KING & SPALDING

Business Lit Ledger

In this Fall 2014 issue of our quarterly newsletter we have several substantive articles on issues that many of our clients are facing. For example our appellate team has an article addressing False Claims Act cases and dismissal of *qui tam* actions. Our clients face more and more of these suits and we have used that experience to develop deep knowledge on strategies for dismissal that we hope will be of interest. Our securities litigators have a commentary in this newsletter on the Delaware Supreme Court extending shareholder books and records inspection rights to privileged internal investigation documents. The antitrust team has authored a piece entitled "Stopping the DOJ at the Border? A New Defense to Reach of Federal Extraterritorial Criminal Prosecution." You will also find articles in this issue from our class action team discussing California's Automatic Renewal Statute and a discussion on the recent new Jersey Supreme Court case regarding common interest privilege. Our national business litigation team handles every variety of commercial dispute in cases around the county. We hope this newsletter is informative and helpful to you and we welcome your feedback. We are committed to being the most trusted, value added, and service driven choice of counsel for our clients.

Robert Meadows
King & Spalding National Business Litigation Team Leader

Important Legal Developments

Promoting the False Claims Act By Dismissing Meritless *Qui Tam* Actions
The False Claims Act's *qui tam* action is a distinctive and atypical form of litigation. Through the *qui tam* mechanism, Congress created a unique way for the United States to recover for false claims by empowering private persons—relators—to file suit "for the person and for the United States Government." 31 U.S.C. § 3730(b). While allowing private persons to file suit on behalf of the government, Congress ensured through a variety of means that the government would retain substantial control over cases brought in its name. In addition to the government's powers to intervene and take over the prosecution of a *qui tam* action, to settle such an action, and to limit or even halt discovery that would interfere with a government investigation, the government also has the power to unilaterally "dismiss [a *qui tam*] action notwithstanding the objections" of a relator. *Id.* § 3730(c)(2)(A). Yet the most striking thing about the government's dismissal power is how rarely the government exercises it—only a handful of times since the 1986 amendments to the False Claims Act created the modern

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qui tam action. **More »**

Delaware Supreme Court Extends Shareholder Books and Records Inspection Rights to Privileged Internal Investigation Documents
A recent decision of the Delaware Supreme Court approved granting shareholders the right to inspect privileged and confidential internal investigation materials upon showing "good cause." Directors and general counsels should be aware of the *Wal-Mart* decision because it reflects continued heightened scrutiny of the board's role in compliance oversight and subjects sensitive internal investigation documents protected by "the oldest privilege recognized by Anglo-American jurisprudence" to inspection by shareholders seeking to substantiate claims that directors breached their fiduciary duties. The *Wal-Mart* decision could also trigger an increase in shareholder requests to inspect corporate books and records related to potential regulatory/legal violations. **More »**

Stopping the DOJ at the Border? A New Defense to the Reach of Federal Extraterritorial Criminal Action
In a one-day Department of Justice Antitrust Division takedown last September, nine international companies based outside the United States pled guilty to criminal antitrust violations and agreed to pay over $740 million in fines. In our increasingly globalized world, federal law enforcers have investigated and prosecuted numerous foreign corporations with limited presence in the United States for violations of U.S. criminal laws. Whether in cartel, corruption, or other international cases, foreign companies and their employees have chosen to submit to U.S. jurisdiction, sometimes facing hundreds of millions of dollars in fines and jail time.

With this background, it may come as a surprise to American corporations that their foreign counterparts—joint venture or business partners—may be able to successfully challenge U.S. criminal charges on a technical ground: failure to properly serve charges. The few foreign corporations to have attempted this argument have met with moderate success because the Federal Rules of Criminal Procedure do not address service of process overseas. Although the law on this topic is inconsistent, it is abundantly clear that American companies may stand alone in court if they are ever charged with criminal wrongdoing in conjunction with a foreign business relationship because their foreign partner may be beyond the reach of service of process by the United States. **More »**

California's Automatic Renewal Statute Creates Risk of Class Action Litigation
California's General Assembly enacted a statute in 2009 that purports to prevent California residents from unknowingly agreeing to automatic renewals of a service. The automatic renewal statute has attracted the attention of the plaintiffs' bar and, like provisions of other consumer-friendly California statutes, appears to be tailor-made for inclusion in class action complaints. Accordingly, companies doing business in California should be aware of the existence, scope, and nuances of this statute to assess potential applicability to any products or services that may qualify as automatic renewals or continuous service offerings. **More »**

New Jersey Supreme Court Recognizes Broad Common Interest Privilege
On July 21, 2014, the New Jersey Supreme Court issued its opinion in *O'Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014), adopting a broad application

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of the common interest doctrine for communications covered by both the attorney-client and attorney work product privileges. In doing so, the Court adopted the formulation of the doctrine previously articulated in *LaPorta v. Gloucester County Board of Chosen Freeholders*, 774 A.2d 545 (N.J. Super Ct. App. Div. 2001). **More »**

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