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Dismissal of Charges in the British-Petroleum (BP) Deepwater Horizon Indictment ... or the Over-Criminalization of the BP Oil Spill

On April 20, 2010, just before 10 p.m., the *Deepwater Horizon* drilling rig suddenly exploded in the Gulf of Mexico, 48 miles off the Louisiana coast. Tragically, eleven men on the vessel died. Oil ultimately flowed from the well into the Gulf of Mexico for 87 days. In response, the United States Attorney General announced a "criminal task force" of prosecutors and agents to find and prosecute those responsible. While the companies involved ultimately pled guilty, the government also charged individuals, who have fought their cases and won. Quinn Emanuel represents BP's "well site leader" on the rig. Representing that individual, we defeated 22 felony charges. As this goes to press, we are fighting the final charge, a misdemeanor, at trial.

First, the companies. Transocean is a Swiss based company that owned the rig and provided most of the staff. It pled guilty to the misdemeanor crime of "negligent" water pollution. BP pled guilty to felony crimes—chiefly "seaman's manslaughter" under 18 U.S.C. § 1115, based on the alleged "simple negligence" of its two representatives on the rig, who supposedly misinterpreted a pressure reading before the explosion.

Given the mass publicity surrounding the *Deepwater Horizon* explosion, BP understandably felt pressure to settle these charges, notwithstanding its defenses. As part of its plea agreement, BP paid a $1.25 billion criminal fine and penalties of $2.75 billion to the National Fish and Wildlife Foundation and the National Academy of Sciences, along with other civil penalties and damages.

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INSIDE

Law360 Names Six Quinn Emanuel Partners 2015 "MVPs of the Year"

Six Quinn Emanuel partners were named 2015 "MVPs of the Year" in their respective practice areas by *Law360*. The publication's "MVPs of the Year" series recognizes "elite attorneys whose successes in high-stakes litigation, record-breaking deals and complex global matters" have made the greatest contributions to their practice areas over the past year. The Quinn Emanuel lawyers named MVPs are: Kathleen Sullivan (Appellate); Dan Brockett (Competition); Charles Verhoeven (Intellectual Property); Sheila Birnbaum (Product Liability); Philippe Selendy (Securities); and William Burck (White Collar). Q

Quinn Emanuel Expands Chicago Office with Two Trial Lawyers

Jonathan C. Bunge and Daniel R. Lombard, both formerly of Kirkland & Ellis, have joined Quinn Emanuel's Chicago office as partners. Mr. Bunge, who became Managing Partner of the office, has tried over 40 jury and bench trials and many domestic and international arbitrations. He has also argued over 20 cases before federal and state appellate courts. He litigates complex business disputes, including class actions, securities, product liability, white collar, and appellate litigation. He also frequently defends clients in government investigations and regulatory matters. Mr. Bunge clerked for Justice Byron White of the U.S. Supreme Court and Judge James Buckley of the U.S. Court of Appeals for the D.C. Circuit. Following his clerkship, he joined the U.S. Attorney's Office in Chicago where he was eventually appointed Deputy Chief of the General Crimes Division. He is a Fellow of the American

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The Manslaughter Case. BP's well site leaders on the *Deepwater Horizon* also were charged with eleven counts (one for each man who died) of "seaman's manslaughter" but challenged the indictment. The Seaman's Manslaughter Statute was passed in the 1850s to control crashes on rivers after the advent of the steamship. It establishes criminal liability for any "captain, pilot, engineer or other person employed" on a vessel who negligently causes death. The statue was passed, at least in part, as a response to deaths that resulted from steamships racing one another to pick up passengers.

Although the *Deepwater Horizon* had both a "captain" and an "engineer," they were Transocean employees, not BP employees. These Transocean employees controlled the navigation and operation of the *Deepwater Horizon* as a vessel. In contrast, the well site leaders were on board as BP's representatives responsible for implementing the drilling plan. By analogy, the well site leaders were like doctors on a hospital ship, serving a specialized, non-marine purpose. Quinn Emanuel moved to dismiss the seaman's manslaughter charges on the grounds that the statute did not apply to them.

The U.S. District Court agreed with the firm, citing the rule of statutory construction called "*ejusdem generis*." *United States v. Kaluza*, 2013 WL 6490341 at *18-23 (E.D. La. Dec. 10, 2013). According to the court, "[c]aptain, pilot, engineer, or other person employed" does not mean "any person employed" on a vessel but rather only those serving a marine function, like the specifically listed employees. *Id.* A unanimous Fifth Circuit panel later affirmed this ruling. *United States v. Kaluza*, 780 F.3d 647 (5th Cir. 2015).

That dismissal still left 11 additional felony charges—for what is called "involuntary" or "reckless" homicide—for the same conduct and same 11 men who died. Quinn Emanuel raised various challenges to these counts as well, concerning jurisdiction as well as factual defenses. Based on these challenges, the DOJ reconsidered the charges and voluntarily dismissed them.

And that leaves one more count, which charges that the alleged misinterpretation constitutes "negligent" water pollution under the Clean Water Act. That case is scheduled to proceed to trial in New Orleans federal court on February 16, 2016. Among other issues, this trial will question how to assign "causation" for tragic accidents that are "caused" by many independent and unforeseen factors.

Lying to Congress by "Under-Stating" the Size of the Spill. In another prosecution arising out of the tragedy, BP Vice President David Rainey was charged with lying to Congress about the size of the spill. He went to trial on June 1, 2015. Rainey challenged whether his statements—in a letter responding to then-Congressman Ed Markey of Massachusetts—actually constituted a statement to "Congress." As the trial began, the U.S. District Court called on the government to prove that Congress had "authorized" Markey's inquiry. When the necessary members of Congress refused to travel to New Orleans to testify, citing their immunity under the "speech and debate clause" of Article I, Section 6 of the U.S. Constitution, the court dismissed the charge.

Although the charges against Rainey ultimately did fail, his indictment is a caution to any company that must report on the size of any environmental release. Often it is difficult, if not impossible, to quantify a release accurately as it is occurring. Company spokespersons should be cognizant of this when public reports must be made, whether to the government or anyone else. Q

Safe Harbor No More: Navigating Unchartered Waters After the European Court of Justice Ruled the European Commission's Seminal Decision on U.S. Privacy Safe Harbor Invalid

Not surprisingly, different governments and regulatory bodies have different views on how to strike the right balance as to the protection of the individual's right to privacy (especially personal data), the facilitation of international commerce, and national security initiatives, and this was all too apparent in the Court of Justice of the European Union's recent decision in *Schrems v. Data Protection Commissioner*, Case C-362/14, Judgment of the Court (Grand Chamber) (October 6, 2015). In that case, the Grand Chamber of the Court declared *invalid* the European Commission's Safe Harbor Decision of July 26, 2000 (Decision 2000/520/EC Pursuant to Directive 95/46 (July 26, 2000) (the "Safe Harbor Decision 2000/520")), which had previously held that the Safe Harbor Privacy Principles, issued by the U.S. Department of Commerce on July 21, 2000 (Annex 1 to Decision 2000/520, Safe Harbor

Privacy Principles (July 21, 2000) (the "Safe Harbor Privacy Principles")), provided adequate protection for transfers of personal data from organizations in European Union Member States to the United States. Earlier this month, in the wake of this significant decision, it was announced that an agreement in principle has been reached between E.U. and U.S. officials concerning a new trans-Atlantic data transfer pact (the E.U.-U.S. Privacy Shield), which includes making efforts on both sides of the Atlantic to address the concerns raised in the *Schrems* decision. Yet, absent specific details about this pact, both regulators and companies have been left questioning the adequacy of the interim data protection measures that are currently in place at thousands of impacted companies, particularly major technology companies. This article assesses the *Schrems* decision (and the very recent politically-charged negotiations and announcements that have followed) in the context of the system that was put in place to regulate transfers of personal data between the European Union and the United States. Specifically, the article highlights the key implications that this decision, the recent announcement of general details about the E.U.-U.S. Privacy Shield, and currently ongoing regulatory reactions (especially by European data protection agencies), will have for many companies based in both Europe and the United States that are now scrambling to ensure that their interim data protection measures are sufficient moving forward.

Regulating the Processing of Personal Data and Transfers of Such Data from European Union Member States to the United States

Within the European Union, an individual's right to privacy is protected by the Charter of Fundamental Rights of the European Union and the Data Protection Directive 95/46 of the European Parliament and Council ("Directive 95/46"). With regard to the processing of personal data and the free movement of such data by organizations, a system was implemented to prohibit transfers of personal data from within Member States to other countries that do *not* ensure an adequate level of protection. Yet, rather than defining what an "adequate level of protection" actually means, Article 25(2) of Directive 95/46 instructs the European Commission to make such assessments "in light of all the circumstances surrounding a data transfer operation or set of operations" affording particular attention to: (1) the nature of the data; (2) the purpose and duration of the proposed operations; (3) the country of origin and the country of final destination; (4) the rules of law, both general and sectoral, in force in the third country in question; and (5) the professional rules and security measures which are complied with in that country. In order to promote a level of predictability, transparency, and efficiency, the European Commission has the authority to enter into negotiations with non-European Union states and make subsequent findings on whether those states ensure an adequate level of protection under their domestic laws.

In the case of regulating data transfers from Member States to the United States, the European Commission issued its Safe Harbor Decision 2000/520 on July 26, 2000, which held that an "adequate level of protection" would be attained if organizations comply with the Safe Harbor Privacy Principles and the Frequently Asked Questions, that offer guidance for the implementation of the Principles, issued by the United States government on July 21, 2000. The Principles were developed in consultation with industry and the public to facilitate trade and commerce between the United States and the European Union. Notably, this was a voluntary self-certification system for U.S. organizations that created a presumption of "adequacy" whenever organizations certified to the U.S. Department of Commerce their adherence to the Safe Harbor Privacy Principles. Such certification required a written description of the organization's privacy policy, including: (1) where the privacy policy is available for public review; (2) the date of implementation of the policy; (3) contact information for the office responsible for handling complaints, access requests, and inquiries about safe harbor; (4) identification of the statutory body responsible for hearing complaints; (5) the name of any privacy program the organization is currently participating in; and (6) the independent recourse mechanism available to investigate unresolved complaints.

For the purpose of the analysis provided below, it is important to also note that the Safe Harbor Privacy Principles contain a major caveat, which notes that adherence to the Principles may be limited: (1) to the extent necessary to meet national security, public interest, or law enforcement requirements; (2) by statute, government regulation, or case-law that creates conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization; or (3) if the effect of the Directive or Member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts.

Although this system (and the Safe Harbor Decision 2000/520) survived for over a decade, warning signals were evident in late November 2013 when concerns were raised about the existence of a number of surveillance programs in the United States that involved large-scale collection and processing of personal data and the impact that these programs were having on individual privacy rights. One major concern was that many of the almost 3250 companies certified under this system (including major companies like Google, Facebook, Microsoft, Apple, and Yahoo) processed the data of their employees in Europe and then transferred that data to the U.S. for human resources purposes, where that data was subject to much greater privacy intrusions that which, it was alleged, were not strictly necessary and proportionate to the protection of any national security objectives. Similar concerns were raised about these companies transferring and processing the personal data of their hundreds of millions of clients in the U.S. An additional concern was that, while U.S. citizens might have some recourse for these alleged surveillance-based privacy violations, there appeared to be little-to-no opportunities for E.U. personal data subjects to obtain access, rectification or erasure of data, or administrative or judicial redress for any collection or further processing of their personal data taking place under the surveillance programs run by the United States government. Ultimately, these concerns were the catalyst for the dispute, and ultimate decision, in *Schrems*.

***The Dispute and Subsequent ECJ Decision in* Schrems**

Mr. Schrems (an Austrian national) entered into a contract with Facebook Ireland Ltd. upon registering his Facebook account in 2008. Some or all the personal data of Facebook Ireland Ltd.'s users who reside in the European Union is transferred to servers belonging to Facebook Inc., which are located in the United States where that data undergoes processing. After revelations were made public by Edward Snowden in 2013 about the purported activities of U.S. intelligence services, in particular the National Security Agency, Schrems filed a complaint with the Irish Data Protection Commissioner requesting that the Commissioner exercise statutory powers to prohibit any transfer of his personal data to the U.S. This complaint was rejected by the Commissioner on the basis that there was (1) no evidence that his personal data had been accessed by the National Security Agency, and (2) any question about the adequacy of data protection in the U.S. had to be determined in accordance with the Safe Harbor Decision 2000/520, where the Commission had found that the United States *ensured* an adequate level of protection. This was not the end of the matter.

Mr. Schrems brought an action before the High Court of Ireland challenging this decision. The High Court found that the electronic surveillance and interception of personal data transferred from the E.U. to the U.S. serve necessary and indispensable objectives in the public interest. Yet, the High Court emphasized that the revelations made by Edward Snowden demonstrated significant over-reach on the part of the National Security Agency and other United States agencies. The High Court also stressed that under the Irish Constitution, interferences with fundamental rights and freedoms, including the right to privacy, must be *proportional* and in accordance with the law. The High Court noted that mass/undifferentiated accessing of personal information was contrary to both this principle and the Irish Constitution. Furthermore, the High Court expressed concern that E.U. citizens appear to have no effective right to be heard in the U.S. about how their personal data is used. Given these concerns, while the High Court ultimately concluded that the Commissioner should have investigated the matters raised by Mr. Schrems, the Court nonetheless noted that this was a matter of European Union law that should be referred to the ECJ for a specific ruling on whether the Commissioner was bound by the finding in the Safe Harbor Decision 2000/520.

On October 6, 2015, the Grand Chamber of the ECJ held that the Safe Harbor Decision 2000/520 is *invalid* and that the supervisory authority of any Member State *can* examine the claim of a person concerning the protection of their rights in regard to the processing of personal data which has been transferred to another country when that person contends that the law and practices in force in that country do not ensure an adequate level of protection. The two main justifications for this decision were that U.S. surveillance measures went beyond what was strictly necessary and proportionate to the protection of national security and that data subjects had no administrative or judicial means of redress enabling the data relating to them to be accessed and rectified or erased. In reaching this conclusion, the ECJ noted that it focused solely on the invalidity of the provisions in the Safe Harbor Decision 2000/520, and did *not* need to examine the content of the Safe Harbor Privacy Principles. Irrespective of this apparent limitation on the Court's ruling (which was likely intended to soften any political impact by striking a European Commission decision rather than a politically-negotiated set of principles), it is hard to see how the current version of the Safe Harbor Privacy Principles will withstand the same arguments that killed the Safe Harbor Decision 2000/520.

***Recent Reactions to* Schrems**

There has not yet been any subsequent decision on the merits of Mr. Schrems' arguments. Nonetheless, the immediate aftermath of the *Schrems* decision was chaotic with many major companies scrambling to react to the invalidation of the Safe Harbor Decision 2000/520.

Since the Court's ruling in October 2015, there has been increased debate about not just the renegotiation of the Safe Harbor Privacy Principles, but also, data protection reform both across the E.U. and between the E.U. and the U.S. The Court's decision has impacted the ongoing negotiations between the E.U. and the U.S. government regarding reform of the Safe Harbor Privacy Principles that have been ongoing since 2013, well before the decision in *Schrems*, and are just one important part of the regulatory reform being proposed. Notably, the most recent development came in mid-December 2015, when E.U. officials reached final agreement on a new uniform data protection regulation that will replace the existing Data Protection Directive (that has been implemented in Member States via a patchwork of national privacy laws) and subject multinational companies to significant fines: namely the greater of four percent of their annual global turnover or 20 million Euros.

It is worth noting that this new regulation will not take effect until two years after the proposal is finally adopted by the European Parliament and Council (which is expected to occur in early 2016). Furthermore, despite the strict penalties that have been included in the new regulation, the proposed regulation has been viewed favorably by businesses in Europe because it purports to usher in a more streamlined and predictable approach to regulation where companies can simply deal with a single supervisory authority. Notwithstanding these efforts, given the structure of the European Union, enforcement of harmonized rules will likely be left to national agencies operating under amended national laws, so complete harmonization might not occur.

In addition to this larger regulatory reform proposal, the body responsible for monitoring data privacy, the Article 29 Working Party, had announced that if by February 1, 2016 no appropriate solution was found with U.S. authorities, national data protection authorities would be forced to take all necessary action, including potential coordinated enforcement action. While that deadline was missed, a new trans-Atlantic data transfer pact (the "E.U.-U.S. Privacy Shield") was announced on February 2, 2016. As of the writing of this article, although American and European negotiators have not released specific details concerning the E.U.-U.S. Privacy Shield for political approval, they have confirmed that this pact will: include stronger oversight of companies' compliance (including enforcement efforts by European Data Protection Agencies, the U.S. Department of Commerce, and the U.S. Federal Trade Commission); include guarantees from the U.S. that access to data concerning E.U. citizens will be subject to clear safeguards and limitations (including limits on mass access to personal data for national security purposes); and provide E.U. citizens with better forms of redress (including the creation of a new Ombudsman and other forms of ADR to assist with individual complaints and inquiries).

This announcement will likely delay the kinds of investigations, legal proceedings, and/or fines against companies that fail to comply with the current patchwork data privacy requirements across Member States, which had been threatened by European data-regulators if a pact was not reached by February 1, 2016. However, even though a deal has been struck, its legality will still likely be subject to the scrutiny of the same European data-privacy regulators.

Despite the concerns raised about over-reach of national surveillance measures, it remains to be seen whether recent terrorist activity will slow some of the momentum behind these data privacy developments and reforms. Much criticism of the *Schrems* decision focuses on the counterarguments that (1) data protection in the U.S. and across Member States is substantively equivalent; and (2) that many Member States enforce just as broad national security data monitoring programs as those U.S. measures that caused concerns in *Schrems*. There is no doubt that any negotiations moving forward will focus on how to strike a better balance between privacy rights and national security objectives, so that concerns about proportionality and over-reach of government surveillance can be addressed.

Implications for Clients

The ruling in *Schrems*, and both the political and regulatory reactions to this ruling, have already had, and will continue to have, direct consequences for businesses transferring personal data to the U.S. or outsourcing the processing of personal data to the U.S. Many companies have already used the ruling in *Schrems* as a catalyst to review policies and procedures relating to the transfer and processing of personal data to locations beyond the E.U. and are closely following updates from not just the European Commission, but also, announcements from national data protection authorities in the Member States and overseas regulators, especially those in the U.S. Furthermore, European data-protection officials have issued warnings that the practices of American businesses, especially technology companies that deal with large amounts of personal and employee data, will come under much closer scrutiny and regulatory oversight in each Member State. These efforts might have even wider implications, whereby companies in Member States, like Germany, might try to invoke data privacy concerns as a basis for objecting to production of internal personal emails in U.S. litigation.

While further clarification from regulators is pending, companies have been taking a number of risk management steps, including: (1) review of current data flows of personal data; (2) analysis of how to limit the amount of personal data that is transferred/processed in the U.S.; (3) analysis of the personal data, if any, that must be transferred/processed in the U.S.; (4) review of contracts with vendors that rely upon Safe Harbor certification; and (5) analysis of local data privacy requirements in each country where personal data is currently being transferred or processed. There was concern that some of these efforts might amount to an attempt to hit a moving target given that national authorities could, at least for the time being, respond to the decision in *Schrems* in an idiosyncratic manner, creating a patchwork of enforcement risks while any subsequent action from the European Commission is pending. To address this risk, the Commission issued a Communication on November 6, 2015, reiterating the Article 29 Working Party's conclusion that while data transfers can no longer be based on the invalidated Safe Harbor Decision 2000/520, standard contractual clauses and binding corporate rules can be used as an interim basis for data transfers.

As such, in addition to the above-cited risk management measures, companies have also been utilizing other mechanisms for international transfers of personal data permissible under European Union data protection laws, such as model contract clauses (approved by the European Commission), binding corporate rules, and approvals from national supervisory authorities. However, it should be noted that achieving compliance is not as simple as obtaining consent from each individual data subject by contract, especially in the context of employee personal data, because a number of Member States have held that employee consent cannot be freely given via an employment contract. There is even some concern about the use of model contract clauses that have been approved by the European Commission given that such approval may have been based upon the presumption of the validity of the now invalid Safe Harbor Decision 2000/520, and thus subject to legal challenges. By contrast, obtaining regulatory approval, whether in the form of specific approvals or the approval of binding corporate rules, can create greater certainty for companies, but such measures can come at the cost of significant delays.

Given the uncertainty and risk that will continue to accompany transfers and processing of personal data between Europe and the United States, and the significant fine exposure that is likely to be enforced in the future against companies that do not take sufficient precautionary action, it is prudent to obtain counsel from a law firm with specific expertise in dealing with data privacy regulators on *both* sides of the Atlantic. Q

NOTED WITH INTEREST

Southern District Decision Confirms Breadth of Bankruptcy Court Jurisdiction

The Southern District of New York in the recent *Ames* decision engaged in a detailed analysis of the contours of bankruptcy-court jurisdiction and found it broadly included a wide array of state law claims (notwithstanding the "reverse-preemption" provisions of federal insurance statutes). Report and Recommendation on Ames' Motion to Confirm Exclusive Jurisdiction, *Ames Dep't Stores, Inc. v. Lumbermens Mut. Cas. Co. (In re Ames Dep't Stores, Inc.)*, Case No. 01-42217 (REG), Adversary No. 06-01890, 2015 Bankr. LEXIS 4106 (Bankr. S.D.N.Y. Dec. 7, 2015) ("*Ames*"). Specifically, the state-law claims in Ames implicated the McCarran-Ferguson Act's reverse preemption provisions, which typically elevate state law regulating the insurance business over federal law. Bankruptcy Courts are units of United States District Courts, which have "original and exclusive jurisdiction of all cases under title 11 [*i.e.,* the Bankruptcy Code]" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). The defendant in *Ames* challenged the District Court's jurisdiction concerning a host of claims the Ames estate brought under state law and the Bankruptcy Code. Notably, these claims included "issues of particular importance to the bankruptcy system—most significantly, serious allegations of interference with the Debtors' property, of two separate types, each of which is subject to the Court's *in rem* jurisdiction and the protection of the Bankruptcy Code's automatic stay." *Ames* at 1. The detail and scope of the *Ames* decision make it one of the most significant recent pronouncements on bankruptcy court jurisdiction and ensure it will be cited frequently in the jurisdictional challenges that have become routine practice in bankruptcy litigation.

Challenged Transactions

Lumbermens Mutual Casualty Company ("Lumbermens") provided a $14.35 million bond surety (the "Bond") to backstop Ames' payment obligations to its workers' compensation insurer, Travelers Indemnity Company ("Travelers") under a bond agreement (the "Bond Agreement") that required Lumbermens to pay Travelers following its demand with respect to Ames' workers' compensation policies. In turn, Ames reimbursed Lumbermens, on an unsecured basis, for any payments it made to Travelers.

After Ames filed for bankruptcy (and invoked the automatic stay under section 362 of the Bankruptcy Code), Lumbermens and Travelers entered into a letter agreement (the "Letter Agreement") beyond the confines of the Bankruptcy Court pursuant to which (i) Lumbermens deposited $8 million into a trust account (the "Trust Monies"); (ii) Travelers agreed to draw on two letters of credit (the "Letters of Credit") Ames obtained in the bankruptcy cases for Traveler's benefit—*before* satisfying Ames' obligations from the Trust Monies; and (iii) Travelers agreed not to make a demand on Lumbermens for any remaining amounts owed under the Bond until after it exhausted both the Letters of Credit and the Trust Monies.

Neither Lumbermens nor Travelers sought bankruptcy court approval of the Letter Agreement or relief from the automatic stay, a significant omission because the Letter Agreement authorized Travelers to draw on Letters of Credit that Ames had collateralized with its own cash. Ames ultimately brought various claims against Lumbermens in the Bankruptcy Court, including (i) breach of the Bond Agreement, (ii) violation of the automatic stay and contempt pursuant to sections 105 and 362(a) of the Bankruptcy Code ("Automatic Stay and Contempt Claims"); (iii) declaratory judgment directing that the $8 million in Trust Monies be released to Ames, (iv) declaratory judgment that Ames' obligations to Travelers should have been satisfied from the amounts available under the Bond prior to a draw on the Letters of Credit pursuant to section 1107 and 105 of the Bankruptcy Code ("Marshalling Claim"), and (v) equitable subordination of Lumbermens' claims pursuant to sections 510(c) and 105(a) of the Bankruptcy Code ("Equitable Subordination Claim"). Subsequently, Lumbermens, as a result of financial difficulties, commenced a rehabilitation proceeding under Illinois state law in the Circuit Court of Cook County, Illinois.

After Lumbermens moved to withdraw the reference, the United States District Court directed the Bankruptcy Court to provide a report and recommendation on the ability of a federal court to exercise jurisdiction over the claims Ames asserted in its adversary proceeding. Lumbermens argued the dispute belonged before the Illinois state court supervising its insolvency proceeding.

Bankruptcy Court's Jurisdiction Analysis

The Bankruptcy Court first determined that it could exercise jurisdiction over each of Ames' claims under the "arising in," "arising under," or "related to" prongs of 28 U.S.C. § 1334. With respect to the state law claims (*e.g.,* breach of contract and unjust enrichment), the Bankruptcy Court found that it could exercise "related to" jurisdiction over those claims and that the breach of contract claim was a "core" matter because the issues raised by those claims overlapped with issues raised in the proof of claim Lumbermens filed against the Ames estate. The Bankruptcy Court found it has *exclusive* jurisdiction over the Automatic Stay and Contempt, Marshalling, and Equitable Subordination Claims because they pertained to property of Ames' bankruptcy estate, *e.g.*, the "bundle" of Ames' rights under the Bond Agreement and to excess cash collateral. Similarly, with respect to the Equitable Subordination Claim, the Bankruptcy Court noted the "claims allowance process is another classic *in rem* function, appropriately handled by no court other than a bankruptcy court." *Ames* at 31.

McCarran-Ferguson Act

Intertwined with the issue of jurisdiction was whether the McCarran-Ferguson Act, which "reverse preempts" federal law, applying state law concerning the regulation of the insurance business over federal law—suggested the Illinois court should decide the claims in the Ames proceeding. 15 U.S.C. §§ 1011-1015 (1994). Noting "[m]any courts, including the Second Circuit, have taken a narrow reading of McCarran- Ferguson," the Bankruptcy Court concluded the McCarran-Ferguson Act did not apply when "the Bankruptcy Code and relevant federal jurisdiction provisions do not specifically relate to the business of insurance." *Ames* at 33-34. While the Illinois Code regulates insurance because it enables the state court overseeing the rehabilitation to issue injunctions against actions against the insurer and to establish claim priority and a procedure for claim allowance, the Bankruptcy Court concluded nonetheless that "application of the Bankruptcy Code would not 'impair, invalidate, or supersede' the relevant jurisdictional provision (or any other provision) of Illinois insurance law." *Ames* at 38. It also noted the "property in question is not subject to the *in rem* jurisdiction of the Illinois court, and insurance law has nothing to do with the controversy" because the Trust Monies were no more property of the Lumbermens estate than they were property of the Ames estate. *Ames* at 39. Similarly, the Bankruptcy Court noted the Illinois statute did not provide that the state court was an exclusive forum and concluded that "[a]bsent a legitimate policy concern and substantive conflict with a federal court's exercise of jurisdiction, McCarran-Ferguson cannot *de facto* deprive such federal court of its otherwise valid jurisdiction." *Ames* at 41.

Given the depth of the Court's analysis and the extent to which it confirmed the breadth of bankruptcy-court jurisdiction, *Ames* is sure to be cited with frequency in jurisdictional challenges that are routine features of bankruptcy litigation. Q

PRACTICE AREA NOTES

Class Action Litigation Update

Supreme Court Upholds Arbitration Agreement in DIRECTV Case. The Supreme Court recently added another decision to a growing body of law reversing state courts for refusing to enforce arbitration agreements. The decision, *DIRECTV v. Imburgia*, 135 S. Ct. 1547 (2015), concerned the validity of a contractual waiver of class arbitration. The Court held the arbitration waiver enforceable despite a clause in the agreement incorporating California law, which at the time of drafting had made class arbitration waivers unenforceable.

The plaintiff in *DIRECTV* was a California consumer who had agreed to DIRECTV's service contract. The contract contained an arbitration agreement, which among other things waived class arbitration by stating "[n]either you nor we shall be entitled to join or consolidate claims in arbitration." The contract, however, further stated that the arbitration waiver would become invalid if such a waiver was unenforceable under the "law of your state." Thus, under the terms of the contract, the entire arbitration agreement would become invalid if California state law made class arbitration waivers unenforceable.

At the time the *DIRECTV* litigation commenced, California state law made class arbitration waivers unenforceable. But in *AT&T Mobility v. Concepcion*, decided in 2011, the U.S. Supreme Court held that the Federal Arbitration Act preempted and invalidated California's prohibition against class arbitration waivers. The central question in *DIRECTV* was thus whether the reference to "the law of your state" in DIRECTV's contract referred to California state law as it existed before *Concepcion*, or California state law after it had been invalidated by *Concepcion*.

In state court litigation underlying the *DIRECTV* decision, the California Court of Appeal held DIRECTV's arbitration agreement invalid by its own terms pursuant to California's prohibition of class arbitration waivers. The Court of Appeal acknowledged the holding of *Concepcion*, but held that the DIRECTV contract referred to California law as it existed before *Concepcion*. The Court of Appeal consequently affirmed the trial court's denial of DIRECTV's motion to enforce the arbitration agreement. The California Supreme Court denied discretionary review.

The U.S. Supreme Court reversed the California Court of Appeal in a 6-3 decision written by Justice Breyer. Although the Supreme Court acknowledged that California courts are the final authority on California contract law, it observed that the Federal Arbitration Act requires arbitration contracts to be placed "on equal footing with all other contracts," and only permits invalidation of arbitration contracts on grounds generally applicable to the "revocation of any [other type of] contract." 9 U.S.C. § 2. The Supreme Court therefore deemed it unnecessary to decide whether the Court of Appeal had correctly applied California law, and rather assessed whether the Court of Appeal's reasoning and decision were generally applicable outside the context of arbitration. In her dissent, Justice Ginsburg characterized the question as whether the California Court of Appeals decision "suggest[ed] discrimination against arbitration."

The Supreme Court held that the Court of Appeal's decision was invalid because it had been based on reasoning unique to arbitration agreements rather than reasoning generally applicable to contract interpretation. *First*, the Court held that the DIRECTV contract's reference to the "law of your state" unambiguously referred only to *valid* state law. *Second*, the Court cited California case law pursuant to which contractual references to California law are deemed to incorporate retroactive changes to the law. *Third*, the Court found nothing in the Court of Appeal's decision to suggest that, outside the arbitration context, a California court would interpret phrases like the "law of your state" to mean the "*invalid* law of your state." *Fourth*, the Court noted that the language of the Court of Appeal's decision focused only on arbitration, further suggesting that "its holding was limited to the specific subject matter of . . . arbitration." *Fifth*, the Court deemed it unlikely that California courts would give continued force to invalidated state law outside the arbitration context. *Sixth*, the Court observed that the Court of Appeal's holding did not identify a *general* principle of contract interpretation, but rather had been framed in a manner specific to arbitration agreements.

For all these reasons, the Supreme Court concluded that the Court of Appeal's decision was preempted by federal law because it failed to place arbitration agreements on equal footing with all other contracts as required by the Federal Arbitration Act. The Court therefore reversed and remanded for enforcement of the contract's arbitration waiver. In so holding, the majority rejected the concerns of Justices Ginsburg and Sotomayor whose dissent criticized the majority's opinion as a "further step" empowering "powerful economic enterprises" to "disarm consumers, leaving them without effective access to justice," and further highlighted parties' freedom to agree to arbitrate. Q

(Quinn Emanuel Expands Chicago Office with Two Trial Lawyers continued from cover)

College of Trial Lawyers and has received numerous commendations, including the Department of Justice's Director's Award for superior performance. He received his J.D. from the University of Chicago Law School and his undergraduate degree from Princeton University, both with honors.

Mr. Lombard specializes in complex commercial litigation. He has a wide range of experience in a variety of litigation matters ranging from billion-dollar contract disputes to nationwide class action defense. Clients he has represented in the recent past include IBM, McDonald's, Boeing, Motorola, and Navistar. Mr. Lombard received his J.D. from DePaul University College of Law, summa cum laude, where he was an editor of the school's *Law Review*. He received his B.S./B.A., *magna cum laude*, from Boston University. Q

Trial Victory for Viva in $2.2 Billion IPO Dispute

The firm recently obtained an important trial victory for client Viva Energy Australia in the Supreme Court of Victoria, Australia. On November 27, 2015, the Court dismissed all claims brought against Viva Energy by the plaintiff, Eureka Operations (a subsidiary of Coles/Wesfarmers, one of Australia's largest companies). Viva Energy is the Australian subsidiary of Dutch commodities trading giant Vitol and proposed a $2 billion IPO to be structured as a real estate investment trust (REIT) over its property portfolio of over 400 service stations.

Since 2003, Eureka and Viva (previously known as Shell) have operated a joint venture over more than 300 of the service station sites around Australia. The joint venture is recorded in a detailed set of alliance agreements and is slated to run to 2024. Under the alliance, Eureka is the operator of Viva's retail service stations and has lease agreements with Viva as landlord. After 9 months of intensive planning, Viva was ready in August last year to launch the $2.2 billion IPO of its property holding arm. However, when news of the transaction leaked to the market, Coles/Wesfarmers immediately advised that Viva could not proceed with the transaction without its consent under the joint venture alliance. Without further warning, Eureka filed injunction proceedings against Viva in the Supreme Court of Victoria, with the immediate impact that as a matter of market raising, the IPO was dead.

At that point, Quinn Emanuel was retained to defend Viva and save the transaction. In its statement of claim, Eureka sought injunctive and declaratory relief on the basis that the proposed transaction would breach the joint venture alliance agreements. Eureka's claims centred around allegations that the real estate property spin-off would breach its rights as a tenant at the service stations under the lease agreements with Viva. Under the proposed transaction, a Viva-related trustee entity will become the owner of the properties, which will then lease the properties back to Viva under a concurrent lease arrangement. Eureka contended that the concurrent lease was the grant of a "right to use or occupy the leased premises" during the term of Eureka's lease, and thus breached its rights under the leases. Eureka also claimed that the proposed spin-off would limit its ability to exercise its right of first refusal on the sale of any of Viva's sites.

The firm's defense strategy for Viva was simple. The transaction establishing the real estate investment trust was a proposal that was envisaged by the alliance arrangements and did not require Eureka's prior consent. Further, Viva and its commercial lawyers structured the transaction carefully to ensure minimal disruption to the alliance itself, and to protect Eureka's rights as tenant. In relation to Eureka's objection to the concurrent lease structure, the firm argued that the concurrent leases do not grant a right to use or occupy that would compete with Eureka's present right of occupation as tenant. The Viva-related trustee entity would simply be granting a reversionary interest with the effect that Viva would again become Eureka's landlord. Therefore, Eureka's consent to the concurrent leases is not required. Finally, Eureka's right of first refusal would be protected as the obligations under those provisions would be retained by the Viva trustee entity.

Given the urgency of the proposed market listing, the parties were granted an expedited trial which occurred a mere eight weeks after the proceedings were filed. After a two-day trial, Justice Clyde Croft, the author of the leading Australian text on commercial tenancy law, dismissed the proceedings and all of Eureka's claims. In the Court's 70-page judgment, Justice Croft agreed with and expressly adopted Viva's submissions on every point of contention. The Court held, inter alia, that the concurrent leases will not breach Eureka's rights under the leases, because the interest granted would merely constitute a reversion, and not a "right to use or occupy" the sites. The Court also held that Eureka's rights of first refusal over the sale of the sites would not be breached if they were transferred to a Viva-related trustee entity.

The Court's decision was a resounding victory for Viva Energy in light of all the work it has done to structure and prepare the transaction. Now, having the benefit of a judgment in its favor, Viva Energy can look forward to bringing the transaction to the market.

ICC Arbitration Victory for Edison

The firm recently obtained an important victory for Italian client Edison in an ICC arbitration. The tribunal reduced by more than EUR 1 billion, without interest and with retroactive effect, the price paid by Edison under a gas supply contract. Hearings on the merits were conducted over six days in July 2014 and September 2015. Italian law applied to the merits and the seat of the arbitration was in Switzerland.

The dispute arose out of a price review under a 25-year gas supply agreement signed in 2000, pursuant to which Edison agreed to buy Libyan gas sold by Eni North Africa ("Eni"). As in many long-term supply agreements for gas, the price of this contract is linked to the price of oil. Between 2009 and 2012, oil prices significantly increased while spot market gas prices remained stable. On October 1, 2012, Edison thus filed its price review request on the ground that a decline in gas prices and the decoupling of gas and oil values meant it was making a loss on the contract.

Price reviews can occur regularly in long-term gas supply contracts (typically, every 3 to 5 years). They are generally predicated upon the existence of significant changes affecting the value of gas on the buyer's market (the so-called trigger).

Edison had already obtained a substantial price reduction in a prior arbitration (Quinn Emanuel was not involved). Edison had nonetheless triggered the new price review on the day on which it received the prior award (October 1, 2012). This situation raised the question of the significance of the prior award for the interpretation and the application of the price review provision in the current arbitration. Eni, as seller, contended that the trigger was not satisfied because no new change had taken place during the new reference period. Eni added that Edison relied in fact on changes, the effects of which had already been taken into account in the prior award.

The tribunal decided that it did "not accept Respondent's axiomatic position that if a change of a certain nature (such as 'oversupply' or 'decoupling') has been considered before, it cannot be considered again." On the quantum, Eni and its experts advanced all sort of theories in order to justify that no price reduction should be allowed. They claimed that Edison was not an efficient market player and that its margins should not be restored to the same level as in the past in the current competitive environment. Quinn Emanuel defeated each and every one of them for Edison.

The Tribunal's award will likely be regarded as a landmark decision in the field of gas price review arbitrations. This case was one of the largest gas price review arbitrations in Europe, involving the two main players of the Italian gas market (Edison is second and Eni is first). Further, the billion-dollar result obtained by Edison is amongst the largest amounts ever awarded in a price review arbitration. It will make a huge impact in the market and reinforces the reputation of the firm in the field.

Inter Partes Review Victory for Celgene

Quinn Emanuel recently won an *inter partes* review ("IPR") of a patent covering the active ingredient in firm client Celgene Corporation's ("Celgene") blockbuster cancer therapy, Revlimid®, and certain associated methods of use. Revlimid® is a $5 billion per year product. The United States Patent and Trademark Office's Patent Trial and Appeal Board's ("PTAB") decision provides Celgene with patent certainty until at least late 2019.

The case began when hedge fund manager Kyle Bass and patent troll Erich Spangenberg filed an IPR petition against Celgene's patent in an attempt to drive down Celgene's stock price and profit on short positions taken in advance of filing. Petitioners argued that Celgene's patent claimed compounds that were only a slight modification from thalidomide and other thalidomide analogs identified in the prior art, and that the claimed methods of use would have been obvious.

Quinn Emanuel quickly identified that Petitioners' theories were based entirely on hindsight—starting with Celgene's patent and working backwards to piece together the claimed compounds and methods of use. The firm scoured the prior art and field of knowledge at the time of the patent's filing and collected several references that would have taught away from the combination of references Petitioners relied upon and also taught away from arriving at the claimed compounds and methods of use. The firm employed an all-out attack strategy in the Preliminary Response, raising PTAB's awareness of the significant scientific advancement achieved in Celgene's patent.

PTAB spent several pages summarizing how Quinn Emanuel's arguments persuaded it that there was no motivation to combine the cited prior art and no reasonable expectation of success in arriving at the claimed inventions. Based on the firm's arguments, PTAB found Petitioners did not prove a reasonable likelihood of succeeding on its petition and denied the IPR.

This is a significant win for Celgene. It vindicates the merits of a key patent protecting Revlimid®, and provides patent certainty and exclusivity in Celgene's growing $5-billion per year market until at least late 2019.

Ninth Circuit Victory Upholds $15.7 Million Victory in Repayment Guaranty Dispute

The Ninth Circuit recently affirmed a $15.7 million judgment Quinn Emanuel obtained against Meritage Homes Corp. related to a real estate development near Las Vegas.

The case arose from the development of a 2,000 acre planned community in Henderson, Nevada. A group of homebuilders, including Meritage, formed South Edge, LLC to develop the property. In connection with the transaction, South Edge borrowed $585 million from a syndicate of lenders, and each of the homebuilders executed a repayment guaranty, which required them to repay their respective portion of the loan if South Edge became bankrupt.

After the financial crisis and drop in the Las Vegas real estate market, South Edge was placed into an involuntary bankruptcy in December 2010. As part of the chapter 11 plan of reorganization, the lenders' claims against Meritage were ultimately assigned to the firm's client, Insolvency Services Group (ISG).

On behalf of ISG, the firm obtained summary judgment in the District Court and an award of $15.7 million against Meritage. The Ninth Circuit subsequently affirmed the decision in full. In particular, the court held that the repayment guaranty was enforceable and that ISG had standing even after the claims against Meritage were assigned to it in connection with the reorganization plan. Q

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business litigation report

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Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Becca Voake at 213-443-3165.

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- We have won five 9-figure jury verdicts.
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