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Artificial Intelligence Litigation: Can the Law Keep Pace with The Rise of the Machines?

Artificial intelligence, or AI, is the broad conceptual term for the technologies or systems making it possible for computers to perform tasks involving human-like decisionmaking, intelligence, learned skills and/or expertise. Once considered a remote possibility for a futuristic tomorrow, the advances in technology over the past 20 years have accelerated the development and integration of AI in multiple private and public sectors. In 2015, over $2.4 billion in venture capital was invested into the development of AI-based technologies. Governmental agencies, ranging from the Department of Defense to the Treasury, are active in exploring and implementing AI for use in the public sector. Within the private sector, well-known companies such as Google, Facebook, Apple and Uber, as well as start-ups across the country, are active in the research and development of innovative AI technology-based products. Examples include self-driving cars, robotic surgical equipment, complex automated accounting and security systems, and even software performing legal tasks such a document review or research. AI has innumerable practical applications, including medical diagnosis expert systems that emulate the decision-making of physicians, automated securities trading systems, automated drones, and many other variants. Developing along with AI is the development of natural language processing, which in the broadest sense concerns the interactions between computer programs and human languages such that computers are learning to emulate human communication.

Emerging with these technologies is an ever-increasing public concern for the many risks present where decisions are made by computers and not by humans. Much has been written of the ethics, safety, and regulatory concerns presented by the rapid growth of AI technologies. Policymakers are forced to chart new territories when tasked with drafting legislation that does not stifle AI innovation, but protects the public from possible dangers presented

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INSIDE

Sheila Birnbaum Recognized for "Lifetime Achievement" by *The American Lawyer*

New York partner Sheila Birnbaum is the recipient of *The American Lawyer*'s 2016 Lifetime Achievement Award, which honors those who have made a far-reaching impact on the profession through extraordinary legal work. Dubbed "the Queen of Toxic Torts" in the legal press, Ms. Birnbaum was recognized for her product liability work on behalf of numerous pharmaceutical, insurance, and automobile companies, including Dow Corning, Pfizer, and State Farm. Q

Stephen Broome Named One of *New York Law Journal*'s 2016 "Lawyers Who Lead by Example"

Partner Stephen Broome was featured by the *New York Law Journal* as one of its "Lawyers Who Lead by Example." Stephen was honored in the Pro Bono category, which recognizes attorneys with an outstanding record of providing legal service to underprivileged New Yorkers. The publication selected Stephen in large part for his work representing Luis Ramon Morales-Santana in *Lynch v. Morales-Santana.* In that case, the Second Circuit agreed with Stephen's and his team's arguments that sections of the Immigration and Nationality Act unconstitutionally discriminate on the basis of gender. Stephen's client, Mr. Morales, was previously subject to deportation, but was deemed an American citizen by the Second Circuit. The government petitioned for certiorari and the Supreme Court granted certiorari. Stephen argued the appeal before the Supreme Court on November 9, 2016. Q

when computer judgment replaces that of humans. The rapid development of AI technology is in tension with the relative snail's pace, and lack of expertise, of state and national legislatures. Protection for the public from AI technologies will need to be enacted, and should be, but our courts may be the first to address these novel legal issues.

Unlike legislation, however, the protection provided by the courts is remedial not preventative. Courts assess liability and damages for activity that has already transpired based on prior legal precedent. Cases where the harm is alleged to have been caused by AI-based computers or systems ask the court to unravel novel technology and apply ill-fitting case law to make determinations of liability. For example, common law tort and malpractice claims often center on the very human concepts of fault, negligence, knowledge, intent, and reasonableness. So what happens when human judgment, or human scienter, is replaced by a computer? What happens when either or both the perpetrator and/or victim is not a human? What happens when there is a real cause of action, but an artificial defendant? Who is liable and what harm was caused?

This article is an overview of how courts have responded to lawsuits involving AI and related technologies, what types of additional legal claims are to be expected as AI becomes more common, and how the law might evolve to address future claims involving AI.

Courts and Common Law Claims Involving Artificial Intelligence

Although claims involving AI technology are novel and only a handful of courts have tackled AI related technologies or products, common law claims involving analogous automated technology can be analyzed to provide a framework for developing jurisprudence regarding AI technology.

For example, a decision in a consolidated class action in the District Court for the Eastern District of Missouri found that the use of a computer program to simulate human interaction could give rise to liability for fraud. *In re Ashley Madison Customer Data Sec. Breach Litig.*, 148 F. Supp. 3d 1378, 1380 (JPML 2015). Among the claims related to a data breach on the infamous Ashley Madison online dating website in 2015 that resulted in mass dissemination of user information, were allegations that defendants were engaging in deceptive and fraudulent conduct by creating fake computer "hosts" or "bots," which were programmed to generate and send messages to male members under the guise that they were real women, and inducing users to make purchases on the website. It is estimated that as many as 80% of initial purchases on the website—millions of individual transactions—were conducted by a user communicating with a bot operating as part of Ashley Madison's automated sales force for the website.

Another court, in a case involving an internet advertising breach of contract claim, was asked to resolve a dispute over the meaning of "impressions," a key term in Internet advertising. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash. App. 73 (2003). The *Go2Net* Court determined that the parties' contract permitted visits by search engines and other "artificial intelligence" agents, as well as human viewers, in the advertiser's count of "impressions." *Id.* at 86.

CNBC reported an incident involving online "bots," where an "automated online shopping bot" was set up by a Swiss art group, given a weekly allowance of $100 worth of Bitcoin—an online cryptocurrency—and programmed to purchase random items from the "dark web" where shoppers can buy illegal/stolen items. In January 2015, the Swiss police confiscated the robot and its illegal purchases to date, but did not charge the bot or the artists who designed it with any crime. We can soon expect to see cases of similar ilk emerge in both criminal and civil courtrooms. *See* http://www.cnbc.com/2015/04/21/robot-with-100-bitcoin-buys-drugs-gets-arrested.html

Cases involving personal injury resulting from automated machines have also been litigated. For example, cases have involved workers compensation claims or claims against manufacturers by workers injured by robots on the job. *See, e.g.*, *Payne v. ABB Flexible Automation, Inc.*, 116 F.3d 480, No. 96-2248, 1997 WL 311586, *1-*2 (8th Cir. 1997) (per curiam) (unpublished table decision); *Hills v. Fanuc Robotics Am., Inc.*, No. 04-2659, 2010 WL 890223, *1, *4 (E.D. La. 2010); *Bynum v. ESAB Grp., Inc.*, 651 N.W.2d 383, 384-85 (Mich. 2002) (per curiam); *Owens v. Water Gremlin Co.*, 605 N.W.2d 733 (Minn. 2000). There has also been extensive litigation over the safety of surgical robots, especially the "da Vinci" robot manufactured by Intuitive Surgical, Inc. *See, e.g.*, *O'Brien v. Intuitive Surgical, Inc.*, No. 10 C 3005, 2011 WL 304079, at *1 (N.D. Ill. Jul. 25, 2011); *Mracek v. Bryn Mawr Hosp.*, 610 F. Supp. 2d 401, 402 (E.D. Pa. 2009), aff'd, 363 F. App'x 925 (3d Cir. 2010); *Greenway v. St. Joseph's Hosp.*, No. 03-CA-011667 (Fla. Cir. Ct. 2003). Although the court in *United States v. Athlone Indus., Inc.*, 746 F.2d 977, *id.* at 979 (3d Cir. 1984) stated that "robots cannot be sued" and discussed instead how the manufacturer of a defective robotic pitching machine is liable for civil penalties for the machine's defects, it is important to note that this decision was rendered in 1984. Robots, and AI technology, have become far more sophisticated and as such courts will continue to grapple with the question

of assessing liability going forward as the use of these AI technologies and autonomous machines gain mainstream acceptance.

Anticipated future litigation surrounding liability for "driverless" cars might run into roadblocks when looking at the limited body of case law involving other forms of what are referred to as "autonomous moving vehicles." Liability has often been difficult to establish in other autonomous moving vehicle cases where alternative theories of liability are present. For example, in *Ferguson v. Bombardier Service Corp.*, 244 F. App'x 944 (11th Cir. 2007), the court rejected a manufacturing defect claim against the manufacturer of an autopilot system in a military cargo plane, when the court found equal credibility in the defense theory that the loading of the plane was improper, such that a strong gust of wind caused the plane to crash. Even cases decided almost fifty years ago reflect the current legal analysis concerning the question of liability for automated technologies. For example, in *Nelson v. American Airlines, Inc.*, 70 Cal. Rptr. 33 (Cal. Ct. App. 1968), the Court applied the doctrine of *res ipsa loquitur* in finding an inference of negligence by American Airlines relating to injuries suffered while one of its planes was on autopilot, but ruled that the inference could be rebutted if American Airlines could show that the autopilot did not cause the accident or that an unpreventable cause triggered the accident.

More recently, auto manufacturer Toyota was embroiled in a multi-district litigation matter involving allegations that certain of its vehicles had a software defect that caused the vehicles to accelerate notwithstanding measures the drivers took to stop. The court denied Toyota's motion for summary judgment premised on the grounds that there could be no liability, because the plaintiff and plaintiff's experts were unable to identify a precise software design or manufacturing defect, instead finding that the evidence supported inferences from which a reasonable jury could conclude that the vehicle continued to accelerate and failed to slow or stop despite the plaintiff's application of the brakes. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, 978 F. Supp. 2d 1053, 1100-01 (C.D. Cal. 2013).

It remains to be seen whether the principles of *res ipsa loquitur* will be used by modern courts to conclude that the car (or other automated device), not the driver/operator, is at fault. Defendants will argue that the doctrine should not apply when it is unreasonable to infer that the accident was caused by a design or manufacturing defect, or when the accident in question is not one ordinarily seen with design defects. *See* Restatement (Third) of Torts: Prod. Liab. § 3 (1998). What is clear is that difficult questions will continue to arise when autonomous machines are involved in accidents and/or cause injury.

Common Law Claims on the Horizon

As AI programs become more adaptive and capable of learning on their own, courts will have to determine whether such programs can be subject to a unique variant of agency law. Current laws of agency may not apply, because once an autonomous machine decides for itself what course of action it should take, the agency relationship becomes frayed or breaks altogether. *See* Restatement (Third) of Agency §7.07 (2006) *("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."*); *id.* §7.03 (describing that a principal is subject to vicarious liability for an agent's actions only when the agent is acting within the scope of employment). As a result, it is possible that the courts or legislatures will be asked to impose strict liability on the creators of programs, for the acts of such programs.

Product liability claims and conventional views of culpability and ethics are certain to be tested by these autonomous machines—like self-driving vehicles—where the current roadmap is for a mixed human and AI driver world. Product liability law provides some framework for resolving such claims; with a "product" like an autonomous car, the law groups those possible failures into familiar categories: design defects, manufacturing defects, information defects, and failures to instruct on appropriate uses. Complications may arise when product liability claims are directed to failures in software, as computer code has not generally been considered a "product" but instead is thought of as a "service," with cases seeking compensation caused by alleged defective software more often proceeding as breach of warranty cases rather than product liability cases. *See, e.g., Motorola Mobility, Inc. v. Myriad France SAS*, 850 F. Supp. 2d 878 (N.D. Ill. 2012) (case alleging defective software pleaded as a breach of warranty); *In re All Am. Semiconductor, Inc.*, 490 B.R. 418 (Bankr. S.D. Fla. 2013) (same).

Under these metrics, courts will have to assess what liability to impose for accidents involving the various types of automated vehicles available today, as well as those soon to be released. One option is to insist on strict liability for manufacturers of the automated systems. If there is no strict liability, a court might find itself in uncharted waters if forced to make a determination as to how best to weigh the comparative liability of AI programs and drivers. The solution suggested by the existing law, while dated, would hold the vehicle's manufacturer liable and let the manufacturer seek

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Ninth Circuit Revives Class Action Alleging "All Natural" Label Can Mislead a Reasonable Consumer, but Affirms Decertification of Damages Class in One of Three Widely Watched Class Actions

In an unpublished decision that is significant for both shoppers and consumer food companies, the Ninth Circuit recently reversed a district court's ruling that the label "All Natural Fruit" is not likely to deceive customers. The court found that a trier of fact could conclude that Dole Foods Co. Inc.'s "description of its products as 'All Natural Fruit' is misleading to a reasonable consumer." *Brazil v. Dole Packaged Foods, Inc.*, Case No. 14-17480, Dkt. No. 51 (9th Cir. Sept. 30, 2016) ("Memorandum") at 4. The Court also affirmed the district court's limit on recovery to the premium paid under the misunderstanding that the fruit was actually "all natural" and decertification of the class pursuing damages because the plaintiff did not show how the premium could be calculated with proof common to the class. *Id.* at 6-8. The case was remanded to allow the plaintiff to move forward on behalf of an injunctive relief class and his remaining individual claims. *Id.* at 8.

Other courts have watched the *Dole* case closely and several lawsuits regarding "natural" label claims were stayed pending the Ninth Circuit's decision. In the *Dole* case, the plaintiff and class representative Chad Brazil alleges that Dole's "All Natural Fruit" labels are deceptive because the packaged fruits they describe contain synthetic citric and ascorbic acid. Dole moved for summary judgment on the merits of Brazil's claims under California's Unfair Competition Law (UCL), (Cal. Bus. & Prof. Code §§ 17200-17210), the California False Advertising Law (FAL) (Bus. & Prof. Code §§17500-17509), and the California Consumer Legal Remedies Act (CLRA) (Cal. Civ. Code §§ 1750-1784) on the grounds that there was no evidence that reasonable consumers likely would have been misled by Dole's "All Natural Fruit" label.

The claims under each of these statutes are evaluated from the perspective of a reasonable consumer, meaning "the ordinary consumer acting reasonably under the circumstances." *Colgan v. Leatherman Tool Grp.*, 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2006). To succeed on his claims, Brazil needs to show that Dole's "All Natural Fruit" labels would probably have misled "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances." *Lavie v. Proctor & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Cal. Ct. App. 2003). The FDA has not promulgated a formal definition of the word "natural" in relation to packaged food, but it has stated its policy that the use of the term "natural" means "that nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food." Food & Drug Admin., *Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food* ("FDA Policy Statement"), 58 Fed. Reg. 2303, 2407 (Jan. 6, 1993); *see also Brazil v. Dole Packaged Foods, Inc.*, Case No. 5:12-cv-01831-LHK, Dkt. No. 240 (C.D. Cal. Dec. 8, 2014) ("Order Granting Defendant's Motion for Summary Judgment") at 7-8.

To prove his claim that a reasonable consumer would be misled by the label, Brazil relied on his own testimony that he was deceived by the label. U.S. District Judge Lucy H. Koh found this evidence insufficient as a matter of "binding Ninth Circuit precedent" under *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008), to demonstrate that it is probable that a significant portion of the consuming public could be mislead by the label and granted summary judgment in Dole's favor. Order Granting Defendant's Motion for Summary Judgment at 8-9. In *Clemens*, the Ninth Circuit held that "a few isolated examples of actual deception are insufficient" to survive summary judgment. 534 F.3d at 1026.

The district court also found unavailing the FDA's informal definition of "natural" because Brazil offered no evidence besides a "conclusory statement" that citric acid and ascorbic acid "would not normally be expected to be in" the products at issue. FDA Policy Statement, 58 Fed. Reg. at 2407; *see also* Order Granting Defendant's Motion for Summary Judgment at 9. Brazil appealed this dismissal.

A Ninth Circuit panel found Brazil's evidence—the label itself, his own testimony, Dole's consumer surveys prepared for litigation, and the FDA's informal definition of "natural" including recent FDA warning letters—when taken together, "could allow a trier of fact to conclude that Dole's description of its products as 'All Natural Fruit' is misleading to a reasonable consumer" and that a trier of fact could also "find that the synthetic citric acid and ascorbic acids in Dole's products were not 'natural.'" Memorandum at 3-4. The Ninth Circuit did not discuss the *Clemens* case on which the district court relied.

Two cases similar to *Dole* are also currently pending

before the Ninth Circuit. In *Jones v. ConAgra Foods, Inc.*, the Ninth Circuit is considering whether self-identified class members who do not have a receipt or other objective proof of their membership in the class are sufficient to fulfill the ascertainability requirement of Federal Rule of Civil Procedure 23. Case No. 14-16327, Dkt. No. 21 (9th Cir. Nov. 21, 2014, filed July 14, 2014) (Opening Brief). In *Jones*, plaintiffs filed a class action alleging certain ConAgra products were falsely advertised as "100% Natural" or "Free from artificial ingredients & preservatives." *Id.* at 5-7. Acknowledging a split in California authority, the district court denied certification of the proposed classes, in part on the grounds that they were not ascertainable based only on class member affidavits. *Id.* at 16-17. One of the plaintiffs appealed the district court's denial of one of the classes. *Id.* at 4-5.

In *Kosta v. Del Monte Foods Inc.*, the plaintiffs allege that Del Monte's labels misled them to falsely believe Del Monte's tomato products contained certain nutrients and that certain fruit products were fresh. Case No. 15-16974, Dkt. No. 8 (9th Cir. Feb. 10, 2016, filed Oct. 2, 2015) (Opening Brief). Plaintiffs appealed the district court's denial of class certification on the grounds that variations in the labels meant the class members were not determinable. *See id.* at 15-18.

Several significant cases in California have been stayed pending the outcome of *Dole*, *Jones*, and *Kosta*. These include a proposed class action by shoppers against Costco Wholesale Corp. over allegedly mislabeled "Kirkland Signature" brand foods. *See Thomas v. Costco Wholesale Corp.*, Case No. 5:12-cv-02908 (N.D. Cal. filed June 5, 2012). In its order granting the stay in *Thomas*, the district court explained that the Ninth Circuit's decisions would provide "substantial guidance on issues material to the class certification issues in the instant case," and the "summary judgment issue from Brazil—about whether label statements such as 'all natural' can mislead a reasonable consumer—will provide guidance on arguments in this case." *Id.*, Dkt. No. 115 at 5. In *Park v. Welch Foods, Inc.*, a class action alleging deception by "no sugar added" labels on juices and jams, the district court stayed a decision on class certification to avoid "wasted effort if the Ninth Circuit's rulings change the requirements for class certification, standing, and damages in food labeling class actions." Case No. 3:12-cv-06449, Dkt. No. 77 at 3 (N.D. Cal. Oct. 22, 2015, filed Dec. 20, 2012).

These suits highlight the tension between the increased demand for products perceived to be healthier and transparency in food production, on the one hand, and the lack of standard definitions or presence of inconsistent definitions for the "healthier" characteristics, on the other hand. While *Dole*'s somewhat relaxed evidentiary standard for proving a reasonable consumer would probably be misled may encourage consumers to bring lawsuits over food labels, the Ninth Circuit's decisions regarding class certification in the two cases still pending before it, *Jones* and *Kosta*, will likely have a greater effect on plaintiffs' and their counsels' willingness to bring more lawsuits like *Dole*.

PRACTICE AREA NOTES

International Arbitration Update

Non-Pecuniary Remedies in Investment Treaty Arbitration. Many of the popular criticisms of investment treaty arbitration are directed at its potential to interfere with the autonomy of sovereign States to make and apply their own policy choices. The frequent perception is that treaty arbitration provides a means for foreign investors to force their will upon a State—to *authorise* an activity that a State might prohibit, or to *oblige* a State to take measures that it might not choose. There is a perception that treaty Tribunals can and frequently do issue orders of specific performance. Yet the reality is that non-pecuniary remedies—restitution, specific performance or declaratory relief—are seldom granted in treaty cases. This is unfortunate for some claimants, who want to retain their investments, and bring treaty claims not as an exit strategy but as a tool of doing business and governmental relations. They want their rights upheld, not extinguished and paid out. One might ask "why?" non-pecuniary remedies are not more common, since any student of public international law learns from *Chorzow Factory* and Article 35 of the ILC Articles on State Responsibility that *restitutio in integrum* is the primary form of reparation for an internationally wrongful act, with monetary compensation being the alternative where restitution is not materially possible or disproportionately burdensome. The early Libyan oil concession arbitration, *Texaco* v. *Libya*, is held up as an example of this theory in practice.

Only a few treaties expressly control a tribunal's

power to award specific performance. Article 1135 of the NAFTA treaty provides that a NAFTA tribunal has the power to award specific performance so long as the award also provides that monetary damages may be paid *in lieu* of specific performance. Similar restrictions are found in the CAFTA-DR, the recently-signed EU-Canada CETA and the draft TPP. But such express provisions are the rare exception.

Likewise, the ICSID Convention does not limit the powers of ICSID tribunals to order non-pecuniary remedies. But the Convention does specify in Article 54(1) that Contracting States are obliged only *to enforce* "the pecuniary obligations imposed by [an] award." ICSID tribunals may therefore order non-pecuniary relief, and such awards are binding, but ICSID Contracting States are not obliged to give effect to such orders.

Tribunals routinely confirm the power to award such remedies. The *Micula v Romania* tribunal held that ICSID tribunals have at their disposal all forms of relief required to redress the injuries suffered as a result of an internationally wrongful act, including definitive or final injunctive relief. Nevertheless, there is a widespread general reluctance on the part of tribunals to grant non-pecuniary relief. This can be explained by four factors.

Impossibility. Issues of "impossibility" are the most common. Article 35 of the ILC Articles makes clear that a State will not be obliged to provide restitution where it is "materially impossible." For example, in *Siag v Egypt*, the Claimant requested the restitution of expropriated oceanfront land. The Tribunal found that restitution was impossible because the property had been conveyed to a third party some six years earlier. Impossibility is less persuasive in cases of unlawful expropriation however, where, by definition, it ought not be possible to pass good title.

Deference. Another concern is the deference tribunals consider due to sovereigns. To order a State to take a positive measure, such as ordering restitution, is perceived to involve a greater infringement of sovereignty than an order to pay money.

Unenforceability. Many tribunals express concern about their inability to police non-pecuniary orders once their mandate is over. A respondent's refusal to comply with a non-pecuniary order diminishes the institution of arbitration, generally, but also would deprive the successful claimant of any effective relief.

The need for the parties to consent to a non-pecuniary remedy. A final theme appears to be the expectation that both parties should desire and consent to an award of a non-pecuniary remedy. This seems to combine elements of deference to sovereignty, as well as perhaps the need for the claimant to accept the instability of any such relief.

There are rare instances in which non-pecuniary remedies have been awarded as they are effectively the only possible means of relief. In *ATA Construction v Jordan*, a Tribunal ordered that the Claimant's right to have a dispute referred to arbitration, which had been retroactively extinguished by decisions of the Jordanian courts, be reinstated and pending court proceedings terminated. Aside from cases of this nature, it is possible to point to a small number of cases—not yet an emerging trend, but perhaps a signifier of greater acceptance—in which tribunals have awarded restitution or other non-pecuniary relief, but always coupled with an award of monetary compensation in the alternative.

Thus, in *Goetz v Burundi*, the Tribunal suggested that the Respondent could provide either restitution of a tax-free zone certificate it had wrongly cancelled or monetary compensation. In *Arif v Moldova*, the respondent State requested that the Tribunal award it the "*opportunity*" to provide restitution instead of damages for the suspension of the Claimant's lease of an airport duty-free shop. The Tribunal ordered "restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days." Lastly, in *von Pezold v Zimbabwe*, the claimants had been deprived of large tracts of farmland. The Tribunal determined that Zimbabwe had unlawfully expropriated the claimants' land and ordered Zimbabwe either to reissue title to the expropriated properties, or, in the alternative, to compensate the claimants. These exceptional decisions recognise non-pecuniary relief as the primary remedy in treaty arbitration but secure the efficacy of that award by an order to pay damages in the alternative.

Energy Litigation Update

Update on Clean Power Plan. In August 2015, the Environmental Protection Agency ("EPA") finalized a new set of standards, now known as the Clean Power Plan (the "Plan"), aimed at reducing carbon emissions from fossil-fuel fired power plants by limiting greenhouse gas emissions from those plants. EPA's authority to regulate carbon dioxide and other greenhouse gases traces to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2005), which held that carbon dioxide was a pollutant under the Clean Air Act. Soon thereafter, EPA found that greenhouse gases were such a threat to public health and welfare as to require regulation under the Clean Air Act. Following further regulatory proceedings, EPA promulgated the Plan pursuant to Section 111

of the Clean Air Act.

The Plan seeks to reduce carbon dioxide emission by slightly more than one-third by 2030, compared to 2005 levels. The Plan sets carbon dioxide emission performance rates for fossil-fuel fired power plants, which States must implement through state-tailored plans. If a State declines to implement its own plan, EPA has the authority under the Plan to implement a federal plan to reduce emissions. States must begin trying to meet the emission goals, through their plans, by 2022, with an ultimate compliance date of 2030.

In *West Virginia v. EPA*, over two dozen States, led by West Virginia, and other affected parties, including several electric utilities, filed petitions for review in the Court of Appeals for the D.C. Circuit challenging EPA's promulgation of the Plan. Eighteen States, including California and New York, and several cities intervened in support of EPA. In January 2016, the D.C. Circuit denied petitioners' motion to stay the Plan pending resolution of the challenges. A few weeks later, however, the Supreme Court, by a 5-4 vote, granted a stay, which immediately halted implementation of the Plan. The Court's order—which did not address the merits of the challenges—was unusual, not only because it overruled the D.C. Circuit, but also, more generally, because it is uncommon for the Supreme Court to block federal regulations pending review. The late Justice Antonin Scalia was in the majority, meaning that his replacement on the Court may hold the deciding vote on the merits.

The D.C. Circuit thereafter ordered, *sua sponte*, that the challenges to the Plan be argued initially to the full court, bypassing the normal three-judge merits panel. The argument, before ten judges, was held on September 27, 2016. It lasted seven hours and focused on a range of statutory, constitutional, and procedural issues.

The petitioners principally argue that the Plan is invalid because it conflicts with Section 112 of the Clean Air Act, is procedurally defective, and unconstitutionally commandeers and coerces States and their officials into carrying out federal energy policy. More specifically, the Plan's challengers have contended that: (1) EPA is acting outside its authority under the Clean Air Act by relying on a little-used provision, Section 111(d), to effectuate massive changes in the industry, forcing fossil-fuel fired power plants to shift from coal to less carbon-intensive sources like solar and wind, termed "generation-shifting;" (2) power plants are subject to regulation under Section 112 of the Clean Air Act, and EPA cannot use Section 111(d) to regulate pollutants "emitted from a source category" already regulated by Section 112; and (3) the Plan violates the Constitution because it does not provide States with a meaningful opportunity to decline implementation, as required for cooperative federalism programs, and thus impermissibly forces the States and their officials to alter their electrical generation and delivery systems.

EPA counters that the Plan is "proper and sensible" and well within EPA's regulatory authority under the Clean Air Act. As to the petitioners' specific contentions, EPA has argued that: (1) it determined the best system for emission reduction based upon strategies, technologies and approaches that fossil-fuel fired power plants are already using to reduce carbon dioxide emissions, and that these strategies have been previously incorporated into various Clean Air Act regulatory programs in the industry; (2) Section 111(d) is ambiguous, and EPA has reasonably resolved those ambiguities through its conclusion that Congress did not intend to bar regulation of different pollutants under different programs; and (3) the Plan does not unconstitutionally coerce States into action, but rather is similar to other court-approved regulatory programs by permitting States to do nothing, in which circumstances a federal plan to reduce emissions would be implemented.

Whether the Plan is determined to regulate carbon emissions in a permissible manner will have far reaching consequences in the field and across the country more generally, and will bear on potential litigation risks to other regulated entities if the Plan is allowed to go forward. But these questions and others will likely remain unresolved for quite some time, as the D.C. Circuit is unlikely to issue a decision for several months, and the losing side will almost certainly ask the Supreme Court to review that decision during its October 2017 Term.

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indemnity or contribution from other parties, if any, that might be responsible. However, consideration also may be given to apportioning responsibility among all of the parties that participated in building and maintaining the vehicle's autonomous systems, through the application of a variation of "common enterprise" liability. In the field of consumer protection, for instance, the Federal Trade Commission often invokes the "common enterprise" doctrine to seek joint and several liability among related companies engaged in fraudulent practices. *See, e.g., FTC v. Network Servs. Depot, Inc.,* 617 F.3d 1127 (9th Cir. 2010); *SEC v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125 (9th Cir. 1991); *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461 (S.D.N.Y. 2014). A "common enterprise" theory might allow the law to impose joint liability, for limited types of claims, without having to assign every aspect of wrongdoing to one party or another.

Legislatures and regulatory agencies have already been making great strides to determine how best to attribute fault in such situations. For example, the states of Nevada, Florida, California, Michigan and Tennessee and the District of Columbia have all passed legislation related to autonomous automobiles, and nineteen additional states have similar bills under consideration. *See* Jessica S. Brodsky, *Autonomous Vehicle Regulation: How an Uncertain Legal Landscape May Hit the Brakes on Self-Driving Cars*, 31 Berkeley Tech. L.J. 851 (2016). Sophisticated parties are destined to address a variety of complicated legal issues presented with the advent of AI technologies and products. In particular, the competing interests between manufacturers of various AI components and the end products that incorporate those components will need to be addressed through contracts and robust indemnification agreements. Legislators and courts will soon have to answer the questions such as whether a machine can enter into a binding contract on behalf of itself, or a person it represents, and does a machine-negotiated contract redefine what it means to look to the understanding of one party or between parties? We are at the precipice of requiring new definitions for scienter, "meeting of the minds," and a host of other black letter law constructs that have served as the underpinning of commercial litigation for generations.

Patent Litigation and Specific Legal Issues Facing AI Innovations

AI technologies have also been at issue in patent cases, and such cases are certain to increase. To date, the main area courts have addressed is whether the AI subject matter at issue is patent-eligible subject matter under 35 U.S.C. § 101. Courts addressing this question must first ask whether a patent's claims are directed to a patent-ineligible concept, such as laws of nature or abstract ideas. If not directed to such a concept, a patent will be enforceable under this test. However, if a patent's claims are directed to a patent-ineligible concept, the analysis moves to a second step: whether the patent claims, despite being directed to a patent-ineligible concept, are nevertheless patent-eligible because they include a sufficiently "inventive concept"—an element or combination of elements that is sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself. *See Vehicle Intelligence & Safety LLC v. Mercedes-Benz USA, LLC*, 635 F. App'x 917 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2390 (2016), (dismissing certain claims directed to the use of "expert system(s)" to screen equipment operators for impairments such as intoxication as patent-ineligible). The *Vehicle Intelligence* Court first determined that the claims at issue were directed to a patent-ineligible concept—"the abstract idea of testing operators of any kind of moving equipment for any kind of physical or mental impairment." The "expert system" concept was considered abstract because, based on the definition assigned to it by the Court during claim construction, it was something performed by humans absent automation, and also because "neither the claims at issue nor the specification provide any details as to how this 'expert system' works or how it produces faster, more accurate and reliable results." This lack of clarity contributed to a holding of lack of inventive concept in the second step, rendering the patent claims at issue unenforceable. The Federal Circuit compared the patent as equivalent to "a police officer field-testing a driver for sobriety."

In *Blue Spike, LLC v. Google Inc.,* No. 14-CV-01650-YGR, 2015 WL 5260506, at *5 (N.D. Cal. Sept. 8, 2015), *aff'd*, 2016 WL 5956746 (Fed. Cir. Oct. 14, 2016), the Court found that because the patents at issue sought to model on a computer "the highly effective ability of humans to identify and recognize a signal," the patents simply cover a general purpose computer implementation of "an abstract idea long undertaken within the human mind." The *Blue Spike* Court also found that the second step of the eligibility inquiry for "inventive concept" was not present as the claims "cover a wide range of comparisons that humans can, and indeed, have undertaken since time immemorial."

At least one District Court opinion has considered the patentability of driverless cars and automated support programs. In *Hewlett Packard Co. v. ServiceNow, Inc.*, No. 14-CV-00570-BLF, 2015 WL 1133244 (N.D. Cal. Mar. 10, 2015), Judge Freeman of the Northern District of California found that HP patents were directed to the abstract idea of "automated resolution of IT incidents" and were not patent-eligible. While rejecting evidence

of commercial success as evidence of an "incentive concept," Judge Freeman considered the hypothetical of patents on self-driving cars in the context of patent eligibility. She remarked that while a self-driving car may be very commercially successful, novel, and non-obvious, the concept of a self-driving car is still abstract. So while an inventor "may be able to patent his specific implementation," Judge Freeman disagreed that the concept of self-driving cars could be patented in the abstract. While Judge Freeman's hypothetical is likely *dicta*, it nevertheless serves as a guidepost regarding patent eligibility of self-driving vehicles.

For patent litigation involving AI technologies, another area ripe for legal intervention is in the determination of inventorship. It is well-settled that an inventor can use "the services, ideas, and aid of others in the process of perfecting his invention without losing his right to a patent." *Hess v. Advanced Cardiovascular Sys.*, 106 F.3d 976, 981 (Fed. Cir. 1997). Furthermore, 35 U.S.C. Section 103 states: "Patentability shall not be negated by the manner in which the invention was made." However, the patent statutes define "inventor" to mean "the *individual* . . . who invented or discovered the subject matter of the invention" and the statutes also describe joint inventors as the "two or more *persons*" who conceived of the invention. *See* 35 U.S.C §§ 100, 116(a). The Federal Circuit has explicitly barred legal entities from obtaining inventorship status because "*people* conceive, not companies." *New Idea Farm. Equip. Corp. v. Sperry Corp.*, 916 F.2d 1561, 1566 n.4 (Fed. Cir. 1990).

The Copyright Office has already announced that it "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author." U.S. Copyright Office, The Compendium of U.S. Copyright Office Practices § 306 (3d ed. 2014); *see also* U.S. Copyright Office, The Compendium of U.S. Copyright Office Practices § 202.02(b) (2d ed. 1984), *available at* http://copyright.gov/history/comp/compendium-two.pdf ("The term 'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being.") The 2014 iteration of the Human Authorship Requirement was partially the result of a prominent public discourse about non-human authorship stemming from the "Monkey Selfies." *See Naruto v. Slater*, No. 3:2015-cv-04324, 2016 WL 362231, *1 (N.D. Cal. Jan. 23, 2016). While there have not yet been cases tackling this unique issue of inventorship, scholars have begun to take notice and weigh in. *See, e.g.,* Ben Hattenbach, Joshua Glucoft, *Patents in an Era of Infinite Monkeys and Artificial Intelligence*, 19 Stan. Tech. L. Rev. 32 (2015); Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 57 B.C. L. Rev. 1079 (2016)

Replacing Professional Judgment with Computers: Malpractice Claims Anticipated

There is no dispute that the legal and medical professions are among the professions that require the greatest decision-making and exercise of judgment. It is because of this that claims of malpractice are available to those who rely on the decision-making and judgment of the skilled, trained professionals who practice in these fields. It is also the case that these are two fields that are introducing an increasing number of AI-based technologies. In the legal industry, a growing interest in "big data" and natural language processing has resulted in start-ups seeking to tackle the difficult task of aggregating, synthesizing and modeling a collective corpus of case law. One example, *RavelLaw* uses natural language processing to identify, extract and classify information from legal documents, automating basic case law analysis to make research more efficient and targeted. The company hopes to add automated analysis of briefs, wording recommendations for particular judges, and probability-based outcome predictions to litigators and their clients. Another, *ROSS Intelligence* calls itself "Your Brand New Artificially Intelligent Lawyer" and is built in partnership with IBM using the Watson artificial intelligence supercomputer. The company highlights its ability to process natural language to assist in case law review. Another area that has had significant penetration within law firms and with clients, is the use of AI to review documents. The advent of e-discovery is such that it is not as efficient, or economical, to have attorneys conduct first reviews of the massive volumes of documents collected in large litigations. Attorney oversight remains necessary, in particular to guarantee adequate controls are in place to secure privileged and confidential information from inadvertent disclosures.

In the medical industry, robotic surgical instruments and cancer treatment devices, as well as the continued development and adoption of IBM's Watson for medical treatment has led to increased analysis of potential liability for the use of such instruments and devices. As mentioned above, there is precedent for litigation over the safety of surgical robots, with the claims all proceeding on some form of agency theory, rather than claiming that the robot itself bears liability. By combining elements from medical malpractice, vicarious liability, products liability, and enterprise liability, the law can create a uniform approach for AI systems, thereby eliminating any inequities that may arise from courts applying different theories of liability and encouraging the continued beneficial use of such systems.

(Continued on page 11)

VICTORIES

Bankruptcy Victory for G-I Holdings

Recently, the firm secured significant victories for G-I Holdings Inc. before the Bankruptcy Court for the District of New Jersey and the Court of Appeals for the Third Circuit, stemming from a $500+ million claim made by the New York City Housing Authority (NYCHA) in G-I's bankruptcy proceeding.

Before the Bankruptcy Court, the firm obtained complete summary judgment and disallowance of NYCHA's claim, which asserted, under various tort and equitable theories, that G-I was responsible for the damage to NYCHA buildings caused by the presence of asbestos-containing materials allegedly sold by certain of G-I's predecessors and installed in NYCHA buildings between approximately 1930 and 1981, and therefore also responsible for any removal costs. Initially, Quinn Emanuel persuaded the Court to dismiss all of NYCHA's tort claims as time-barred, since NYCHA was, or at least should have been, aware of its asbestos-related claims no later than the mid-1980s. The firm then sought and obtained discovery revealing that not even NYCHA treats the presence of asbestos-containing materials as an immediate hazard to its tenants—which is consistent with EPA guidelines—and therefore the hazards NYCHA asserted in support of its claims for equitable indemnity and restitution were simply not present. The Court's 106-page opinion agreed, and further agreed that no statute or common law imposed a duty upon G-I to remove asbestos-containing materials from NYCHA's buildings.

That victory came directly on the heels of the previous month's win before the Third Circuit, which affirmed dismissal of NYCHA's related adversary complaint that, in the words of the Third Circuit, had "creatively tried to repackage" the ongoing $500+ million claim. NYCHA had filed the adversary proceeding to circumvent G-I's Plan of Reorganization, arguing that, because it was a regulator seeking equitable relief, its claim was not discharged under the Bankruptcy Code or the Plan. In obtaining dismissal, the firm persuaded the Bankruptcy Court, District Court, and finally the Third Circuit that, because NYCHA is not an environmental regulator and does not otherwise possess police powers, was not seeking to remedy ongoing or imminent pollution, and could be adequately compensated by monetary relief, its adversary complaint did not fall into the narrow discharge exception potentially available for claims that fulfill those requirements.

These successive victories remove the specter of hundreds of millions in liability from the client.

Arbitration Victory for Major European Energy Company

The firm recently won a complete victory in arbitration on behalf of a major European energy company. The dispute arose from the termination by the firm's client of a medium-term take-or-pay gas supply agreement entered into with a major European gas supplier. The agreement was governed by New York law and subject to ICC arbitration with a seat in Geneva. Because this was a medium-term contract, it did not contain a price-review clause, as is commonly the case in long-term take-or-pay contracts. Rather, it contained a hardship provision entitling the buyer to terminate the agreement in the event of a change of circumstances resulting in losses on average over a certain time period.

The buyer triggered the hardship provision of the agreement and terminated the contract one year ahead of the end of its term. The seller almost immediately commenced arbitration proceedings against the buyer requesting compensation, claiming that the termination was in breach of the agreement, that the termination notice did not comply with the agreement, and that the buyer's conduct constituted willful misconduct. The seller claims totaled USD 100 million.

In a recent award, an arbitral tribunal of three arbitrators sided with the firm's client on every issue, rejected all of the seller's claims and thus confirmed the validity of the termination.

Significant Interim Victory in First Trial of RMBS "Putback" Claims

The firm recently achieved an important trial victory for its client U.S. Bank in *U.S. Bank v. UBS Real Estate Securities, Inc.*, otherwise known as "MARM," following a month-long bench trial before Judge Kevin Castel of the Southern District of New York. The case involved allegations by U.S. Bank, as trustee for three residential mortgage-backed securities ("RMBS") trusts, that UBS breached key contractual representations and warranties it had made about the thousands of loans backing those trusts. *MARM* was the first RMBS case involving claims brought by a trust on behalf of investors to go to trial.

During fact discovery, the firm gathered extensive evidence that the securitized loans were not as warranted, and that UBS knew it. During expert discovery, a re-underwriting expert sampled hundreds of loans and found rampant deficiencies throughout the sampled population. After the former presiding judge passed away, Judge Castel took over the case and told the parties that they could not rely on sampling, but rather had to be prepared to litigate the case loan-

by-loan, for many thousands of loans. The Court briefly reopened expert discovery, and in an extensive effort, the expert and his expanded team reviewed over 12,000 loans in six months, finding material breaches in about 9,300 of them.

During the month-long trial spanning from April to May 2016, U.S. Bank provided its experts' findings, and also showed the problems that pervaded UBS's business during the lead-up to the financial crisis, including their failure to adequately review the loans they securitized and their willingness to turn a blind eye to red flags. One UBS employee admitted that, upon re-running borrower credit scores and seeing that some scores dropped by almost 200 points from the initial numbers, UBS chose to report the higher score to investors in offering documents, and never edited those documents to reflect the new, lower, scores. These problems, among many others, resulted in UBS securitizing thousands of shoddy loans and representing that the characteristics of these loans (e.g. borrowers' FICO scores and debt to income ratios) were much better than they actually were.

U.S. Bank also explained why UBS's theories for why it could avoid liability were ill-founded. Among other things, UBS argued that: U.S. Bank's experts should be excluded; that UBS's warranties did not actually promise that the information provided to investors was true and correct; the contracts made it impossible for U.S. Bank to recover for loans that had been liquidated; and there was no way for U.S. Bank to show that the breaches it had uncovered had a material and adverse effect on the interests of the trusts' investors.

In its September 6, 2016 decision, the Court ruled in U.S. Bank's favor on these and other key legal issues. Based on these findings, Judge Castel then proceeded to examine 20 "exemplar" loans and ruled in U.S. Bank's favor on 13 of the 20. The Court ruled that it would appoint a group of special masters to apply these rulings to the remaining nearly 9,300 loans. Although the final amount of U.S. Bank's recovery will not be known until the special master process is completed, based on Judge Castel's rulings, it appears the recovery will be substantial. Q

(lead article continued from page 9)

Medical malpractice is applied to healthcare providers, while vicarious liability tends to focus on institutions that employ healthcare providers. It is possible to envision a medical malpractice action based on a lack of informed consent arising when a physician fails to inform the patient of all relevant information about a course of treatment, including any risks associated with the use of autonomous machines for such treatment. The hospital's own duty to supervise the quality of medical care administered in the facility would be related to actions asserting vicarious liability, so long as the court determines that the autonomous machine can be analogized to an employee. If a court decides instead to analogize the AI system to a machine like a Magnetic Resonance Imaging device, then products liability claims may be attached to defective equipment and medical devices that healthcare providers may use. While manufacturers of medical equipment and devices can be liable through products liability actions, the learned intermediary doctrine results in the manufacturer having no duty to the patient and thus prevents plaintiffs from suing medical device manufacturers directly. *See, e.g. Banker v. Hoehn*, 278 A.D.2d 720, 721, 718 N.Y.S.2d 438, 440 (2000). This liability structure makes it challenging for patients to win products liability suits in medical device cases.

While AI innovations are certain to save time and money, there are concerns that AI technology, when used to replace human professional judgment, could lead to increased claims raising complex issues of causation, legal duties, and also liability. A regime based on some form of enterprise liability, similar to what has been discussed previously in relation to autonomous vehicles, which combines elements of malpractice, products liability, and vicarious liability, could address these legal challenges while encouraging professionals to purchase and use these AI systems.

Conclusions

As AI technologies, products, systems, and autonomous machines continue to develop and gain acceptance, the legal claims related to these technologies will also rise. While courts, legislatures, and regulatory agencies have begun to address the novel legal issues presented, the current legal framework leaves several areas open for significant development. Parties filing and defending actions related to AI technology will need to advance creative concepts for addressing issues such as causation and liability that will surely be at the forefront of any AI-related litigation. And when novel AI related issues arise with no apparent legal precedent or laws to rely upon, let's still wait a bit longer before asking a robot for help. Q

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business litigation report

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