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EC Competition Law: Latest Developments Provide Ever Greater Opportunities for Private Enforcement

The private enforcement of competition law within the EU continues its inexorable rise and plaintiff opportunities abound. Small and medium size businesses throughout Europe are joining larger companies in initiating proceedings relating to all manner of products and services. The European Commission, as well as national competition authorities, are showing an ever greater appetite for investigating and prosecuting breaches of European competition law, and the resulting regular flow of infringement decisions provides powerful ammunition for private parties injured by such infringements to assert their rights and often claim substantial damages in the national courts. The national courts themselves are becoming increasingly sophisticated in processing these claims, and the Commission's very recently adopted Directive on competition damages actions will further strengthen plaintiffs' rights, improve national systems for private enforcement across the EU, and make it even easier to prosecute and succeed in such claims.

The Directive reflects a policy desire to strengthen the link between public enforcement of competition law by the European Commission and national competition authorities and private enforcement by individuals and companies. The latter includes "follow-on" damages actions – which allow victims of EU competition law infringements to obtain redress for harm suffered. Private, follow-on civil litigation is steadily growing across the EU. In particular, courts in England, Germany and the Netherlands now frequently play host to multi-million Euro lawsuits, triggering court battles into relatively unchartered legal territory. All indicators – legal, economic, and political – suggest that the momentum behind private enforcement will continue to gather pace. According to the competition policy brief issued by the Commission on 13 January 2014, cartels cause up to €23 billion in losses annually that should be recovered through private enforcement. All businesses engaged

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INSIDE

Quinn Emanuel Elects Eleven New Partners *see page 11*

Quinn Emanuel Opens Seattle Office Led by Former U.S. Attorney and Cyber Law Expert

The firm has opened an office in Seattle, Washington, headed by former U.S. Attorney, Jenny Durkan. She will serve as Global Chair of the Cyber Law and Privacy Group, and join the firm's White Collar & Corporate Investigations practice. She will be joined by John ("Jay") Neukom, a partner from the firm's San Francisco Office.

While Jenny was a U.S. Attorney, a primary focus of her practice was Cyber law. She was a member of the Attorney General Advisory Committee, and chaired its sub-committee on Cybercrime and Intellectual Property Enforcement. She served on the DOJ's Cyber Advisory Committee and IP Enforcement Taskforce, where she co-chaired its criminal and civil enforcement working groups. Durkan is a Fellow of the American College of Trial Lawyers, and a graduate of the University of Notre Dame and the University of Washington. Before serving as the United States Attorney in Seattle, Durkan was known for her work in noteworthy litigation, including serving as trial counsel to defend Washington Governor Christine Gregoire in the disputed election re-count of 2004.

Jay is a graduate of Dartmouth College, Yale University, and Stanford Law School. He serves as lead counsel to technology companies in IP disputes. In 2014, *Law360* named him one of the top 10 IP lawyers in the country under the age of 40. Q in commerce within the EU should have on their radar the issues and opportunities that are arising.

Public Enforcement

Under EU competition law, the Commission and national competition authorities can investigate and sanction infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit, respectively, cartels and other agreements that could inhibit free competition, and abuse of a dominant position. Enforcement by the relevant competition authorities remains the primary mechanism by which competition laws are enforced in the EU. The sanctions implemented (including requirements to change behavior and fines) can be, and increasingly are, significant. For instance, in December 2013, the Commission fined 8 international financial institutions a total of €1.7 billion for participating in cartels in the interest rate derivatives industry; and, in March 2014, it fined producers of bearings for cars and trucks €953 million for cartel conduct.

Private Enforcement

In the well know line of cases including *Courage* and *Manfredi*, the Court of Justice of the European Union has recognized the right to compensation of individuals and companies that have suffered harm from infringements of competition laws. Any person or undertaking that has suffered loss as a result of an infringement of national and/or EU competition law may bring a claim for damages or other relief (e.g. injunctive relief/declarations) before the competent national courts in accordance with national substantive and procedural laws – including laws on discovery, statute of limitations, burden of proof, causation and quantum of damages. A claim may be brought on a "stand-alone" basis or on a "follow-on" basis.

In a stand-alone action, there is no prior competition authority decision finding a breach of competition law; hence, the plaintiff has to prove to the court both that the breach of competition law occurred and that it suffered loss as a result of that breach. In a follow-on action, however, private enforcement occurs *after* a competition authority has already concluded its investigation and reached a decision that competition law has been infringed. Follow-on actions are unique in that the plaintiff can then rely on that decision as *proof* of infringement to establish liability in the civil claim. In most follow-on actions, the plaintiff need only prove that it has suffered *loss* as a result of the infringement and the amount of loss. Damages obtained through follow-on claims can be as large as any fine imposed by a competition authority.

EU Directive on Competition Damages Actions

Private enforcement of competition law has become an increasingly prominent feature in the European legal landscape and is intended to act as a complementary – and additional – deterrent against anti-competitive conduct. In particular, follow-on damages claims are an important aspect of private enforcement, as they provide a strong and relatively low risk route for plaintiffs to recover losses suffered as a result of anti-competitive conduct. Whilst a significant number of such claims have been brought in various national courts across the EU, and the volume of cases continues to rise, a lack of familiarity with the available process, together with the still-developing jurisprudence in this area, results in relatively few companies seeking the compensation to which they are entitled. Differences in rules between EU Member States also have an impact.

To address such issues, on 10 November 2014, the EU Council of Ministers adopted a European Commission proposal for a Directive on competition damages actions. This Directive is designed to achieve a more effective enforcement of EU competition rules overall, and specifically to help individuals and companies claim damages if they have suffered loss as a result of infringements of EU competition rules, primarily by alleviating certain practical obstacles faced by plaintiffs. In particular, the Directive is intended to give plaintiffs easier access to the evidence they need to prove damage, provides a presumption of harm, and more time to bring their claims. EU Member States will have two years to implement the Directive into their domestic laws.

Directive—Key Provisions

The Directive provides that any person who has suffered loss due to infringement of a competition law is entitled to full compensation; meaning that the injured party shall be placed in the position in which it would have been had the infringement of competition law not been committed – an entitlement to compensation for actual loss and for loss of profit, plus interest. Although the legal principle of full compensation is on its face a reasonable and straightforward concept, the calculation of damages that result from a competition violation is a complicated subject, and is highly controversial in any damages claim.

The Directive also imposes a *presumption* that cartel infringements cause harm, consistent with economic evidence that more than 90% of cartels result in price increases. This reverses the usual position, putting the burden squarely on the defendant to rebut the presumption that harm has been suffered as a result of its competition law infringement. This presumption of harm also applies to indirect purchasers with the Directiver providing for a rebuttable presumption of "passing-on" of losses from direct to indirect purchasers. The Directive, in addition, empowers national courts, in accordance with national procedures, to *estimate* the amount of harm (i.e. quantum of damages) if it is established that a plaintiff has suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the available evidence. Assistance in this respect can also be sought from the national competition authorities.

Furthermore, the Directive provides that an infringement of competition law found by a final decision of a national competition authority, a review court, or by the European Commission itself is deemed to be irrefutably established for the purposes of a private action for damages brought before national courts under Article 101 or 102 TFEU or under national competition law. This critical concept, already reflective of the position in a number of Member States (including England and Germany), enshrines an injured party's right to sue before EU national courts on the basis that the final decision of the competition authority is binding on that same Member State's court for the purpose of establishing the liability of the defendant. In the courts of other Member States, the decision will be *prima facie* evidence of the infringement. This should give plaintiffs a greater selection of jurisdictions in which to bring their claims.

The Directive also paves the way for documentary discovery to be obtained more easily and to a greater extent, from the defendants, third parties and also from the relevant competition authorities, within the conduct of private claims; although limitations are imposed, such as a requirement of proportionality, and to protect aspects of the regulatory enforcement process either until the competition authority has closed its proceedings (or in perpetuity, where the evidence in question concerns leniency statements or settlement submissions).

The Directive also provides that the limitation period for damages claims shall be at least five years and shall not begin to run before the infringement has ceased and the plaintiff has knowledge or can reasonably be expected to have knowledge of the infringement, of the harm caused to it, and of the identity of the infringers. In addition, there is a requirement that a limitation period is suspended if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the private action for damages relates, and that the suspension shall end at the earliest one year after the infringement decision of the competition authority has become final, or after the proceedings are otherwise terminated.

Taken together, these enhanced rights will materially strengthen the ability of plaintiffs to prosecute private claims against infringers of European competition law before national courts across the EU efficiently and with greater success; particularly where such claims follow on from a final infringement decision of a relevant competition authority such as the Commission.

Concurrent National Law Developments

Until Member States each adopt the Directive domestically, their existing national laws and judicial precedents continue to determine the rights of individuals in private damages actions. Legislators in a number of EU jurisdictions already have established laws to provide a robust framework for civil claims for competition law violations (and particularly for follow-on damages claims).

With the recent campaign by the Commission to facilitate competition damages claims, there has been a significant rise in the volume of follow-on civil litigation cases. A few key recent highlights from Germany, England and the Netherlands demonstrate how national tribunals continue to develop the law related to private actions. In Germany, for example, the revised German Law on the Restraints of Competition (the GWB) strengthened private enforcement in Germany by facilitating claims for lawyers and investigators. Similarly, the UK's Enterprise Act 2002 facilitates competition law claims by expressly recognizing a right to damages for breach of competition law and enabling a specialist tribunal to hear and decide on private competition law claims. Other developments continue across Europe.

Germany

German competition law already substantially complies with the mandatory provisions in the Directive: the victim of a competition violation has a right to full compensation pursuant to Sec. 33 GWB. A violation of national or EU competition law is a key prerequisite for a damages claim; as such, final decisions by the Commission, the German Federal Cartel Office or the competition authority of any other EU Member State are legally binding on the German national courts. Furthermore, the infringer must have violated competition law intentionally or negligently (*mens rea*) and the claimed losses must be caused by the infringer's (intentional or negligent) anti-competitive conduct (*causation*).

Sec. 33 GWB is only applicable to undertakings; personal liability of board members or managers remains a highly controversial issue. In *Dornbracht v. reuter.de*, however, the German Federal Supreme Court held that – at a minimum - chief executive officers can be personally liable pursuant to Sec. 830 para. 2 German Civil Code as an instigator or participant in the anti-competitive conduct. As a recent example, the cargo unit of Deutsche Bahn filed follow-on proceedings in the regional court of Cologne claiming damages of potentially more than €1.2 billion from 13 airlines, including Air Canada, Air France-KLM, British Airways, Cathay Pacific, Lufthansa and Qantas. The claims arise from the Commission's investigation and 2010 decision to fine air cargo carriers a total of circa €800 million for operating a cartel which affected cargo services in the EU. The Commission found that the airlines had colluded to inflate airfreight fees for a period of over six years.

England

England is well known as a forum for follow-on competition litigation as it offers plaintiffs favorable procedural means to seek redress – means even exceeding the mandatory rights set forth in the Directive. In addition, the English courts have a wide discretion to accept jurisdiction over such claims. In particular, S. 47A of the Competition Act, 1998, allows injured parties to bring damages actions before the Competition Appeal Tribunal (CAT), a specialized judicial body. Many follow-on claims have also been pursued before the English High Court, as an action upon a tort of breach of statutory duty; the duty defined with reference to the relevant provision of UK or EU Competition law. A number of decisions have affirmed the appetite of the English Courts to deal with such cases and the relative ease of establishing jurisdiction in England for claims in this area. The Government has also introduced the Consumer Rights Bill, 2014, containing provisions to amend the Competition Act 1998 and the Enterprise Act 2002, to establish the CAT as the primary venue for private enforcement actions in the UK, and to make it easier for claimants to bring claims. This Bill will also significantly introduce an opt-out collective action regime (along the lines of US class actions) that should enable claims to be brought on behalf of all UK purchasers of cartelized goods and services.

One thorny issue has been the limitation period applicable to bringing private actions. The Limitation Act, 1980, requires that proceedings be brought in the High Court within six years of the date on which the cause of action accrued, while a limitation period of two years from the date when the infringement decision is final applies to claims brought before the CAT under S. 47A. Earlier this year, the Supreme Court, in *Deutsche Bahn v Morgan Crucible*, confirmed that the limitation period for claims in the CAT starts to run, as against a party to an illegal cartel which does not appeal an EC decision, at the date of that decision and not once any appeals by other parties are finally determined by the EU General Court and Court of Justice Soon after, the English High Court, in *Arcadia v Visa*, struck out a substantial part of the claimant's claim, which dated back to 1977, for having been brought too late under the Limitation Act, 1980. The case concerned the so called "multi-lateral interchange fees" charged on debit and credit card transactions, which the plaintiffs (a group of major UK retailers) argued, unlawfully restricted competition and led to higher prices. Relevantly, unlike most cartels, these agreements were not secretive. The Court reasoned that the retailers possessed adequate information to have sufficiently pleaded a claim, since before 2006 at the latest, available in decisions, notices and press releases issued by the Commission and the English competition authority relating to their respective investigations into these fees. This reduced the claimed damages by around £500 million.

The effect of these decisions is diluted by the Consumer Rights Bill which will align the limitation period for the CAT, with the six year limitation period for the High Court. It will be arguably further diluted by the Directive, which provides that the limitation period (of at least five years) is suspended from the moment a competition authority starts investigating an infringement until at least one year after the infringement decision has become final. Interestingly, although the Court in *Arcadia*, considered the incoming Directive, it refused to take a view consistent with it, as the Directive itself provided that claims brought prior to national legislation bringing the Directive into force would be unaffected.

Until the Directive comes into force in the UK, the *Arcadia* decision stands as good law. Its effect on other pending litigations remains to be seen given that most cartels are secretive and it is not until a competition authority investigation is concluded that most plaintiffs have the requisite knowledge to trigger the running of limitation periods. *Arcadia* may, however, have most impact on the numerous related litigations between UK retailers MasterCard and Visa, brought as follow-on claims from the 2007 Commission decision establishing that the interchange fees charged on MasterCard's debit and credit card transactions unlawfully restricted competition and led to higher prices. The Commission's decision was confirmed by the Court of Justice on 11 September 2014.

In another controversial case, involving a large number of shippers, many of which are well known global companies, are claiming damages from an air cargo cartel that involved British Airways (*Emerald Supplies v British Airways*). The litigation is in part a follow-on claim from the decision of the Commission in 2007, which fined 11 airlines a total of €799 million for infringing competition law. The Commission found that the carriers had entered into illegal agreements regarding cargo pricing. In addition to their follow-on claim, the plaintiffs have raised a novel claim that the airlines illegally conspired to injure them by "unlawful means" and sought disclosure of the Commission's decision. The "unlawful means" include "foreign unlawful means", which refers to the infringement of foreign competition law and deceit under foreign law. By raising this unlawful means tort claim, the plaintiffs are looking to expand the jurisdiction of the English Courts to consider claims of foreign companies based on breaches of foreign competition law. British Airways requested the Court to strike out these broader "conspiracy charges" and to limit the litigation to English law. In October, in two separate orders, the Court ruled that British Airways' strike out request was premature, finding it was not appropriate to deal with this question on a summary judgment application. In the other decision, delivered on the same day, the Court made an order for disclosure by British Airways of the Commission's decision, in its entirety and without redactions, to a strict "confidentiality ring" comprising a limited number of lawyers. This order was made in circumstances where nearly seven years after the Commission issued its decision, no public version has been available. This is the first time a Court has ordered disclosure of a Commission Decision before a public version has been made available and also the first time a Court has ordered disclosure of a completely unredacted version of the decision. The airlines have filed an appeal against the latter order, and a decision from the Court of Appeal as to the entitlement of Claimants to such confidential material, including leniency material, is eagerly anticipated.

The Netherlands

In a highly controversial case, the Court of Appeal of Arnhem-Leeuwarden handed down a judgment on 2 September 2014 confirming the availability of the passing-on defence under Dutch law (*TenneT v. ABB*); this is where the defendant argues that the plaintiff itself has not suffered loss as that loss has been passed on, e.g. through price adjustments, to the plaintiff's customers. While case law on this topic already existed in, amongst other jurisdictions, France and Germany, the judgment is the first authoritative decision on this issue in the Netherlands.

What Does the Future Hold?

Private enforcement of competition law arrived in Europe some time ago and is now flourishing, with opportunities readily available for companies to recover very substantial damages. The Directive will further strengthen and enhance European competition law, providing victims of competition infringements with an ever more powerful platform from which to prosecute civil damages actions against infringers. Yet, the ultimate weapon in private enforcement in this area - *class actions* - are still to be decided on across the EU, although the English are leading the way here with the introduction of an opt-out collective action regime that is due to be in effect by late 2015.

Class actions in the field of competition law are clearly on the Commission's agenda. It has been conferring on collective redress schemes since 2005. On 2 February 2012, the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress'. In the Commission's Recommendation 2013, the Commission called for the implementation of its collective redress principles by 26 July 2015 at the latest. Although the recommendation is not legally binding, the Commission noted that it would evaluate the status of collective redress laws in the Member States and if appropriate propose further measures by July 2017. This tight agenda leads observers to believe that the current recommendation is merely an intermediate step. In all probability, a more far-reaching legal act will follow.

NOTED WITH INTEREST

The Strategy of *Lone Pine* Orders: Timing Matters

Federal and state courts are using *Lone Pine* orders to effectively manage and control mass tort cases and other complex litigation. A *Lone Pine* order is a case management order that requires all plaintiffs to furnish fundamental evidence to substantiate essential elements of their claim, such as causation and the nature and extent of their injuries or damages. Used strategically, a *Lone Pine* order provides defendants with a powerful weapon to streamline and narrow claims, or even eliminate them altogether. This article discusses some of the important considerations in seeking *Lone Pine* orders.

The concept originates from the New Jersey case *Lore v. Lone Pine Corp.,* a toxic tort case in which the court entered a pre-discovery case management order requiring all plaintiffs to provide documentation containing what the court deemed "basic facts" in support of their claims. No. L-33606-85, 1986 WL 637507, at *1-2 (N.J. Super. Ct. Law Div. Jan. 1, 1986). Specifically, with respect to each personal injury claim, plaintiffs were ordered to provide facts in support of their individual exposure to the toxins at issue, as well as reports from treating physicians or other experts supporting their claim of injury and causation. And for each claim for diminution of property value, plaintiffs were required to provide address information as well as reports of real estate experts or other experts supporting each claim, which were to include information regarding timing, degree of diminution in value, and causation. The court ultimately ruled that the plaintiffs' evidence was insufficient and dismissed the case.

Since the *Lone Pine* decision, courts have adopted similar protocols in appropriate cases, noting the usefulness of *Lone Pine* orders in defining and narrowing issues, streamlining discovery, weeding out unmeritorious claims, and conserving judicial resources. Federal district court judges have wide discretion to enter such orders under Rule 16(c)(2)(L), and, generally speaking, state courts can employ such mechanisms at their discretion.

Courts, however, have taken different approaches to the *Lone Pine* order, particularly with respect to the timing of its entry. Very recently, the United States Court of Appeals for the Eleventh Circuit held that district courts should not issue *Lone Pine* orders prior to ruling on whether those claims survive a motion to dismiss for failure to state a claim under *Iqbal/Twombly*. *Adinolfe v. United Technologies Corp.*, 768 F.3d 116, 1167-69 (11th Cir. 2014). The *Adinolfe* Court distinguished between "demand[ing] that plaintiffs come forward with some evidence supporting certain basic elements of their claims as a way of organizing (and maybe bifurcating) the discovery process once a case is at issue and dealing with discrete issues or claims by way of partial summary judgment motions" and "compiling, analyzing, and addressing evidence (pro and con) concerning the plaintiffs' allegations without reciprocal discovery before those allegations have been determined to be legally sufficient under Rule 12(b)(6)." *Id.* at 1168. The Eleventh Circuit was concerned that *Lone Pine* orders might become "the practical equivalent of a heightened, court-imposed quasi-pleading standard, something the Supreme Court has frowned on." *Id.* The *Adinolfe* Court expressly declined to comment on the "general propriety and/or utility of *Lone Pine* orders," but suggested that discovery should be in play before a *Lone Pine* order is issued. *Id.*

The United States Court of Appeals for the Fifth Circuit, by contrast, approved the use of a *Lone Pine* order before discovery in *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000). *Acuna* involved approximately 1,600 plaintiffs alleging personal injury and diminution of property value claims in connection with purported exposure arising from defendants' uranium mining and processing activities. The Fifth Circuit affirmed the use of *Lone Pine* orders that required plaintiffs to submit expert affidavits "specify[ing], for each plaintiff, the injuries or illnesses suffered by the plaintiff that were caused by the alleged uranium exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions." *Id.* at 337-38. The Fifth Circuit reasoned that the *Lone Pine* orders only required of each Plaintiff what he or she should have known before filing suit in the first instance. As a result, the Fifth Circuit found that the district court did not commit clear error or an abuse of discretion "in refusing to allow discovery to proceed without [a] better definition of plaintiffs' claims." Notably, the *Acuna* decision highlights the need for plaintiffs to conduct due diligence prior to filing suit, or in other words, to comply with Rule 11's "reasonable inquiry" requirement. *See* Fed. R. Civ. P. 11(b).

In light of the varying approaches to *Lone Pine* orders, defendants must carefully consider when to seek a *Lone Pine* order. There may be strategic benefits to seeking a *Lone Pine* order early on (either before a Rule 12-type motion or after) if there is some indication the plaintiffs' claims are susceptible to attack. For example, claims that are inconsistent with well-established science or medicine, claims of multiple plaintiffs alleging identical injuries (often against many defendants), or claims that lack exposure to the alleged toxins all may be ripe for an early *Lone Pine* order. This could allow for two different attacks on plaintiffs' complaint before discovery even begins – one on the face of the complaint via Rule 12-type motions and one on the sufficiency of plaintiffs' evidence via a *Lone Pine* order.

Alternatively, the better move may be to wait until some discovery has occurred to strengthen the basis upon which to argue for the *Lone Pine* order. For example, a limited number of targeted depositions in a mass tort case might create a record that plaintiffs lack evidence to support certain essential elements of their claims. At this stage and with this record, a defendant may be able to persuade the court to issue the *Lone Pine* order in lieu of protracted and expensive further discovery in a mass tort action. In our experience, some discovery also may reveal certain defenses, such as statutes of limitations or immunity, that a *Lone Pine* order is well-suited to address. *Lone Pine* orders are potentially powerful weapons in the defense of mass tort matters and other complex litigation. As a defendant in such cases, the decision about when to seek a *Lone Pine* order can be just as important as its contents. While the temptation may be to seek a *Lone Pine* order early on, the better strategic move may be to wait. Because each case is different, thinking creatively about when and how to use a *Lone Pine* order is critical to maximizing its effect. Q

Insurance Litigation Update

Risk Developments in the U.S., UK, and Australia. We have recently had the opportunity to talk to liability insurers in the U.S., UK and Australia about risk developments in those jurisdictions. There are both surprising similarities and differences in what is quickly becoming a global economy and litigation landscape.

Comparatively, the U.S. has traditionally been considered the plaintiff's haven, and the home of the class action. Leading U.S. and UK insurers have reported, however, that U.S. courts have recently been taking a more restrictive approach to claims than courts in the other jurisdictions, especially during the strenuous pre-trial procedures characteristic of the jurisdiction. A headline example is the strict approach that the Supreme Court continues to prescribe for class certification. The traditional view nevertheless remains that, if a plaintiff's claim survives initial challenges and wins at trial, there will be a substantially higher damages award in the U.S. than if the same claim were made in the UK or Australia.

Though Australian damages awards are usually smaller than those in the U.S., a recent development is that plaintiffs are now considered more likely to succeed before Australian judges than before their U.S. or UK counterparts. An Australian statutory body has recently recommended that Australia join the U.S. and UK in permitting lawyers to charge contingency fees. This will likely further increase the frequency of claims in Australia, where there is no class certification and arguably less obstacles to bringing a class action.

Insurers in the U.S., Australia, and increasingly the UK, remain concerned about securities class actions. Cross-listed businesses and their insurers are particularly concerned about the potential of having to defend parallel class actions in multiple jurisdictions. This of course increases defense costs and creates issues associated with the multiple presentation of evidence. The potential for such actions is increased by the globalization and overall growth of litigation funders. The risk of multiple actions arises in many areas, including white collar crime, particularly given increasing cooperation amongst regulators like the Department of Justice, the Serious Fraud Office and the Australian Securities and Investments Commission. There is similarly the specter of multiple actions in the product liability sphere, as demonstrated by recent highly publicized matters.

In some respects, securities fraud is a relatively straightforward claim for plaintiffs and funders to assess. The information necessary for preliminary assessment is often readily available: a plaintiff firm or funder can analyze publicly-available announcements which trigger share price drops to decide whether a claim of fraud can be asserted. Estimates of damages can be made by looking at the size of the price drop and volume of shares traded. This is not limited to securities actions. Some insurers have reported that publically available information is making it easier for non-securities claimants, and particularly dust diseases claimants, to assess the viability of a claim. One insurer reported that claimants can now access lists of potential asbestos defendants and details of their insurance at the relevant times. Further, UK plaintiff law firms and funders are taking to social media to help market claims. In Australia and the UK, litigation funders report that they are actively moving into areas like product liability and insolvency matters.

There remains a broad concern that litigation funders are supporting claims that are arguably unmeritorious, banking on the claims being too expensive to defend in terms of cost, reputation, and company executives' time. Settling such claims is seen to reward this behavior. In Australia at least, this has fueled an ongoing debate about the proper role and regulation of funders.

UK insurers also raised serious reservations about the risks associated with companies expanding into foreign jurisdictions with regulatory and legal regimes that are not well understood. There are of course risks associated with operating in new regulatory regimes, and risks arising from the cultural and political situation of a new jurisdiction. A popularly voiced concern is that some political systems may present greater risks of corruption, and are increasingly the focus of international authorities. When businesses expand into developing countries concerns may also be raised about sovereign risk. However, this is not confined to developing economies. Recent actions by Australian legislatures to seize valuable mining rights without compensation (through the passing of legislation such as the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014*) has shown that developed economies are not immune to sovereign risk.

Differences clearly remain between each of these jurisdictions and the emerging risks within them. The inescapable point, however, is that as business and trade become more global, the developing legal trends and the sharing of information among plaintiff firms, litigation funders and regulators means that the risks faced by companies and their insurers become increasingly similar (and international) in scope.

EU Litigation Update

Second Helping—The EPO's Enlarged Board of Appeals Hears Tomatoes/Broccoli II. On October 27, 2014 the Enlarged Board of Appeals of the European Patent Office (EBoA) heard the two appeals against the Opposition Division's decisions to allow product claims on certain types of tomatoes and broccolis (G 2/12 and G 2/13) following the referrals made in both instances by the respective Technical Boards of Appeals (TBA) (T 1242/06 and T 83/05).

Joint proceedings had already taken place in G 2/07 and G 1/08, respectively known as *Tomatoes/Broccoli I*. The issue before the EBoA at the time related to the patentability of methods to produce the concerned vegetables. In G 1/08, the patent concerned a method for breeding tomatoes having a low water content. It involved a step consisting in leaving the fruit on the vine past its normal point of ripening as well as a screening step to select a fruit with a reduced water content. In G 2/07, the patent concerned a method for breeding a certain type of broccoli having a cancer prevention effect. The claimed method involved several steps of crossing, selecting and backcrossing but also a screening step using molecular markers for the selection of specific hybrids. On December 9, 2010 the EBoA held that both processes fell under the patentability exclusion of Art. 53(b) EPC, being "essentially biological processes for the production of plants". Following this decision, the parties amended their claims (deleting all process claims contained in their previous requests) and the cases were remitted to the respective TBAs for further prosecution of the remaining product claims. New referrals were made to the EBoA however, since allowing patentability of the product claims could be seen as a way of circumventing the process exclusion.

The recent hearing therefore revolved around the interpretation of Art. 53(b) EPC, in particular the potential <u>extension</u> of the essentially-biological-process exclusion <u>to plant products</u> issued from such processes. While the EBoA refused to issue a preliminary opinion at the close of the debates as requested by the Appellant in G 2/12, the Board indicated that reference could be made to its last communication to the parties dated July 15, 2014 in which it noted that considering the wording, purpose and legislative history of Art. 53(b) EPC, nothing could lead to an extensive reading of the expression "essentially biological processes for the production of plants". The Board, however, invited the parties to summarize their submissions regarding the impact on the interpretation of Art. 53(b) of the following legal considerations:

the effect of Rule 26(5) EPC which defines a process for the production of plants as being essentially biological "*if it consists entirely of natural phenomena such as crossing or selection*";

the need for a dynamic interpretation having regards to factors which have arisen since the signing of the EPC and which might give grounds for assuming a restricting reading of the provision;

the scope of application of the "essential biological process" exclusion if claims on products generated by such processes are allowed; and finally

the role of Rule 27(b) EPC which warrants patent protection for plants "*if the technical feasibility of the invention is not confined to a particular plant or animal variety*".

It is a very rare case when both Patentees and Opponents agree on what should be the outcome of a decision. In the present case, all parties advocated for a restrictive reading of the process exclusion. It was agreed on all sides that the Rules 26(5) and 27(b) EPC have to be interpreted in view of the legislative history of the Biotech Directive, which contains identical provisions (Articles 2(2) and 4(2) of Directive 98/44 EC on the legal protection of biotechnological inventions). According to the Parties, the legislative history of the Directive shows that the very narrow definition given for "essentially biological process for the production of plants" cannot support an extension of the process exclusion to products without depriving Rule 27(b) of its meaning.

Each party developed specific arguments regarding the need for a dynamic interpretation of Art. 53(b) EPC and the risk of rendering the process exclusion meaningless or without substance:

For *Plant BioScience*, one of the Applicants, the exclusion would still be applicable to new and improved methods or processes producing a <u>known</u> plant. This was also the approach formulated by the representatives of the President of the EPO. The EBoA, however, pointed out that this situation would relate to the issue of lack of novelty of the plant products themselves, rather than the scope of the process exclusion.

Syngenta, one of the Opponents, argued that the legislative intent for the exclusion of essentially biological processes is the prohibition of patents on non-technical breeding processes. A dynamic interpretation of Art. 53(b) EPC would not be necessary, since the inventive step requirement is sufficient to ensure that patents will not be granted on conventional breeding methods. Yet, this line of reasoning is unlikely to be followed by the EBoA as it reiterated at the start of the hearing its unwillingness to re-examine previous decisions: such an approach would indeed conflict with G 2/07 and G 1/08, which did not draw a distinction between technical and non-technical essentially biological processes.

Limagrain, another Opponent, requested that the need for a dynamic interpretation be considered in light of Art. 31(3) Vienna Convention which requires that subsequent agreements and practice between the parties (i.e. the Contracting States to the EPC) be taken into account. It submitted that since the signing of the Convention in 1973, there has been a clear wish to maintain patent protection for plant products since no amendments were made to Art. 53(b) EPC in 2000. *Limagrain* also specifically asked the EBoA to ensure that protection would not be conferred for the use of patented plant products for the production of new different plants.

The Board's decision is expected to issue soon and the hope is that it puts an end to the uncertainties in Europe surrounding the question of plant product patents. The Board's opinion will, in any case, be of paramount importance for any actor in the plant industry.

ITC Litigation Update

The ITC as a Favorable Venue in Light of Increasing IPR Petitions and District Courts Propensities to Stay Pending IPR. Since its inception in September 2012, inter parties review ("IPR") has become a powerful tool for delaying patent litigation in federal district courts. Lending credence to this notion is the fact that district courts grant nearly three out of every five motions for stay in view of a related IPR proceeding. With that understanding, petitioners have filed an incredible 2,100+ IPR petitions—with more than 1,250 of them coming in 2014 alone—and monthly filings continue to trend higher.

When determining whether or not to stay litigation in view of a related IPR proceeding, district courts generally consider the following three factors: (1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party. A review of how district courts have applied these factors, to date, shows that a quickly-filed IPR proceeding can be an effective tool in obtaining a stay of a district court litigation.

Patent litigation brought in the International Trade Commission ("ITC") plays under an entirely different set of rules. In addition to the factors considered by a district court, the ITC considers three additional factors for deciding stay motions: (1) the stage of the PTO proceedings; (2) the efficient use of Commission resources; and (3) the availability of alternative remedies in federal court. *Certain Microelectromechanical Systems ("MEMS Devices") and Products Containing the Same*, Inv. No. 337-TA-876, Order No. 6 at 3 (May 21, 2013). Given the tremendous pace at which ITC investigations proceed (typically 9-10 months to trial and 16 months to final resolution), an IPR proceeding instituted *after* an ITC investigation would almost certainly be insufficient to justify a stay of the investigation, considering that the IPR proceeding itself may take up to 18 months to complete. Further, unlike federal courts, the ITC cannot award damages and thus cannot remedy a complainant for past damages incurred during a stay. The stay would in effect create a "dead period" in which a complainant would be powerless against alleged infringers in the ITC. As put nicely in *MEMS Devices*, "if it were possible to create such a lengthy dead zone, reexamination petitions would become part of every respondent's tactical playbook in every single ITC investigation." *Id.* at 8. Accordingly, under the ITC's additional factors, it appears extremely difficult for a party in the ITC to win a motion to stay in view of a related IPR proceeding. Since the IPR's inception in 2012, no such stays have been granted.

Knowing of the towering hurdle that they would need to overcome, respondents very rarely attempt to obtain stays in the ITC based on parallel IPR proceedings. In fact, no respondent has filed such a motion to stay in nearly 18 months. For this reason, if a complainant files in the ITC as opposed to district court, a respondent may have less motivation to file an IPR.

That said, the ITC is not without its downsides for potential complainants if the respondent does in fact file an IPR. For one, if an ITC investigation and parallel IPR proceeding begin at roughly the same time and no stay is issued, a financially strapped complainant may have a difficult time litigating and financing both actions. Moreover, the complainant would have to be especially mindful of the positions and evidence that it takes in each of the actions so that they are not inconsistent. Also, because of the speed at which ITC investigations progress, it is unlikely that the IPR proceeding would march quickly enough to generate a ruling *before* the ITC investigation holds an evidentiary hearing. In other words, the complainant would likely be unable to benefit from any preclusive effect that a finding of patent validity by the IPR may have. Another downside for a potential complainant is that to win at the ITC, the complainant would need to be able to establish a domestic industry. As a result of this requirement, foreign companies with little to no presence in the United States other than importing and selling its products may be automatically barred from winning at the ITC.

So whether a party asserting patent infringement should initially file in district court or in the ITC heavily depends on that party's specific circumstances. For those who can stomach a potential year-long-plus delay to final resolution in return for a lower annual cost, filing first in district court may be the correct move. But for virtually guaranteed speedy resolution, the ITC is the way to go.

Equate Wins Dismissal of Claims for Breach of Alleged Distributorship Agreement

The firm recently obtained a victory for client EQUATE Petrochemical Company, a Kuwaiti chemical products manufacturer, in the Second Circuit. EQUATE had a sales arrangement in Turkey with a Turkish company, Continental Kimya Sanayi Ve Dis Tic, A.S. ("CIG-Turkey"). When EQUATE phased out the relationship, CIG-Turkey's U.S. affiliate, Continental Industries Group ("CIG-NY"), filed suit against EQUATE in federal district court in New York, alleging multiple causes of action, including breach of contract, unfair competition, promissory estoppel, and tortious interference with contractual relations.

The firm moved to dismiss CIG-NY's lawsuit on multiple grounds, including lack of personal jurisdiction and the doctrine of *forum non conveniens.* On September 9, 2013, the district court (Nathan, J.) agreed with EQUATE and dismissed the lawsuit against EQUATE concluding that CIG-NY had not met its burden of establishing a prima facie case of personal jurisdiction over EQUATE. The court did not reach EQUATE's other arguments. CIG-NY appealed the district court's September 9, 2013 Order.

On October 10, 2014, a week after the oral argument, the Second Circuit unanimously affirmed the district court's order dismissing CIG-NY's lawsuit against EQUATE. The Second Circuit held that exercising general jurisdiction over EQUATE would be inconsistent with due process under the U.S. constitution because CIG-NY did not allege facts sufficient to show that EQUATE is either headquartered or incorporated in New York or otherwise at home in New York. Further, the Second Circuit held that there is no specific jurisdiction over EQUATE because: (i) the sales arrangement between EQUATE and CIG-NY concerned distribution of EQUATE's products in the Turkish market rather than New York; (ii) EQUATE's employees never visited New York to negotiate or execute the sales arrangement with CIG-NY; (iii) CIG-NY failed to allege sufficient facts to show that Union Carbide acted on behalf of EQUATE in order to attribute the New York contacts to EQUATE; (iv) EQUATE's purchase orders are governed by English law; and (iv) the invoices sent by EQUATE to CIG-NY were incidental to EQUATE's shipment of goods from Kuwait to Turkey. Moreover, the Second Circuit held that there is no specific jurisdiction based on EQUATE's alleged tortious interference with the contract because the situs of the injury was Turkey not New York. The court explained that the first effect of the tort as felt by CIG-NY's customer was in Turkey and, as a result, the situs of the injury was Turkey, not in New York. Finally, based on the determination that CIG-NY failed to establish a prima facie case for jurisdiction, the Second Circuit held that the district court did not abuse its discretion in declining to permit jurisdictional discovery.

Major Victories and Settlements in Foam Antitrust Case

Quinn Emanuel, as court-appointed co-lead counsel for companies that directly purchase flexible polyurethane foam and allege that major foam manufacturers conspired to fix prices, in 2014 won certification of a nationwide class, defeated the defendants' effort to appeal the class certification ruling, and secured approximately $148 million in settlements from two of the defendant foam manufacturers.

Flexible polyurethane foam is a product widely used in furniture, bedding, automobiles and carpet underlay. Direct purchasers of polyurethane foam have alleged that the major foam manufacturers colluded for at least a decade to raise prices above competitive levels, in particular by illegally coordinating price increase announcements. The Judicial Panel on Multidistrict Litigation consolidated various cases before Judge Jack Zouhary of the United States District Court in Toledo, Ohio.

Earlier this year, after briefing, expert reports and an evidentiary hearing with live testimony by the parties' respective experts, Judge Zouhary certified a national class of direct purchaser plaintiffs. The defendants promptly filed a motion with the federal appeals court in Detroit, Michigan, seeking leave to appeal the grant of class certification. Quinn Emanuel, also serving as co-lead counsel in the appeal, defeated that motion, with a 3-judge appeals court panel unanimously finding that the defendants' had not identified any ground for permitting the appeal.

On behalf of the direct purchaser class, the firm was able to secure two settlements this year: one for $108 million with defendants Carpenter Co., E.R. Carpenter, L.P. and Carpenter Holdings, Inc.; and one for $39.8 million with defendant Leggett & Platt, Incorporated. Earlier in the case, the class secured a settlement for $9 million to $15 million (depending on certain contingencies) with defendant Vitafoam, which had cooperated with government investigations of the alleged collusion and had less than 1% market share during the relevant period. All of the settlements to date have thus totaled approximately $160 million.

Six non-settling defendants remain in the litigation, which is scheduled for trial on March 31, 2015. A hearing on the defendants' pending motions for summary judgment will be held before Judge Zouhary on January 15, 2015. Q

Quinn Emanuel Elects Eleven New Partners

The firm has elected eleven new partners, effective January 1, 2015. The new partners are:

- **Sean P. Baldwin** is based in New York. His practice focuses on complex civil litigation and arbitration, with an emphasis on financial products, securities, and insurance. Sean received an L.L.B., *with honors,* from the University of Canterbury and a B.C.L., *with honors,* from Oxford University, Lincoln College.
- **Andrew J. Bramhall** is based in Silicon Valley. His practice focuses on high-stakes intellectual property disputes with an emphasis on patent litigation. Andrew received a B.A. in molecular biology from Pomona College and a J.D. from New York University School of Law.
- **Andrew S. Chalson** is based in New York. His practice involves intellectual property, with a focus on Hatch-Waxman patent litigation and related regulatory and antitrust issues. Andrew received a B.A. in biological anthropology and anatomy, *magna cum laude*, from Duke University, and a J.D., *cum laude*, from Georgetown University Law Center.
- **Michelle Ann Clark** is based in San Francisco. Her practice focuses on technology-based litigation with an emphasis on patent, contract, and other commercial disputes. Michelle received a J.D. from Northwestern University School of Law and clerked for the Hon. Percy Anderson of the U.S. District Court for the Central District of California.
- **Dr. Jan Ebersohl** is based in both Munich and Mannheim. He has extensive experience representing his clients in patent infringement and nullity cases as well as commercial litigation and arbitration matters. He obtained his doctorate degree in law, *summa cum laude*, from Saarbrücken University.
- **Andrew R. Dunlap** is based in New York. He has represented clients in all manner of complex commercial litigation, including securities, antitrust, ERISA, RICO, and mass tort matters. Andrew received a B.A. and M.A. in history, *with honors*, from the Johns Hopkins University and a J.D., *magna cum laude*, from Georgetown University Law Center.
- **Joseph C. Sarles** is based in Los Angeles. His practice focuses on the trial and arbitration of complex disputes of all kinds, including commercial tort and contract claims, class actions, professional liability, antitrust and unfair competition, and intellectual property. Joseph received a Bachelor of Music from Vanderbilt University and a J.D., *with honors,* from University of Texas School of Law, where he was an articles editor of the *Law Review*.
- **Meredith M. Shaw** is based in San Francisco. Meredith is a trial lawyer with extensive experience litigating a broad variety of complex commercial disputes including products liability, false advertising, unfair competition, contract and intellectual property actions. Meredith received an A.B., *with honors,* from Harvard University and a J.D. from Columbia Law School, where she was a James Kent Scholar and Harlan Fiske Stone Scholar.
- **Elinor C. Sutton** is based in New York. Her practice focuses on complex commercial litigation and arbitration, including class actions, contract and financial disputes, and intellectual property matters. She received a B.A. in economics from Villanova University where she graduated *summa cum laude* and *Phi Beta Kappa,* and a J.D. from Yale Law School.
- **Matthew Traupman** is based in New York. He specializes in patent litigation and other intellectual property matters. Matt received an A.B., *cum laude,* in Biochemistry & Molecular Biology (*high honors)* and Government, and a J.D. from the University of Virginia School of Law.
- **Tyler Whitmer** is based in New York. His practice focuses on complex civil litigation and dispute resolution, with a focus on finance and restructuring-related matters. Tyler received a B.A. in both liberal arts (*Plan II Honors*) and theatre and dance (acting concentration), as well as his law degree (*with high honors* and *Order of the Coif*) from the University of Texas, where he was a Chancellor.

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