ("Crédit Agricole"), and orders for the appointment of a receiver in respect of the funds to be received by SOMO under the letters of credit.

Although SOMO was the named beneficiary in the letters of credit, a key factor in the case was that each of the credits contained "special provisions" providing for payment to be made by the advising bank in New York to the Iraq Oil Proceeds Account of the Federal Reserve Bank of New York. In addition, each credit contained a separate undertaking on the part of Crédit Agricole in favour of the Central Bank of Iraq ("CBI") to make payment in this way. These provisions and the undertakings reflected the requirements of the UN Security Council Resolution imposing sanctions on Iraq by which the proceeds of sales of oil by Iraq had to be paid in this way. Although not strictly enforced at the time when the credits were opened, the Iraqi government had decided to continue the practice in any event.

The orders were granted, ex parte, by the High Court in March 2013, after which Crédit Agricole made a payment of £9,404,764.08 into court and dropped out of the proceedings. SOMO challenged the orders on various grounds - including jurisdiction, sovereign immunity and the true construction of the letters of credit - and the High Court subsequently discharged the orders. Taurus appealed to the Court of Appeal, which dismissed the appeal, and then to the Supreme Court.

The Court Proceedings

To understand the Supreme Court decision, it is helpful to highlight certain points arising out of the Commercial Court and Court of Appeal decisions. In particular, Field J in the Commercial Court held that the debts were situated in London rather than New York, that each letter of credit contained a joint promise in favour of both SOMO and CBI, and that the debt arising from it was a joint debt. Therefore, a third party debt order could not be granted. He also held that the debts, as property of the CBI and Central Bank of Iraq, were in any event immune from execution on the basis of sovereign immunity. Both parties appealed to the Court of Appeal.

On the issue of construction, the Court of Appeal found that the "special provisions" for payment to CBI did not give CBI any proprietary interest in the debt. Rather, each letter of credit gave rise to two separate obligations: an obligation to SOMO alone to pay the proceeds into CBI's account in New York, and a separate collateral obligation to both SOMO and CBI jointly to pay the proceeds into that account. The first obligation, owed to SOMO alone, sounded in debt, whereas the separate collateral obligation owed to SOMO and CBI jointly sounded in damages. However, the court would not restore the orders on the basis that it was bound by *Power Curber*, the effect of which was that the debts arising under the letters of credit were situated in New York, where they were payable against documents, and not in London. As a result, the English courts did not have jurisdiction to grant the orders sought.

The Supreme Court granted Taurus' appeal, holding that Taurus was entitled to the orders sought, and restored the interim third party debt order and the receivership order. The two key issues before the Supreme Court, as considered by the previous courts, were as follows:

a) On the true construction of the letters of credit, were SOMO and the CBI joint beneficiaries under the credit or was SOMO a sole creditor?
The issue here was to whom the debts created by the letters of credit were owed. If the debts were owed to CBI and SOMO jointly, or to CBI alone, as had been decided in the previous proceedings, then a third party debt order could not be granted.

b) Where were the debts arising under the letters of credit situated?
A third party debt order, being a proprietary remedy, could only be granted in respect of a debt within the jurisdiction of the English Courts (or outside the jurisdiction if compliance with that order would be recognised in that jurisdiction as discharging the primary debtor's liability, which was not the case here). If the debts were situated in New York and not London, the English courts would not have jurisdiction to make the third party debt orders. If the debts were situated in London, being the place where the issuing bank was domiciled, and where the debt was recoverable, then the English courts would have jurisdiction.

On the first issue, the Supreme Court held that, on the true construction of the letters of credit, SOMO was the sole beneficiary of the debts created by the letters of credits and the sole entity to which the issuing bank, Crédit Agricole, incurred the primary obligation to make payment. It rejected previous arguments that the debt was owed jointly to both SOMO and CBI or that it was owed solely to CBI. This was important in enabling the court to grant the third party debt order over the proceeds of the letters of credit in light of the pre-requisite that there is a *"debt due or accruing due to the judgment debtor from the third party"* (CPR Part 72.2(1)). In other words, the debt must be owed solely to the judgment debtor. If the obligation to pay were owed to both SOMO and CBI, as joint beneficiaries, or to CBI alone, as had been argued in the earlier proceedings, the debt could not be attached by a third party debt order.

On the second issue, the situs of the debt, the Supreme Court overturned *Power Curber* and held that the place of a debt arising under a letter of credit is not different from any other kind of debt. It is the place where the debtor resides or where the debt is recoverable. In this case, the place of the debt was where the issuing bank, Crédit Agricole, was domiciled—London. The Supreme Court could see no reason to distinguish between a debt arising under a letter of credit and an ordinary debt. Pursuant to UCP 600, which provides that "Branches of a bank in different countries are considered to be separate banks" (article 3), the London branch of Crédit Agricole was treated as a separate bank to any international branches and, therefore, the sole residence of the debtor under the letters of credit was London where the debt could be recovered. As a result, the English courts did have jurisdiction to grant the third party debt order.

Conclusion

The Supreme Court's decision in *Taurus v SOMO* is important in that it overruled the decision in "*Power Curber.*" The effect is that judgment creditors will be able to enforce arbitration awards and judgments by attaching letters of credit opened in London in favour of beneficiaries outside the jurisdiction, provided that those letters of credit are only advised outside the jurisdiction and are not confirmed. This could have wider implications if other common law jurisdictions which have followed *Power Curber* decide to follow the Supreme Court's decision. The decision is also significant in that it was made despite the fact that there were legitimate third party interests under the letters of credit. Q

Product Liability Litigation Update

Municipal Cost Recovery Rule May Be Potent Defense in New Wave of Tort Cases Brought by States, Cities, and Counties. In the wake of the Class Action Fairness Act of 2005 and the resulting federal court scrutiny of class action claims, attorneys seeking to aggregate claims have explored a number of options. One such option that has become increasingly common is for plaintiffs' attorneys to partner with state attorney generals, cities, and other municipal subdivisions to bring lawsuits against companies for public harms allegedly incurred by these governmental entities. These suits have been filed in a variety of circumstances, including claims based on price fixing, tying arrangements, and deceptive marketing of everything from prescription medicines, credit cards, and televisions to vacation rentals. *See, e.g.*, *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 82 (5th Cir. 2013) (alleging credit card companies mislead state residents); *Louisiana v. Pfizer, Inc.*, 2014 WL 3541057, at *2 (M.D. La. July 17, 2014) (alleging drug manufacturer sold ineffective prescription medicine to state residents); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 (2014) (alleging price fixing by manufacturers of LCD panels); *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 444 (E.D. Pa. 2010) (alleging unlawful tying by cable company).

The trend is exemplified most dramatically by a recent wave of claims against pharmaceutical companies that manufacture opioid medications, which now include suits brought by more than 400 cities and counties across the U.S., and which seek to recover the cost of providing medical, police, and other municipal services in response to drug abuse in those communities.

Defendants facing these types of suits have a number of defenses available to them, including standing, federal preemption, remoteness, and proximate cause. Additionally, these claims may, in many states, be barred by a common law doctrine known as the municipal cost recovery rule, which holds that municipal costs incurred in the rendering of public services are not a cognizable form of tort injury. As claims by municipalities become more prevalent, the municipal cost recovery rule could become an increasingly important and effective defense.

The Municipal Cost Recovery Rule Prevents Municipalities from Recovering the Costs of Providing Public Services. The municipal cost recovery rule prevents municipalities from recovering the costs of providing public services, such as fire department, police, and medical services. The rule is founded on public policy considerations, including the expectation of citizens that the costs of municipal services will be spread among the taxpayers. It is often traced to the Ninth Circuit's decision, authored by now Supreme Court Justice Anthony Kennedy, in *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.,* 719 F.2d 322, 323 (9th Cir. 1983) (Arizona law), though similar principles had been applied in other states prior to that decision.

In *City of Flagstaff*, the city brought suit against a railroad company after railroad cars carrying gasoline derailed near the city limits, causing a fire. The city sought to recover the cost of responding to the accident, including the cost of overtime for fire department and emergency medical personnel. In affirming dismissal, the Ninth Circuit held that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *Id.* at 323. The court emphasized that cities and states were free to abrogate the rule by statute. But to allow cities to recover municipal costs in tort in the absence of a statute would upend "the expectations of businesses and individuals, as well as their insurers." *Id.* at 323-24. The court also made clear that historically recognized causes of action, such as claims seeking to recover the cost of abating a public nuisance, would not be barred by the rule. *Id.* at 324.

Similarly in *State v. Black Hills Power, Inc.*, after a downed power line caused a massive forest fire, the State brought negligence claims in Wyoming federal district court against the power company that owned the power line, alleging damages in the form of fire suppression and emergency services. 354 P.3d 83, 85 (Wyo. 2015). Recognizing that the municipal cost recovery rule would generally bar those types of damages, but that no Wyoming court had yet addressed the rule, the district court held that the issue of whether the rule applied in Wyoming should be determined by the Wyoming Supreme Court. *Id.* at 84. On certification, the Wyoming Supreme Court adopted the rule based on the same public policy considerations articulated in *City of Flagstaff*. Noting that, "[w]here emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement," the court concluded that reallocating the risk of municipal costs to tortfeasors was not in the public interest, in light of the government's power "to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties." *Id.*

Most states that have considered similar attempts by cities and counties to recover the costs of providing fire, police, and other services have likewise concluded that such claims should not be allowed as a matter of public policy, including California, Delaware, the District of Columbia, Florida, Georgia, Illinois, Louisiana, Massachusetts, New York, New Jersey, Ohio, Pennsylvania, Virginia, and Wisconsin. *See County of San Luis Obispo v. Abalone Alliance*, 178 Cal. App. 3d 848 (Cal. App. 1986); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008) (applying California law); *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522 (Del. Super. Nov. 27, 2002); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) (applying District of Columbia law); *Penelas v. Arms Technology, Inc.*, 1999 WL 1204353 (Fla. Cir. Ct. Dec. 13, 1999); *Walker County v. Tri-State Crematory*, 643 S.E.2d 324 (Ga. App. 2007); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *Mayor & Council of City of Morgan City v. Jesse J. Fontenot, Inc.*, 460 So. 2d 685 (La. Ct. App. 1984); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 384 Mass. 60 (1981); *Koch v. Consol. Edison Co. of New York*, 468 N.E. 2d 1 (N.Y. 1984); *County of Erie v. Colgan Air, Inc.*, 711 F.3d 147 (2d Cir. 2013) (applying New York Law); *City of Bridgeton v. B. P. Oil, Inc.*, 369 A.2d 49 (N.J. Sup Ct. 1976); *In re Lead Paint Litig.*, 924 A.2d 484, 502 (N.J. 2007); *Board of Commissioners v. Nuclear Assurance Corp.*, 588 F. Supp. 856 (N.D. Ohio 1984) (applying Ohio law); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83 (Penn. 1986); *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (applying Pennsylvania law); *Bd. of Sup'rs v. U.S. Home Corp.*, 18 Va. Cir. 181 (Va. Cir. Ct. 1989); *Town of Howard v. Soo Line RR Co.*, 217 N.W.2d 329 (Wisc. 1974); *State v. Black Hills Power, Inc.,* 354 P.3d 83 (Wyo. 2015).

The Municipal Cost Recovery Rule May Apply to the Categories of Damages Sought in Many Governmental Actions. Many of the current governmental actions seek the types of damages that may be barred by the municipal cost recovery rule. For instance, in many of the opioid cases, states, cities, and counties are seeking to hold pharmaceutical manufacturers and distributors responsible for the effects of opioid addiction, and claim injury in the form of expenses incurred in providing public services in response to drug abuse, including law enforcement, emergency medical services, prisons, and addiction treatment. Such municipal expenditures on public services are the type of damages that have been generally barred by the municipal cost recovery rule in the past. Thus, as these cases proceed, the municipal cost recovery rule is likely to play an important role in determining what damages are, and are not, compensable.

Conclusion. Under the municipal cost recovery rule, municipalities cannot recover the cost of providing public services from tortfeasors in the absence of specific statutory authorization. The rule may be an effective defense in the recent wave of claims filed by cities, states and counties against product manufacturers seeking to recover the costs of providing medical, police, and other municipal services to residents affected by the defendants' products.

Life Sciences Litigation Update

Amgen Inc. v. Sandoz Inc., ***No. 2015-1499, 2017 WL 6375146 (Fed. Cir. Dec. 14, 2017).*** This Federal Circuit decision is a remand from the June 2017 Supreme Court decision addressing the consequences when the proposed marketer of a biosimilar refuses to engage in the statutory "patent dance"—a pre-litigation information exchange—with the marketer of the innovator or reference product. The issue presented on remand was whether the Biologics Price Competition and Innovation Act ("BPCIA") preempted the innovator, Amgen, from asserting state law unfair competition and conversion claims against the proposed manufacturer of the biosimilar, Sandoz, under either field and/or conflict preemption grounds, when Sandoz refused to engage in the information exchange.

The BPCIA is a set of regulations that covers biological drugs. Biological drugs are generally more complicated than conventional drugs and are often made through biotechnology methods or other cutting-edge technologies. Amgen sells the biological product Neupogen® that is used to ameliorate certain side effects of chemotherapy in cancer patients. Sandoz applied for FDA clearance to market a proposed follow-on or "biosimilar" version of Neupogen®. The BPCIA creates the rules by which companies like Sandoz can make biosimilar versions of existing biological drugs. On remand, the Federal Circuit barred Amgen's state law claims finding that "the preemption analysis here demonstrates that Amgen's state law claims conflict with the BPCIA and intrude upon a field—biosimilar patent litigation—that Congress reserved for the federal government." *Id.* at 11.

BPCIA requires biosimilar applicants to provide the maker of the reference product with confidential access to "manufacturing information pertaining to the biosimilar product" relevant to a potential claim of patent infringement. *Id.* at 3 (citing 42 U.S.C. § 262(l)(2)(A)). Sandoz, however, refused to provide Amgen with the information required under § 262(l)(2)(A), alleging that it was not a mandatory component. *Id.* In October 2014, Amgen sued Sandoz in the Northern District of California asserting, along with patent infringement, that Sandoz engaged in unfair competition and conversion under California Unfair Competition Law by failing to disclose the information required by the BPCIA. Sandoz, in turn, counterclaimed seeking a "declaratory judgment that the BPCIA permitted its actions, [and] that Amgen's state law claims were unlawful and/or preempted." *Id.* The district court dismissed Amgen's unfair competition and conversion claims, stating that "Sandoz did not violate the BPCIA or act unlawfully." *Id.* at 5. Amgen appealed the final judgment as to its "unfair competition and conversion claims and as to Sandoz's BPCIA counterclaims." *Id.* The Federal Circuit heard the appeal and affirmed the dismissal. *Id.* at 1. On appeal to the Supreme Court, the Court directed the Federal Circuit to decide on remand whether California law would treat noncompliance with the BPCIA as "unlawful" and if so, whether the BPCIA preempts any additional remedy available under state law for a party's failure to comply with the BPCIA. *Id.* at 2.

On remand, Amgen argued that the BPCIA does not preempt state law remedies for failure to comply with § 262(l)(2)(A) and that Sandoz's failure to comply with § 262(l)(2)(A) is both unlawful under the California Unfair Competition Law and an act of conversion. *Id.* at 5. Sandoz argued that principles of both "field" and "conflict" preemption bar Amgen's state law claims. *Id.*

Under *field* preemption, "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). Here, the Federal Circuit agreed with Sandoz that "the BPCIA preempts state law claims predicated on an applicant's failure to comply with § 262(l)(2)(A)." *Id.* at 8. The court stated that "no presumption against preemption applies in this case because biosimilar patent litigation is hardly a field which the States have traditionally occupied." *Id.* (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). It is well-established that Congress granted federal courts exclusive jurisdiction over patent cases, and "the FDA has exclusive authority to license biosimilars pursuant to the provisions of 42 U.S.C. § 262." *Id.* The Federal Circuit also noted that field preemption exists for biosimilar patent litigation because the BPCIA is a "complex statutory scheme" that established a process of FDA approval of biosimilars and adjudication of associated patent disputes that was specifically intended to balance both "innovation and consumer interests." Under these circumstances, the Federal Circuit held that "the federal government has fully occupied this field" so field preemption exists. *Id.*

Under the doctrine of *conflict* preemption, federal laws take precedence "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *English*, 496 U.S. at 79). Here, the Federal Circuit agreed with Sandoz that "conflict preemption also bars Amgen's state law claims" because Amgen's complaint sought "through state law to impose penalties on Sandoz unavailable under the BPCIA for failure to comply with § 262(*l*)(2)(A)'s disclosure requirements" giving rise to a "conflict in the method of enforcement" between the BPCIA and state law that creates "an obstacle to the regulatory system Congress chose." *Id.* (citing *Arizona v. United States*, 567 U.S. at 406 (2012)). The Federal Circuit reasoned that it "must assume that that Congress acted intentionally when it did not provide an injunctive remedy for breach of § 262(*l*)(2)(A)'s disclosure requirements," and "made a deliberate choice not to impose certain penalties for noncompliance with federal law" such that "state laws imposing those penalties would interfere with the careful balance struck by Congress." *Id.* (citing *Arizona*, 567 U.S. at 405-06.) The Federal Circuit found that any state claim in conflict with those determinations would necessarily conflict with, and therefore be preempted by, the federal scheme. *Id.*

Based on the foregoing factors, the Federal Circuit held that Amgen's state law claims were preempted by the BPCIA and "intrude upon a field, biosimilar patent litigation, that Congress reserved for the federal government" and were, therefore, properly dismissed. *Id.* at 11.

Landmark Constitutional Law Victory in High Court of Australia

The firm recently achieved a complete victory in a landmark judgment on Australian constitutional law in the High Court of Australia (*Re Canavan* [2017] HCA 45) which has enormous implications for the current "citizenship crisis" engulfing the nation's Parliament.

In August 2017, the Australian Parliament referred questions to the High Court of Australia to determine whether Mr. Barnaby Joyce MP (the Deputy Prime Minister) and 6 members of the Senate were eligible to be elected to Parliament at the last general election in 2016. Section 44(i) of the Constitution states that "a subject or a citizen…of a foreign power" is ineligible to be elected to Parliament, barring dual citizens from being elected. Candidates for election were required to sign a declaration that they complied with this and all other eligibility requirements.

In each reference, the question whether the referred person was disqualified turned upon the proper construction of Section 44(i) of the Constitution, having regard to evidence suggesting that each person held dual citizenship at the time of his or her nomination. The Court appointed Mr. Antony Windsor (a former member of Parliament) as the contradictor to the reference concerning Mr. Joyce MP and Quinn Emanuel was retained by Mr. Windsor to represent him in the references.

Over the six weeks between our initial instructions and the hearing, Quinn Emanuel's Sydney office worked intensively with its offices in Paris, New York, Washington DC, Hamburg, and Perth to file expert and lay evidence and develop submissions to argue for a literal interpretation of Section 44(i). We urged the Court to eschew readings implying a knowledge or "voluntariness" requirement in relation to the dual citizenship before the engagement of the constitutional disqualification. Rather, we argued that our interpretation was consistent with the text, context, and evidence purpose of the provision, as well as the drafting history of the Australian Constitution and the approach taken by the majority of the Court in its previous leading decision in *Sykes v Cleary* (1992) 176 CLR 77.

On 27 October 2017, in a comprehensive victory, the High Court of Australia delivered a unanimous judgment adopting our legal reasons and construction arguments regarding the proper interpretation of Section 44(i). The Court declared that five of the seven members, were disqualified from sitting due to their dual citizenship, including Mr. Joyce MP.

Our successful representation in contradicting Mr. Joyce's eligibility meant that a by-election was held for his seat in the House of Representatives (which Mr. Joyce won). Our victory has also had significant implications for Australian political and commercial life. There have been several changes to the composition of the House of Representatives and the Senate due to the disqualifications, affecting parties across the political spectrum.

More significantly, the judgment has provided a massive wake-up call to Australian politicians to ensure their strict compliance with the eligibility requirements of the Constitution and has brought both the government and opposition together to agree on a protocol going forward for the assessment of the eligibility of current and future members of Parliament to sit.

Victory for Pro Bono Client in Asylum Case

The firm obtained a significant victory for a pro bono client in his case for asylum in the United States. Our client is a political activist and former Al-Jazeera journalist who was imprisoned and tortured by successive governments in Egypt. He played an instrumental part in the 2011 Egyptian Revolution and helped mobilize thousands of people across Egypt to bring democratic change in his home country. As an avid supporter of freedom of speech, he reported on the Revolution for Al-Jazeera and subsequently founded non-governmental organizations to promote democracy, election integrity, and human rights. He also held leadership positions in opposition parties that campaigned on a platform seeking democratic change (and whose members have since disappeared). Because of all of this, the government and security services in Egypt repeatedly tried to silence our client but he continued speaking out against the government. Matters took a darker turn in 2014 when our client was named in a widely disseminated "WANTED" list issued by the Egyptian Security Services. Many people on that list have since disappeared. With no option but to flee, in late 2014 our client managed to fly to the United States to seek asylum.

Quinn Emanuel was retained to represent the client in early 2015 and prepared his application, memorandum of law, and accompanying materials evidencing his persecution. Our submissions, which sought relief under both domestic legislation and the UN Convention Against Torture, focused on our client's past persecution as well as his well-founded fear of future persecution. On November

30, 2017, the client, represented by Quinn Emanuel lawyer Lucas Bento, appeared for his interview at the Asylum Office in Bethpage, New York. Two weeks later, the client was granted indefinite asylum in the United States. The significance of our victory is best summarized by what the client told us upon hearing the news: "I'd be a dead man if I went back. You have given me my life back!" Q

Quinn Emanuel Shortlisted for *The Legal 500 UK* 2018 Awards

The firm has been shortlisted for *The Legal 500 UK* 2018 awards as Firm of the Year in both Dispute Resolution and Dispute Resolution: Tax Litigation and Investigations. The firm has won the *Legal 500* "Litigation Firm of the Year" award three times in the last five years. Q

Ben O'Neil Named *National Law Journal* Rising Star for Washington, D.C.

The National Law Journal named Ben O'Neil one of D.C.'s Rising Stars for 2017. Ben was named a top 40 lawyer under 40, one of only two white collar lawyers to receive this recognition. Among other successes which led to this recognition, Ben represented a special committee of BTG Pactual Group, S.A., Brazil's largest private investment bank, in an internal investigation arising out of the much publicized arrest of the bank's CEO, restoring the Bank's reputation and ensuring its survival. He also represented the Odebrecht Group in perhaps the most significant white collar matter of past years, as well as led CONMEBOL's representation related to the indictments and investigation into international soccer being pursued by the U.S. Attorney's Office for the Eastern District of New York. Q

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business litigation report

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Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

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