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Cybersecurity and Privacy Law: What Is the European General Data Protection Regulation and What Does it Mean for Companies Doing Business in Europe

Background

A new data protection framework, the General Data Protection Regulation ("GDPR"), goes into effect in the European Union on May 25, 2018, replacing the Data Protection Directive 95/46/EC ("Directive"). *See* Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 ("GDPR").

The GDPR is directly applicable in member states without implementing legislation. Similar to the Directive, it restricts the processing and disclosure of personal data, which is defined as "any information relating to a data subject." GDPR Article 4(1). Greater restrictions apply to "sensitive personal data," such as information about racial or ethnic origin, political opinions, and religious and philosophical beliefs. GDPR Article 9(1). The GDPR harmonizes data protection rights across Europe and creates significant changes for both European and non-European businesses, including increased territorial and subject-matter scope, along with stiffer penalties for non-compliance.

Increased Territorial Scope

Perhaps the most significant change presented by the GDPR is its extended territorial jurisdiction, which purports to apply to all companies processing data from European data subjects, regardless of where the companies are based. The GDPR covers overseas organizations that satisfy one or both of two tests: (1) "the offering of goods or services" in Europe or (2) "the monitoring of" behavior within Europe, even if the organizations prove they are not established within the European Union and do not process data there. GDPR Articles 3(2)(a) and (b). Once covered, organizations must appoint representatives in the European member states where they offer goods or services or monitor behavior. GDPR Article 27(3). Examples of companies that may be covered by the expanded scope of the law include (1) certain online retailers that target European consumers by using a local language and (2) entities that price goods and services in a local European currency. *See* GDPR Recitals 23-24.

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Quinn Emanuel Opens Boston Office with Veteran Trial Ace Harvey Wolkoff

The firm has announced the opening of an office in Boston, along with the hire of veteran Ropes and Gray trial lawyer Harvey Wolkoff. The firm is opening the office primarily to serve the large technology and financial service industries in Boston. Intellectual property and financial services litigation are the firm's two largest practice areas. Partners Steven Cherny, Patrick Curran, and Sandra Bresnick are relocating from the firm's New York office to open the office with Mr. Wolkoff. Mr. Wolkoff is a trial lawyer who has successfully represented clients in complex commercial disputes, including securities litigation, consumer and security class actions, fraud, data intrusion, and contract disputes. He has been named a Massachusetts' "Lawyer of the Year" by *Massachusetts Lawyers Weekly*, and is recognized by leading legal periodicals including *Chambers USA* and *Law360*, who named him an "International Arbitration MVP" in 2017. Before becoming a partner at Ropes & Gray, he was an Assistant U.S. Attorney in the U.S. District Court for the Southern District of New York. Q

Increased Subject Matter Scope

Another key scope change under the GDPR is its treatment of so-called data "processors," which are companies and persons who work with data at the direction of controllers. Processors include companies like cloud service providers and payroll vendors; controllers include companies like retailers who collect and maintain customer data. Unlike the Directive, the GDPR imposes direct data-protection obligations on processors. These new obligations include maintaining written records of processing activities, designating a data protection officer, naming a representative when not established in the European Union, and breach notification. GDPR Article 30.

Notably, the GDPR also prohibits processors from sub-contracting without written consent. GDPR Articles 26(1a), (2)(d) This means that cloud providers with sub-processor infrastructure, such as Amazon IaaS and Dropbox SaaS, along with businesses that sub-contract elements of their supply chain requiring the use or transmittal of "personal data," will likely need to update their disclosure procedures to obtain consent from counterparts for the sub-contracted elements of the business.

Government Penalties

Compared to the Directive, which left applicable fines to the discretion of member states, the GDPR significantly increases the stakes for non-compliance. Where applicable, there is a tiered approach to fines. A company can be fined up to 4% of global turnover or €20 million, whichever is greater, for the most serious infringements, such as insufficient customer consent for the processing of data. GDPR Article 83. Fines up to 2% of global turnover or €10 million, whichever is greater, apply to other types of violations, such as the failure to comply with breach notification requirements or the failure to maintain adequate records. *Id.*

Under the GDPR, fines are tied to the revenues of an "undertaking," not merely the entity that constitutes the relevant controller or processor. GDPR Article 83. Recital 150 explains that where fines are imposed, "undertaking" should be understood in accord with the Treaty on the Functioning of the European Union, which addresses competition law. In that context, the European Court of Justice has sometimes defined "undertakings" to encompass entities engaged in economic activity, regardless of legal status and financing.

Private Litigation

The GDPR contemplates private litigation against data controllers and processors. GDPR Article 79. In contrast with U.S. litigation norms, any person who has suffered "material or non-material damage" as a result of a violation has the right to receive compensation from controllers and processors. GDPR Article 82(1). Individuals also have a right to lodge complaints with supervisory authorities, and to mandate a consumer protection body to bring claims on their behalf. GDPR Articles 77, 80.

Breach Notification

Unlike the Directive, which is silent on the issue, the GDPR imposes notification obligations in the event of a personal data breach. For data controllers, the GDPR adopts a two-tiered approach to breach disclosure. First, the breach must be reported to supervisory authorities *unless* it "is unlikely to result in a risk for the rights and freedoms of natural persons." GDPR Article 33. Whether a breach implicates risks to the "rights and freedoms of natural persons" is likely to be subject to significant consideration in the event of a breach, but preliminarily seems likely to encompass at least those breaches involving sensitive data such as health information. Where required, the disclosure is to be made "without undue delay and, where feasible, not later than 72 hours after having become aware of [the breach]." *Id.*

Second, the breach must also be reported to the affected individuals without "undue delay" where it "is likely to result in a high risk to the rights and freedoms of natural persons." GDPR Article 34. However, the controller is not required to provide this additional data-subject notification under certain circumstances, such as where the controller has anonymized the data and rendered it unintelligible to any person not authorized to access it.

When a data processor, unlike a data controller, experiences a personal data breach, it must notify the data controller but otherwise has no other notification or reporting obligation under the Regulation. GDPR Article 33.

Data Protection Officers

The GDPR eliminates the requirement under Article 18 of the Directive for data controllers to notify local data protection authorities of their data processing activities, and limits requirements to obtain approval for data transfers. However, the GDPR increases internal recordkeeping requirements and requires the appointment of data protection officers for controllers and processors engaged in certain high-risk activities—*i.e.*, where one of a company's core activities is the regular monitoring of data subjects or special types of sensitive data. GDPR Article 37.

Cross-Border Transfers

Like the Directive, the GDPR prohibits the transfer of personal data outside the European Union to any jurisdiction not found to offer an adequate level of data protection. Because the U.S. has not been granted a complete adequacy decision, U.S. companies that receive data from the European Union must consider whether they have adopted appropriate methods for the cross-border transfer of data. The most common are the Privacy Shield, Standard Contractual Clauses, and Binding Corporate Rules. The specific requirements for these mechanisms are laid out in GDPR Articles 44-50.

Privacy Shield. Like its predecessor, the Safe Harbor Framework, the Privacy Shield is enforced by the Federal Trade Commission and Department of Transportation, and any U.S.-based organization that is subject to the jurisdiction of one or both agencies may participate. To do so, organizations must self-certify annually, and, among other things, publicly agree to adhere to the Privacy Shield Principles, such as notice, choice, access, and accountability for onward transfer of personal data. Over 2,500 U.S.-based businesses maintain active Privacy Shield registrations, including Adobe Systems, Airbnb, Inc., Allergan plc, Baxter International Inc., Citrix Systems, Inc., Deloitte LLP, Eli Lilly and Company, Facebook, Inc., Fair Isaac Corp. dba FICO, Foot Locker, Inc., Google Inc., Hard Rock Café International (USA), Inc., J Crew Group, Inc., LinkedIn Corp., Merck & Co., Inc., Microsoft Corp., PricewaterhouseCoopers LLP, Ralph Lauren Corp., Raytheon Co., Reddit, Inc., and Snap Inc. *See* Privacy Shield Framework, Privacy Shield List (Active), *available at* https://www.privacyshield.gov/participant_search.

Standard Contractual Clauses. As an alternative or supplement to the Privacy Shield, standard contractual clauses, or "model clauses," can be incorporated into contracts governing the transfer of data from the European Union. The GDPR streamlines the requirements for the model clauses and, in contrast to the Directive, explicitly provides that clauses previously approved by the European Commission can be agreed and used by the parties. GDPR Article 46. Although not subject to ongoing monitoring, the clauses can be challenged legally, including by individuals whose personal data they cover. One such challenge was made recently by the same individual who previously challenged the Safe Harbor Framework, *see Data Protection Commissioner v. Facebook Ireland* (Case No. 4809) [2016], and the European Court of Justice is now evaluating the mechanisms used to facilitate the transmission of personal data from Europe to the U.S.

Binding Corporate Rules. As an alternative or supplement to entering into standard contractual clauses for each cross-border data transfer, organizations fielding a substantial number of complex internal transactions may wish to implement binding corporate rules (BCRs) governing intra-group international data transfers. GDPR Article 47. BCR, which must be approved by the national Data Protection Authority for each applicant, can be used only for intra-group transfers, and do not provide a basis for transfers made outside a single corporate group or group of enterprises engaged in a joint economic activity.

The data protection authorities of nearly two dozen European countries have adopted a "mutual cooperation procedure" whereby approval of BCR by the lead data protection authority for an organization established in Europe is treated as a sufficient basis for providing a national permit for the BCR in other European countries. The cooperation process is closed for just under 100 companies, including Accenture, Airbus, American Express, BMW, Bristol-Myers Squibb, e-Bay, Ernst & Young, GlaxoSmithKline plc, Hermes, HP Enterprise, Michelin, Novartis, and Shell International B.V. To date, the most common lead authorities include CNIL France, ICO UK, and Dutch DPA.

Production of Documents for Litigation. The GDPR introduces a new provision restricting the transfer of data to countries outside Europe for use in litigation. *See* GDPR Article 48. Although there is no comparable limitation under the Directive, the U.S. Supreme Court has previously addressed similar "blocking statutes" and held that, subject to a balancing test, the laws "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." Société Nationale Industrielle Aéreospatiale v. U.S. Dist. Court for the Southern District of Iowa, 482 U.S. 522, 544 n.29 (1987). Since then, courts in the U.S. have usually, but not always, held that the U.S. interest in discovery outweighs the foreign interests inherent in preventing the transmittal of data. *See, e.g.*, *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409 (S.D.N.Y. April 29, 2016) (permitting discovery from UK-based entities pursuant to the Federal Rules of Civil Procedure and rejecting argument that the mere risk that production of documents would violate UK law was a sufficient basis to resist discovery); *but see SEC v. Stanford International Bank Ltd,* 776 F. Supp. 2d 323 (N.D. Tex. 2011) (sovereign interest in protecting the privacy of bank records was great enough to require use of the Hague Convention to obtain the records). Therefore, a court in the U.S.

may order the production of documents containing personal data even if that would potentially subject the producing party to sanctions under the laws of another country. Businesses engaged in cross-border litigation should monitor post-GDPR developments in whether U.S. courts order the production of documents stored in Europe.

Recommendations

In the months before the GDPR goes into effect on May 25, 2018, organizations should prepare for the changes it may bring. Key tips include: (1) understand how you use European personal data; (2) perform a systems gap analysis to ensure compliance; (3) evaluate contracts with third parties, such as cloud service providers, to determine if the agreements should be modified to address the new rules, and assess whether there are appropriate mechanisms in place to transmit personal data within and outside the organization; (4) determine whether the organization is required to name a data protection officer; and (5) be ready for prompt breach notification.

Recent Developments in Cybersecurity in the United States: The Proposed Data Broker Accountability and Transparency Act of 2017

In the wake of disclosures of major data breaches affecting hundreds of millions of American consumers by numerous companies including Yahoo, Whole Foods, Uber, and Equifax, and even the SEC and IRS, federal legislation regarding consumer financial data is being seriously discussed in Washington, D.C. Presently, there is no federal law requiring notification to consumers or remedial measures when a data breach impacting American consumers occurs. Instead, companies that handle the personal identifying and financial information of American consumers must comply with a patchwork of 48 different state regulatory schemes regarding when and how to notify affected consumers, and remedial action following a breach. On September 14, 2017, U.S. Senator Chris Markey (D-MASS) introduced Senate Bill 1815, "The Data Broker Accountability and Transparency Act of 2017." Co-sponsored by Senators David Blumenthal (D-CT), Sheldon Whitehouse (D-RI), Al Franken (D-MN), and Bernie Sanders (I-VT), SB 1815 would (1) give consumers access to, and the ability to correct, their personal information held by data brokers, (2) allow consumers to stop data brokers from using, sharing, or selling their personal information for the marketing of financial services, (3) require data brokers to develop comprehensive privacy and data security programs and to provide "reasonable" notice in the event a breach occurs, and (4) empower the Federal Trade Commission to enforce the law and to promulgate regulations including establishing a centralized website for consumers to view a list of covered data brokers and information regarding consumer rights. "Data brokers" are principally credit reporting firms, but the Act would apply to any company that maintains personal information of non-employees/non-customers for the purpose of selling that information or providing it to anyone other than the consumer. Following its introduction, the bill was referred to the Senate Commerce Committee, which conducted hearings in November 2017. We will continue to monitor this legislation; in the meantime more information about SB 1815 is available at https://www.congress.gov/bill/115th-congress/senate-bill/1815/all-info.

Federal Circuit Issues Important Decision On Written Description And Enablement In *Amgen Inc. v. Sanofi*

In *Amgen Inc. v. Sanofi*, 872 F.3d 1367 (Fed. Cir. 2017), the Federal Circuit acknowledged the relevance of post-priority date evidence in determining whether claims satisfy the written description and enablement requirements, rejected the "newly characterized antigen" test as a means of proving written description of monoclonal antibodies, and commented on the proper application of the standards for considering permanent injunctions in the medical context. This decision provides crucial clarity on important issues in the ever growing area of biologic drugs, but also offers valuable guidance for all patent litigation.

The Patent

Amgen brought suit against Sanofi for infringement of two patents through its Praluent® alirocumab product. *Id.* at 1372. The two asserted patents (U.S. Patent Nos. 8,829,165 and 8,859,741) generally relate to monoclonal antibodies that help reduce low-density lipoprotein ("LDL") cholesterol by inhibiting PCSK9—a naturally occurring protein that causes the destruction of LDL receptors responsible for extracting LDL from the bloodstream. *Id.* at 1371. The relevant claims of those patents are directed to the entire genus of monoclonal antibodies that bind to specific amino acid residues on PCSK9 and block PCSK9 from binding to LDL receptors. *Id.* at 1372.

The Dispute

Sanofi appealed from a final judgment of the district court holding the two patents asserted against it not invalid. *Id.* at 1371. Sanofi argued, *inter alia*, that the district court erred in at least the following respects: (1) the district court improperly excluded post-priority date evidence regarding written description and enablement; (2) it improperly instructed the jury on written description that a claim to antibodies can be adequately described by the disclosure of a newly characterized antigen; and (3) it improperly issued the permanent injunction. *Id.*

With respect to post-priority date evidence, the district court had concluded that the evidence "did not illuminate[] the state of the art *at the time of filing*," and therefore was not relevant "to determine whether there is sufficient disclosure of the claimed invention." *Id.* at 1373 (emphasis in original). Sanofi argued that excluding such evidence was improper because the "written description requirement protects against attempts to preempt the future before it has arrived" and it "would make [no] sense if future innovators were barred from introducing evidence of their own innovations in written description challenges." *Id.* Amgen responded that "post-priority-date evidence may be relevant [to written description and enablement] only if it illuminates the state of the art at the filing date" and that antibodies not in existence as of the priority date are not "part of the state of the art" and "therefore cannot 'illuminate' it." *Id.*

With respect to the challenged jury instruction, the district court had instructed the jury that "[i]n the case of a claim to antibodies, the correlation between structure and function may also be satisfied by the disclosure of a newly characterized antigen by its structure, formula, chemical name, or physical properties if you find that the level of skill and knowledge in the art of antibodies at the time of filing was such that production of antibodies against such an antigen was conventional or routine." *Id.* at 1376. Sanofi argued that this instruction was improper because "disclosing an antigen does not satisfy the written description requirement for a claim to an antibody." *Id.* Amgen responded that the district court's instruction was consistent with the "newly characterized antigen" test allegedly supported by Federal Circuit precedent. *Id.*

With respect to the permanent injunction, the district court entered the injunction despite having concluded that doing so would "disserve the public interest" by eliminating "a choice of drugs." *Id.* at 1381.

The Federal Circuit's Opinion

The Federal Circuit panel (Chief Judge Prost, Judge Taranto, and Judge Hughes) reversed both the district court's exclusion of post-priority date evidence and its jury instruction on written description. In reaching its decision on post-priority date evidence, the Federal Circuit confirmed that "evidence illuminating the state of the art subsequent to the priority date is not relevant to written description." *Id.* at 1373-74. However, the Federal Circuit held that "post-priority-date evidence of a particular species can reasonably bear on whether a patent fails to disclose a representative number of species falling within the scope of the genus or structural features common to the members of the genus so that one of skill in the

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Transnational Litigation Update

Supreme Court Trend Against Extraterritorial Jurisdiction Continues in 2017. Two 2017 Supreme Court decisions and a recent Ninth Circuit opinion soundly rejected district courts' exertions of jurisdiction over foreign corporations, reinforcing the message that corporations will not easily be sued in U.S. Court where they are not "essentially at home."

All told, 2017 was a year that solidly reinforced the jurisprudential focus on "at home" personal jurisdiction that began with *Daimler AG v. Bauman*, 134 S. Ct. 746, in 2011. In May, in *BNSF Ry. Co v. Tyrrell*, 137 S. Ct. 1549 (2017), the Supreme Court refused to permit general jurisdiction over a non-resident railroad corporation even though the railroad had "over 2,000 miles of railroad track and more than 2,000 employees" in the forum state. The case involved employees' Federal Employers' Liability Act claims brought in Montana state court: the employees neither lived in Montana nor were injured there, and the employer was neither incorporated in Montana nor had its principal place of business there. Reversing the Montana Supreme Court, the Court made clear that general jurisdiction over a non-resident defendant requires more than sustained business in the forum and exists only where the forum is analogous to the defendant's primary place of operation or residence—that is, the defendant's "home."

A month later, the Supreme Court addressed personal jurisdiction again, this time in the context of specific, or "case-linked" jurisdiction, the type of personal jurisdiction that can arise from a defendant's specific contacts with the forum state. In *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773 (2017), the Supreme Court found that specific jurisdiction could not be exercised over a pharmaceutical company for personal injury claims resulting from the use of a drug that the company sold in the forum state when the plaintiffs bringing the suit had purchased and used that same drug in other states. The Court found that the plaintiffs' alleged injuries did not arise out of the pharmaceutical company's conduct in the forum state, but rather from the company's activities in *other* states, even though the plaintiff's injuries were connected to the same drug that was sold by the defendant in the forum state. The plain language upshot here is that the plaintiffs could sue only where the pharmaceutical company had its headquarters and place of incorporation (where the court had general jurisdiction) or in states where the plaintiffs actually used the drugs (where the claims would arise out of the defendant's contacts with a forum state and the court had specific jurisdiction).

The effects of 2017's back-to-back Supreme Court guidance on the limits of personal jurisdiction over defendants not regularly at home in the forum is already evident. A recent decision from the Ninth Circuit Court of Appeals, *Axiom Foods, Inc. v. Acerchem International, Inc.*, 874 F.3d 1064 (9th Cir. 2017), applied the recent high court precedent to its analysis and held that specific personal jurisdiction could not be exercised over a UK subsidiary of a Chinese wholesale food manufacturer when the sole basis for specific personal jurisdiction was the manufacturer sending an infringing newsletter to various recipients, only ten of which were located in California. The court held that Acerhem's "case-linked" or "suit related" conduct did not create a sufficient connection with California for the proper exercise of specific personal jurisdiction. On these facts, the court held that Acerchem's conduct was "barely connected to California." The court explained that to the extent Acerchem created California contacts by sending a single newsletter to 55 recipients of unknown residence, those contacts are too "attenuated" and "isolated" to support specific personal jurisdiction over a corporation that is not at home in California. The court further explained that "Acerchem UK itself conducts no business in California ….It can hardly be said that 'California [wa]s the focal point of the [newsletter] and of the harm suffered."

Tyrrell and *Bristol-Myers Squibb* mark the Supreme Court's fifth and sixth opinions in six years addressing personal jurisdiction. In all six, the Court has held that a forum's exercise of jurisdiction over the defendant was improper. The basic rules: general jurisdiction is strictly limited to where a defendant can be said to be "at home" (where it is incorporated and where it keeps its principal place of business), and specific jurisdiction requires a direct connection between the plaintiff's claim, the defendant's conduct, and the forum. The end result: suing a corporation where it isn't at home or didn't hurt you will not be easy.

Appellate Practice Update

The Supreme Court Speaks to Exceptions to Appellate Time Limits. In the minefield of legal procedures, perhaps none strikes fear in the hearts of lawyers and clients alike as much as a missed deadline. In several high-profile cases in recent years, courts have shown little tolerance for litigants who missed deadlines for seeking appellate relief, even by as little as a few days. *See Two-Way Media LLC v. AT & T, Inc.*, 782 F.3d 1311, 1314 (Fed. Cir. 2015) (affirming district court's denial of a request to reopen or extend the time to notice an appeal after party missed the deadline under

Federal Rule of Appellate Procedure 4). In *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), the Supreme Court provided some clarity as to when a missed deadline is fatal to a party's future appellate rights, and when an untimely filing may be excused or an exemption granted.

The Supreme Court in *Hamer* adopted a bright-line rule on the question of when a missed deadline creates a jurisdictional bar to relief and when it does not. Specifically, the Court held that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,'" whereas "a time limit prescribed only in a court-made rule … is not jurisdictional" but only a "mandatory claim-processing rule subject to forfeiture." This rule follows from the constitutional principle that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." The Court further explained that while a "jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal," mandatory claim-processing rules are "less stern" because they "may be waived or forfeited" by a party.

The *Hamer* case involved an order by the district court extending the time for the plaintiff, Charmaine Hamer, to file a notice of appeal from an adverse judgment by two months, consistent with statutory authorities that allow extensions but in violation of Federal Rule of Appellate Procedure 4(a)(5)(C), which limits extensions to 30 days. Hamer filed the notice more than 30 days after the original deadline, but within the time ordered by the court. On appeal, the defendants did not challenge the timeliness of the notice of appeal. The Seventh Circuit, however, raised the issue *sua sponte* and ultimately dismissed the appeal, ruling that the notice's inconsistency with Rule 4(a)(5)(C) stripped the court of appellate jurisdiction. Noting that the defendants had repeatedly conceded that the notice of appeal was "timely" based on the district court's extension, the Supreme Court ruled that the Seventh Circuit "erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal."

Hamer's holding that court-made appellate deadlines are not jurisdictional provides some relief to litigants whose appeals are jeopardized by a missed deadline. It also raises the question of what other deadlines qualify as mere "mandatory claim-processing rules" subject to waiver or forfeiture. While a deadline to file a notice of appeal is rarely forgotten by the parties, other deadlines in trial practice are of less obvious importance for preserving issues for appeal.

An apt example is in the context of motion practice during and after trial for judgment as a matter of law. Federal Rule of Civil Procedure 50(b), like Federal Rule of Appellate Procedure 4, sets a court-made deadline: a motion for judgment as a matter of law must be made "[n]o later than 28 days after the entry of judgment." While a timely Rule 50(b) motion will toll the 30-day time to notice an appeal, if the motion itself is not timely, courts have held that it will not toll the 30-day time to take an appeal. *See, e.g.*, *Dotson v. City of Syracuse*, 549 F. Appx. 6, 7 (2d Cir. 2013). The decision in *Hamer* suggests that such deadlines, too, are subject to waiver and forfeiture should a party neglect to raise an opponent's noncompliance as a grounds for dismissal.

These and other district court deadlines are also critical to determining the *scope* of issues that are preserved for appeal. It is commonplace in appellate practice for parties who fail to raise issues in district court to be barred from asserting them on appeal. Likewise, a Rule 50(b) post-trial motion may be limited to issues which the party adequately raised in a Rule 50(a) motion before the case is submitted to the jury. These considerations mean that litigants must be diligent not only in their post-trial motions, but in the moment during trial, to ensure that arguments they may raise on appeal are preserved.

The risks of untimely or inadequate preservation of issues at trial underscore why litigants must always act in trial courts with an eye to the future appellate rights. Parties may often view trial and appeal as distinct stages of a case, often led by separate legal teams or even different firms. Quinn Emanuel adheres to the view that integrating appellate expertise at the trial level offers our clients the best service, by ensuring that nuances of appellate practice are considered in building the record for appeal. Far from the ivory-tower approach for which appellate lawyers are sometimes criticized, our appellate attorneys work closely with our trial teams at every stage of a case.

Class Action Litigation Update

Discoverability in U.S. Class Actions of Submissions in Foreign Government Investigations. Activities giving rise to class actions in the U.S. are frequently the target of investigations by foreign governments—indeed, these investigations are increasingly the genesis of the U.S. litigation. In response to such investigations, companies often provide foreign agencies with candid and detailed narrative descriptions of the underlying events, as well as key documents. Such submissions regularly sit atop the wish list of U.S. class action plaintiffs. Decisions concerning the discoverability of these materials are intensely fact-specific, but defendants

have powerful arguments to shield production.

In the U.S., different rules apply to the discoverability of submissions to foreign governments than to the discoverability of submissions to the U.S. government. Absent objection from the U.S. government, relevant materials a litigant produces to U.S. agencies are typically discoverable under Rule 26's broad provisions. *See, e.g.*, *In re Pac. Pictures Corp.*, 679 F.3d at 1126–31; *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003); *In re Columbia/HCA Healthcare*, 293 F.3d 289, 291 (6th Cir. 2002). However, submissions to foreign governmental agencies, such as the European Commission ("EC"), are subject to a different consideration—international comity. The Supreme Court established a five-factor test in *Societé Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa* for assessing international comity concerns in document-production scenarios:

1. the importance to the . . . litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

482 U.S. 522, 545 n.28 (1987) (quoting Restatement of Foreign Relations Law § 437). If a court finds comity considerations paramount, submissions to a foreign investigatory body are not discoverable. This protection will not prohibit discovery of underlying, non-privileged information simply by virtue of its provision to the foreign government, but it does shield disclosure of the materials "as packaged" in connection with the foreign investigation.

U.S. case law does not provide any bright-line guidance on whether confidential materials submitted to foreign governmental bodies are discoverable in U.S. litigation. In *In re Vitamins Antitrust Litigation*, the plaintiffs sought a corporate immunity statement made by the defendants to the EC. No. MDL 1285, 2002 WL 34499542 (D.D.C. Dec. 18, 2002). Despite the Directorate General for Competition of the EC appearing as *amicus curiae* and requesting the District Court shield the immunity statement under principles of international comity, the district court found the EC's concerns to be insufficient to prevent discovery of the materials. Moreover, the district court found that the defendants' submissions to the EC were not covered by either work product or investigatory privileges. 2002 WL 34499542, at *9.

However, multiple district courts have reached the opposite conclusion and held that similar submissions to foreign agencies are not discoverable in U.S. litigation. In *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, the Eastern District of New York denied the plaintiff's motion to compel discovery of an EC oral hearing tape and statement of objections. No. 05–MD–1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010). The Court applied the *Aérospatiale* factors to find that "the Commission's interest in confidentiality outweighs the plaintiffs' interest in discovery of the European litigation documents". WL 3420517, at *9 (E.D.N.Y. Aug. 27, 2010). Similarly, the Northern District of California has shielded confidential materials submitted to foreign agencies from production in a series of decisions. *In re Methionine Antitrust Litigation* No. 00-1311, (N.D. Cal. June 17, 2002) (denying production of unredacted EC immunity application where plaintiffs had access to a redacted version and lack of access to unredacted application did not impede plaintiffs in their discovery); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 U.S. Dist. LEXIS 41275, at *74 (N.D. Cal. Mar. 26, 2014) (protecting confidential version of EC decision; plaintiffs did not seek underlying investigative materials); and *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007) (order denying plaintiff's motion to compel discovery).

The courts' findings in the above cases are all context-dependent. Important elements in decisions shielding documents from production are: (i) the foreign investigatory body having a strong interest in the non-production of the materials and directly requesting the court to prevent production, and (ii) plaintiffs having discovery of the materials underlying the submissions to the foreign agency. In *In re Vitamins*—where the D.C. district court ordered confidential submissions to be produced—the court had found that the defendants had "assiduously avoided keeping records of their activities or destroyed what records existed and went to great lengths to hide their activities and meetings from others." *In re Vitamins Antitrust Litig.,* Misc. No. 99–197(TFH), 2002 U.S. Dist. LEXIS 26490 at *127 (D.D.C. Jan. 23, 2002) (Special Master's Report).

Quinn Emanuel Elects Eight New Partners

Quinn Emanuel Urquhart & Sullivan, LLP announced that nine new partners have been elected to the partnership, effective January 1, 2018.

The newly elected partners are as follows:

Deepa Acharya is based in the firm's Washington, D.C. office. Deepa is a trial lawyer specializing in technology-based litigation with an emphasis on patent, trade secret, and other intellectual property disputes. Deepa received a B.S. in Electrical and Computer Engineering and Economics from Carnegie Mellon University and a J.D. *with honors* from the University of Texas at Austin.

Rollo C. Baker IV is based in the firm's New York office. Rollo is a trial lawyer with a focus on corporate governance, investment management, and energy related matters. Rollo received a B.A., *magna cum laude*, in Government and Economics from Franklin & Marshall College, and a J.D., *cum laude*, from the Georgetown University Law Center. Before joining the firm, Rollo clerked for Chief Judge Mary Ellen Barbera of Maryland's highest court.

Rachel E. Epstein is based in the firm's New York office. Her practice focuses on complex commercial litigation and international arbitration, with an emphasis on business and technology matters. She received a B.A. in English from Wesleyan University and a J.D. from Columbia Law School. She clerked for the Honorable Terence T. Evans of the U.S. Court of Appeals for the Seventh Circuit.

Nathan Hamstra is based in the firm's Chicago office. His practice focuses on intellectual property litigation, with a particular focus on patent and trade secret disputes. Nathan received a B.S., *with honors*, in Computer Engineering from the University of Illinois at Urbana-Champaign, and a J.D., *cum laude*, from the University of Michigan Law School.

James D. Judah is based in the firm's San Francisco office. He is a trial lawyer focused on intellectual property litigation with an emphasis on patent, trade secret, and copyright. James graduated *magna cum laude* from Dartmouth College and received a J.D. from Columbia Law School, where he was a Stone Scholar.

Ryan Landes is based in the firm's Los Angeles office. He has a diverse commercial litigation practice and experience representing plaintiffs and defendants in securities and financial matters, trade secret disputes, mass tort litigation, and other business disputes at the trial and appellate levels. Ryan received a B.A. in Economics from University of California, Berkeley and a J.D., *cum laude*, from New York University School of Law, where he was an articles editor of the *NYU Law Review*, a Florence Allen Scholar, and a recipient of the Morton Geller Award.

Gabriel Soledad is based in the firm's Washington, D.C. office. His practice focuses on the representation of domestic and overseas companies, boards of directors, senior executives and government officials in investigations, crises and litigation in several jurisdictions, including Latin America. He received both his J.D. and his B.A. in International Relations *with honors* at Stanford University.

Ellison Ward Merkel is based in the firm's New York office. Her practice focuses on complex commercial litigation, with an emphasis on disputes involving complex financial instruments. Nelly received an A.B. from Princeton University and a J.D., *cum laude*, from New York University School of Law, where she was a managing editor of the *NYU Law Review*. Before joining the firm, Nelly was the Sinsheimer Fellow at the Partnership for Children's Rights and clerked for Judge James C. Francis IV in the United States District Court for the Southern District of New York.

VICTORIES

Sweeping Preliminary Injunction Victory in Trade Secret Case

The firm represents biopharmaceutical company Theravance Biopharma US, Inc., and certain of its affiliates ("Theravance") against its former Senior Vice President of Technical Operations, Junning Lee. The firm recently obtained a broad preliminary injunction from the Northern District of California ordering Lee not to disclose, copy, or otherwise use Theravance's proprietary, confidential, and trade secret information; not to destroy certain materials; and requiring Lee to surrender dozens of devices and email accounts potentially containing Theravance's proprietary, confidential, and trade secret information that Lee downloaded without authorization before his resignation in February 2017. The injunction also required Lee to identify any third parties who may have received Theravance confidential information, and to refrain from altering or transferring any such data. The court did not require Theravance to post a bond.

Prior to Lee's resignation in February 2017, he downloaded hundreds of thousands of documents including some of Theravance's most valuable and closely-guarded secrets regarding its years-long research and development of new pharmaceutical products. When Theravance discovered Lee's misappropriation, Lee attempted to cover his tracks by providing misleading explanations for his activity and deleting thousands of documents from his devices after he was told to return them to Theravance.

Quinn Emanuel responded with a pre-litigation investigation consisting of multiple interviews, written data requests, cooperation with a forensic discovery firm, and a deep dive into the hundreds of thousands of documents Lee downloaded. Through these efforts, Quinn Emanuel discovered that Lee failed to return dozens of external storage devices that he connected to his Theravance-issued laptops, that he had sent Theravance data to private email accounts, and that he had allowed at least one third-party to access his Theravance-issued laptop and login credentials.

As soon as Lee stopped cooperating with the investigation, Quinn Emanuel filed a complaint and motion for preliminary injunction in the Northern District of California asserting claims for trade secret misappropriation under state and federal law, breach of contract, and breach of Lee's fiduciary duty and duty of loyalty.

The day before the scheduled hearing on Theravance's motion for a preliminary injunction, Judge Vince Chhabria took the hearing off calendar and shortly thereafter granted Theravance's motion —adopting Theravance's proposed order with only minor modification.

Jury Trial Victory in Fight to Save Ultraman

Quinn Emanuel scored a major jury trial victory for Japanese entertainment company Tsuburaya Productions Co., Ltd., involving rights in Tsuburaya's iconic superhero character "Ultraman." Created by Tsuburaya in the 1960s, "Ultraman" has become as famous in Japan and other parts of Asia as "Superman" or "Batman" is in the U.S. Today, the Ultraman universe includes dozens of movies and television shows and countless products based on the "Ultraman" characters and works, including toys, books, and clothing. Because of a decades-long dispute regarding ownership of "Ultraman" outside of Japan, however, Tsuburaya has struggled to make inroads with "Ultraman" in the U.S. and other western countries.

The background of the dispute—which is as bizarre as any question that has been imagined for a law school exam—is as follows: In 1996, a Thai man, known as Mr. Sompote, claimed that he owned all rights in "Ultraman" outside of Japan based on a one-page contract that, he asserted, had been executed 20 years earlier by Tsuburaya's former president, Noboru Tsuburaya. Before Mr. Sompote brought the document to Tsuburaya in 1996, no one at the company had heard about it or seen it. To make matters even more complicated, Mr. Tsuburaya had died just months before Mr. Sompote came forward—leaving no other witness who could attest to the alleged formation of the purported contract. Nevertheless, the document bore indicia of reliability—it had a purported signature of Noboru Tsuburaya, and it contained what appeared to be the company's official "hanko" seal.

Shortly after Mr. Sompote made his claim, the parties began litigating over the authenticity and meaning of what came to be known as the "1976 Document." Over the past two decades, courts in Thailand, Japan and China have reached varying results regarding whether the document is a real contract, or whether it was forged, and if it is real, what it means. The divergent foreign judgments have made it virtually impossible for either side to exploit "Ultraman" outside of Japan, which has been

devastating to Tsuburaya.

The dispute finally reached U.S. shores in 2015, when a Japanese company formed by Mr. Sompote's son, called UM Corporation ("UMC"), sued Tsuburaya in the Central District of California, seeking a declaration that the 1976 Document is authentic, and raising claims for breach of contract and copyright infringement. On behalf of Tsuburaya, Quinn Emanuel filed counterclaims against UMC, Mr. Sompote and others for a declaration that the 1976 Document is not authentic and for copyright infringement.

In November 2017, after Quinn Emanuel defeated UMC's motion for summary judgment and prevailed on its own, the question of the authenticity of the 1976 Document was tried to a jury. The two-week trial, conducted before the Hon. André Birotte Jr., was notable for the significant amount of testimony in foreign languages and from witnesses who are no longer living, and was also riddled with esoteric evidentiary disputes about "ancient documents" and witness foundation for authenticating evidence from decades ago. The trial also prominently featured competing expert testimony on forensic document examination, including whether the signature on the 1976 Document was genuine.

After minimal deliberation, the jury unanimously found that the 1976 Document was not authentic. With this significant victory behind it, the path has been cleared for Tsuburaya to greatly increase the presence of "Ultraman" in the United States and elsewhere. Quinn Emanuel's trial team was led by founding partner John B. Quinn, partners Ryan S. Goldstein and Daniel C. Posner, and associate Zack Schenkkan.

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art can 'visualize or recognize' the members of the genus." *Id.* at 1374 (internal quotations omitted). The Federal Circuit also held that post-priority date evidence "could have been relevant to determining if the claims were enabled as of the priority date and should not have been excluded simply because it postdated the claims' priority date." *Id.* at 1375.

In reversing the district court's jury instruction on written description, the Federal Circuit stated that the instruction's recitation of the newly characterized antigen test "effectively permitted the jury to dispense with the required finding of a written description of the invention." *Id.* at 1377 (internal quotations omitted). The Federal Circuit emphasized that "to satisfy the statutory requirement of a description of the invention, it is not enough for the specification to show how to make and use the invention, *i.e.*, to enable it." *Id.* The district court's instruction—which allowed the jury to deem any claimed antibody adequately described merely because antibodies to the antigen could be easily produced and used—was therefore erroneous. *Id.* The Federal Circuit further noted that the instruction was improper for the additional reason that it would allow "patentees to claim antibodies by describing something that is not the invention, *i.e.*, the antigen." *Id.* at 1378.

In light of these reversals, the Federal Circuit remanded the case to the district court for a new trial on written description and enablement and accordingly vacated the permanent injunction. Although not necessary to its decision, the Federal Circuit noted in *dicta* that "the district court's permanent injunction analysis in this case was improper for two distinct reasons." *Id.* at 1381. First, the district court should not have issued an injunction it found not to be in the public interest. As stated by the Federal Circuit, "[i]f a plaintiff fails to show that the public interest would not be disserved by a permanent injunction, then the district court may not issue an injunction." *Id.* (internal quotations omitted). Second, the district court should not have based its finding that the injunction would disserve the public interest solely on a reduction in choice of drugs. The Federal Circuit reasoned that "[u]nder such an approach, courts could never enjoin a drug because doing so would always reduce a choice of drugs," which "of course, is not the law." *Id.*

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business litigation report

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