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Recent Trends and Developments in German Litigation

Introduction / overview

Germany has long been known as a premier venue—one of the most important in the world—for patent and other intellectual property litigation. With four offices in Germany, Quinn Emanuel has been a major presence there, assisting U.S. and international clients in a variety of German litigation matters, including, in particular, IP cases in which the firm has a leading practice. With its efficient court system, and comparatively low overall litigation costs, Germany has now emerged as an ideal venue for non-IP matters including private antitrust actions, capital markets, arbitration, and even class actions. Germany is the European Union's largest economy. Cartels targeted by the Commission of the European Union typically have a German presence and such investigations present a wide range of issues spanning from white collar to mass torts. When German companies engage in corporate misconduct, the size and liquidity of Germany's capital markets can amplify the consequences of that misconduct. This article provides an overview of recent developments that impact Germany as a venue for litigation, arbitration, and regulatory disputes.

Private Antitrust Litigation

The European Court of Justice's holding that anyone who sustains losses from a violation of European Union and member state-level cartel laws has a right

(continued on page 2)

INSIDE

Qualcomm Settlement on the Heels of Quinn Emanuel Trial Wins Page 10

Class Actions in the UK: Groundbreaking $18 Billion Court of Appeal Decision Opens the Door and Signals Encouragement for Claimants Page 6

Quinn Emanuel Sponsors Chinese Mock Patent Trial in San Francisco Page 11

Partner Dan Cunningham Passed Away on March 31, 2019

Our valued partner, Daniel P. Cunningham, passed away on March 31, 2019. Dan was a superb lawyer and a wonderful human being. He started his career at Cravath, Swaine and Moore, where he became head of the firm's London office and head of the corporate department. Always an internationalist, Dan left Cravath in 2001 to head up the New York City office of the British firm Allen and Overy. At the time of the 2008 financial crisis, Dan decided that corporate transactional work was, as he put, "not going to be fun" for a while and made the extraordinary decision—after 33 years as a corporate transactional lawyer—to join Quinn Emanuel and become a litigator. In that role he helped Quinn Emanuel lawyers understand and develop claims relating to complex financial products and was a wonderful mentor to associates.

More than a great lawyer, Dan was an engaging and ebullient human being. He was a big man with an even bigger heart. He was always upbeat and was a great sports fan, poker player, and long distance hiker. He loved the company of friends (of which he had many), with whom he liked to share good food, wine, and cigars. We will sorely miss our great and unique friend and partner Dan. Q

to full compensation, and that national procedures must ensure the practical effectiveness ("effet utile") of this right has led to an avalanche of private antitrust enforcement actions for damages in Europe. "Anyone" in this context includes direct/indirect purchasers and suppliers, umbrella customers, end consumers, and others. The European Union legislature encouraged this development by issuing a directive on antitrust damages actions ("Directive"), which codifies the case law and removes further obstacles to compensation.

This new antitrust environment has not been without controversy, with some commentators characterizing the newly-issued rules authorized by the Directive as game changers that introduce, de facto, a U.S. style litigation system. Others point out that, although often described as plaintiff-friendly, the Directive holds equal promise for defendants, and thereby ensures an even playing field for all stakeholders in private antitrust enforcement litigation. Either way, this debate underscores the need for experienced representation in such matters.

Some of the most significant changes imposed by the Directive include:

- **Limited discovery is now permitted***:* One of the most significant developments is the introduction of a limited disclosure regime. Unlike the U.S., discovery is generally not a viable option in German civil procedure. Until now, litigants could only ask the civil judge to apply a very general provision of the German Code of Civil Procedure to require production of documents in the possession of the opponent or third parties. However, such requests were rarely successful, as they were subject to the Court's discretion, with "*no fishing expeditions under German law*" serving as the governing principle.

  This bias against discovery no longer applies in competition cases. The German Act against Restraints of Competition now requires anyone in possession of relevant evidence to produce it upon request. This demand for evidence may be brought as a standalone claim and need not be combined with an action for damages. While some documents may be withheld as privileged (especially leniency statements and settlement submissions), the interests of the parties will be balanced. Because the legislature left it to the courts to implement protections for confidential information, the practicalities of this new process will evolve over time. Whether Germany will opt to permit discovery in non-antitrust cases remains to be seen. In any event, the ability to obtain discovery in German antitrust actions is a substantial change that is likely to impact the selection of Germany as a forum for such disputes.
- **Burden of proof**: The new law also introduces a rebuttable presumption that cartels lead to higher prices in the affected market, and therefore, will typically have an effect on purchases. As a consequence, the burden of proof that the cartel did not cause any damages, or otherwise affect the purchases in question, now rests with the defendant.
- **A new statute of limitations:** The new law now provides considerably more time for those harmed by anti-competitive conduct to bring their claims. The usual three years short-stop limitation period—starting from the end of the year in which the plaintiff knew, or should have known, of the facts giving rise to the claim—has been extended to **five years**, and only begins to run after the antitrust violation has ceased. For example, in the event of a dawn raid, the short-stop limitation period will not begin to run until the end of the year after the raid has taken place. While the so-called existing **ten-year** long-stop limitation period, which is calculated regardless of any knowledge or grossly negligent lack of knowledge, remains unchanged, it now will also not commence until the antitrust violation has ceased. But unlike the short-stop limitation period, the long-stop limitation period does not begin at the end of the year, but runs immediately when the violation ceases. These changes to the statute of limitations dramatically benefit plaintiffs.
- **Two recent decisions:** There are two recent decisions of which practitioners should be aware. In June 2018, the German Federal Supreme Court permitted a provision suspending the statute of limitations during the pendency of competition proceedings to be applied retroactively to claims that accrued before the provision was introduced in 2005, thereby reviving damages claims worth billions of Euros which otherwise would have become time-barred—a result that Nadine Herrmann of Quinn Emanuel's Hamburg office helped to obtain. In addition, in late 2018, the Federal Supreme Court issued another opinion called the "rail-track cartel decision," imposing certain complications on standing and damages assumptions for private cartel enforcement.
- **Indirect purchasers**: Unlike in most U.S. states (*see e.g., Illinois Brick v. Illinois),* indirect

purchasers in Germany have standing to bring damages claims for passed-on overcharges. At the same time, the passing-on defense against claims of the direct purchaser is available. With respect to proof of active passing-on of overcharges to indirect purchasers, the indirect purchaser now need only demonstrate that the defendant violated competition law resulting in an overcharge for a direct purchaser from whom the indirect purchaser acquired goods or services impacted by the violation. The indirect purchaser, however, must still prove the quantum of damages resulting from the passing-on.

- **Settlements of German cartel cases**: When settling a German cartel case, it is imperative that a party which drops a viable defense and pays money to settle a claim include adequate safeguards to prevent a later demand that the party pay the full amount as recourse/contribution to other cartel members (e.g., joint and several liability). Under the new law, contribution claims are no longer automatically time-barred, but rather are subject to a complicated mechanism to protect the settling party against double-dipping. The basic idea is that the plaintiff must reduce the action against the remaining jointly and severally liable defendants by the amount of the settling party's liability share. This requires settling parties to establish the liability share of the settling defendant, which can be difficult in practice, as the other defendants will rarely agree on the calculation. For this reason, settlements can be combined with an indemnity agreement to protect the settling defendant. Such indemnities can also protect against damages actions by other market levels if the settlement was concluded with a market level that supposedly did not suffer the damages, but rather passed them down.

Capital Markets

Corporate scandals in Germany, and a wave of privatizations in the public banking sector have led to the filing of an unprecedented number of significant capital markets cases that routinely exceed one billion Euros (USD 1.2bn) in value.

Model case proceedings: Long before a comparable tool became available for consumer actions, Germany implemented so-called "model case proceedings" (discussed below) to ease the judicial case load for information-based market manipulation cases. These model case proceedings are now a viable enforcement mechanism for international investors when combined with sound trial advocacy and international evidence gathering tools.

U.S. discovery to support German litigation: Section 1782 of the United States Code permits discovery in support of foreign proceedings. As many capital markets cases have an international (i.e. U.S.) angle, it is often vital to take advantage of U.S. style pre-trial discovery by submitting a § 1782 application to a U.S. court in support of German model case proceedings. Because defendants often fiercely oppose such applications, experienced German and U.S. counsel must work together to obtain the desired discovery.

Disclosure requirements for multi-step processes: Recently, German defendants in a high profile case asserted that corporate wrongdoing need not be disclosed under E.U. ad-hoc publication rules if the ex-ante risk that such wrongdoing would be uncovered remained slim. This concept, if accepted, would create incentives for the most sophisticated corporate culprits to keep their fraudulent acts secret. The more sophisticated a fraud, the less likely the corporation would have an obligation to disclose it. To see that capital markets remain robust, Quinn Emanuel is at the forefront of the efforts to ensure that this inequitable doctrine is not implemented.

German Class Action – Musterfeststellungsklage

Prompted by Volkswagen's diesel emissions scandal, on November 1, 2018 the German legislature passed a new Model Claim Proceedings Act as a tool to litigate mass torts more efficiently and facilitate collective redress for consumers in Germany, an idea that has been publicly debated for many years. The emissions scandal provided the final traction for this initiative, with the legislature having had to hurry to introduce the new law before claims against Volkswagen became time-barred at the end of 2018. This rush, however, impacted the quality of some of the provisions of the new law.

The scope of the Model Claim Proceedings Act is broad, subjecting any company with a Business to Consumer (B2C) business model to potential liability. Although the legislature expected about 450 Model Claim Proceedings to be initiated per year, in the five months since the new law came into force, only five proceedings have been initiated, three of which relate to the emissions scandal. Nevertheless, companies with a B2C business model will have to be prepared for the number of pending cases to increase dramatically in the coming months and years, as uncertainty about the implementation of this new mechanism diminishes. For example, it is likely to be used increasingly by consumer protection agencies, as it is the only collective

redress scheme available for consumer protection in Germany.

The Model Claim Proceeding Act only provides for declaratory relief and individual consumers do not have standing to sue. Claims must be brought by so-called "*qualified entities*," (i.e. consumer protection agencies that fulfil certain requirements regarding their size, financials, and scope of work). The reason behind these strict rules is the legislature's goal to exclude the possibility of third-party funding. Accordingly, the new law is not a realistic litigation option for the plaintiff side of mass tort cases.

With regard to the affected consumers, the Model Claim Proceeding follows an opt-in model. Affected consumers are not directly involved in the proceedings, but they can register their claims with a public claims register without any costs involved. The Model Claim Proceeding is admissible if at least 50 affected consumers register their claims with the public register. Once registered, consumers can stay the statute of limitations on their claims without having to actively pursue them. In fact, they are barred from pursuing their claims against the company individually outside of the Model Claim Proceeding. Likewise, individual actions filed prior to the initiation of the Model Claim Proceeding will be stayed for the duration of the Model Claim Proceeding.

A judgment in the Model Claim Proceeding binds all consumers whose claims are publicly registered. As the judgments are declaratory in nature, consumers must separately file payment claims on the basis of the final judgments in the Model Claim Proceedings. The German legislature believes that companies will adhere to declaratory judgments and pay consumers what they are entitled to on the basis of their principal liability. In practice, however, the quantum of a claim often is highly contentious. Therefore, with an increasing number of Model Claim Proceedings, Germany is likely to see its courts flooded with thousands of individual payment claims after Model Claim Proceedings have ended.

In sum, the Model Claim Proceeding is a first, but incomplete, step towards mass tort litigation in Germany. However, without providing adequate incentives for large numbers of plaintiffs, it will only help corporate defendants drag out proceedings and, perhaps, escape liability altogether. Practitioners should monitor these developments carefully.

Arbitration – DIS reform of arbitration rules

On March 1, 2018, the new Arbitration Rules of the German Arbitration Institute ("*Deutsche Institution für Schiedsgerichtsbarkeit DIS*") came into force. The DIS is the leading arbitration institution in Germany. In the past years, the DIS has seen a steady increase in the number of arbitration proceedings conducted under its rules. But its existing rules, which date back to 1998, were viewed as old-fashioned compared to the rules of other leading European arbitration institutions like the ICC or the LCIA.

To close this gap, the DIS set up a group of approximately 300 stakeholders to redraft the DIS rules, a difficult and at times controversial process. These efforts resulted in a modern set of arbitration rules that will enable the parties to conduct their arbitral proceedings efficiently. To that end, the new rules introduce short deadlines for the parties and the arbitrators. They also call for financial penalties in case the parties, or the arbitrators, do not adhere to these deadlines. To ensure the success of the new DIS rules, it is imperative that the DIS strictly enforce them.

In addition to efficiency, the new DIS rules also enhance transparency through the introduction of a new and independent body called the Arbitration Council whose role is to decide controversial issues, such as the determination of the amount in dispute, arbitrators' fees, and challenges to arbitrators and their subsequent replacement. The introduction of the Arbitration Council will likely enhance the role of the DIS as the arbitration institution.

White Collar – Competition Register for Public Procurement Wettbewerbsregister

To date, Germany—in contrast to the U.S. and almost all other EU Member States—has not introduced a genuine corporate criminal liability regime, meaning that corporations cannot be held criminally liable. Under the present law, corporations can only be fined up to EUR 10 million for misconduct of managerial staff or deficiencies in compliance, although law enforcement authorities can also order the disgorgement of improper profits–often the primary sanction. Such sanctions had little deterrent effect, because, *inter alia*, law enforcement authorities had wide discretion as to whether they initiate an investigation against a corporation. But times have now changed. In the wake of the many corporate scandals involving German companies, the German government introduced a corporate criminal liability regime to counter corporate misconduct more efficiently and to increase the sanctions for such corporations. While the general public, corporate managers, and legal counsel eagerly await the new regime (rumors say that a draft bill will be made public in April), the German legislature has introduced relevant new legislation.

Under existing procurement law, enterprises involved in certain misconduct must, or may depending on the type of offense, be excluded from Government

procurement processes. In practice though, it is extremely difficult for public contracting authorities to check whether a bidder should be banned because the relevant information is either not stored, or not readily available. To resolve this problem, the German Federal Cartel Office (Bundeskartellamt) is currently setting up a Competition Register (Wettbewerbsregister), which is expected to become operational next year. The Competition Register is a nation-wide electronic database that will contain non-appealable criminal convictions for specific "economic" offenses (including bribery, money laundering, tax evasion, and fraud to the detriment of the government) as well as fines for violations of competition laws and other administrative offenses. Orders issued against natural persons will only be registered if the misconduct is attributable to a business enterprise. Entries will also be deleted from the registry after three or five years, depending on the type of misconduct. Public contracting authorities will be required to check the database if the government contract to be awarded exceeds EUR 30,000 in value and must clear or ban the bidders based on the information in the database.

An entry in the new register is not a sanction in itself, as the database is only meant to ensure that contracting authorities can efficiently apply already existing procurement laws. Nonetheless, corporations doing business with government authorities should analyze this tool in detail as a ban from public procurement processes can severely damage their business models. Because the best protection is to avoid registration in this database, corporations should ensure that they have a state-of-the-art compliance program. A further incentive to invest early in strengthening a compliance program is that corporations can request that their registration be deleted early if they can demonstrate that they have taken sufficient self-cleaning measures. Corporations that have already built a strong compliance program will generally be able to "clean the house" more swiftly than corporations that first have to set up or reinforce their compliance tools.

First Rulings under the General Data Protection Regulation ("GDPR")

Although broadly perceived as a sweeping new regime of European Union data protection laws, the GDPR may, in fact, be viewed as an attempt to harmonize the existing data protection regime that was already in place. Before the GDPR, national laws implemented under the European Data Protection Directive, which included a definition for personal data, a requirement to justify processing, a concept of data avoidance, and high thresholds for international data transfers governed data protection. Nevertheless, the increase in potential fines under the GDPR, together with increased activity among data protection authorities, has heightened awareness among controllers and created the perception that the GDPR is a "new law."

A noteworthy decision involving the GDPR originates in France where the national data protection regulator, CNIL *(Commission nationale de l'informatique et des libertés*), recently imposed a record fine on Google of EUR 50 million for infringement of data protection rules, including alleged lack of transparency, inadequate information, and not meeting consent requirements for personalized ads. This decision is remarkable because it addresses jurisdictional questions relating to the so-called "one-stop-shop" mechanism. Article 56 of the GDPR provides that the supervisory authority at the main establishment of the controller in the EU shall be solely responsible for cross-border processing activities of the controller. Although Google's European headquarters are located in Ireland, CNIL ultimately held that the "main establishment" must have effective decision-making powers with respect to the processing of personal data, a requirement that was not met for Google's Irish establishment. Consequently, the one-stop-shop rule did not apply.

Although the rules alleged to have been breached were in place for more than a decade, this case serves as a practical reminder that the data protection landscape in the Europe Union has changed. Regulatory authorities are moving swiftly to enforce data protection rules (CNIL conducted its entire investigation of Google in less than four months). As a result, companies must take the GDPR seriously, take proactive steps to ensure compliance, and be prepared to act quickly in response to any investigation.

New Partner Elaine Whiteford Joins Competition Litigation Team in London

Elaine Whiteford has joined the London office as a partner in the competition litigation team. She has over 15 years' experience of contentious EU, Competition, and Regulatory work, specializing in follow-on damages litigation, challenges to regulatory decisions, cartel and other regulatory investigations, and commercial litigation involving competition law issues. She has experience in coordinating multi-jurisdictional litigation on behalf of claimants and defendants and in advising on proactive litigation strategies as well as options for avoiding litigation. Her experience includes litigating claims before the High Court, the Competition Appeal Tribunal, the Court of

(continued on page 9)

Class Actions in the UK: Groundbreaking $18 Billion Court of Appeal Decision Opens the Door and Signals Encouragement for Claimants

On 16 April 2018, Quinn Emanuel secured a significant victory when the English Court of Appeal delivered a landmark judgment in the case of *Walter Hugh Merricks v. MasterCard Inc & Ors*, in which Quinn Emanuel acts for Mr Merricks (the UK's former Chief Financial Ombudsman). The case, the largest claim ever brought in England, is also the first mass consumer class action brought before the English Courts. The Court of Appeal overturned the decision of the first instance court, the Competition Appeal Tribunal (CAT), refusing certification, thereby paving the way for the action to proceed. In doing so, it sent a clear message that going forward the interpretation and application of the class action rules should be informed by the clear legislative intention that class actions should facilitate the bringing of claims that could not otherwise be brought on an individual basis. The Court of Appeal thereby resuscitated the UK's class actions regime, which the CAT's original certification ruling had appeared to suffocate.

Background

Opt-out class actions were introduced into England late in 2015, after the previous regime which allowed approved representative bodies to bring cases on an opt-in basis had proved woefully ineffective in facilitating consumer claims. The new class actions regime, which allows proposed class representatives to choose whether to pursue class actions on an opt-in or an opt-out basis, is currently limited to antitrust claims. However once its contours have been shaped by experience and the regime has proved its efficacy, the expectation is that it will be expanded to cover other kinds of claims. As such, the Merricks judgment, which addresses critical elements of the class certification standard, is one which will shape class action litigation in England for generations to come.

The background to Mr. Merricks' claim lay in the European Commission's 2007 decision that the setting of the EEA multilateral interchange fee (which is charged between banks in relation to transactions involving the use of a MasterCard issued in one EEA member state and used in another) was contrary to EU antitrust law. The Commission additionally considered that some part of the interchange fees charged to merchant banks was likely to have been passed on to consumers in the form of increased prices, irrespective of whether those consumers used a payment card or cash to purchase the goods or services in question, although it made no attempt to quantify that.

In September 2016, Mr. Merricks filed a claim with the CAT. He sought to be appointed class representative to pursue a compensation claim on an opt-out basis on behalf of all individuals over the age of 16 who between 1992 and 2008 had purchased goods or services from businesses in the UK which accepted MasterCard. The class was said to encompass 46 million consumers who, he argued, had suffered damages of £16 billion by reason of these unlawful interchange fees. Mr. Merricks sought an aggregate award of damages, in other words an award without assessing the amount of damages recoverable by each individual member of the class. He asserted that an individual assessment of damages suffered by each class member would be impracticable because it would require (i) the determination of the actual purchases of goods and/or services made by each class member and (ii) the assessment of the extent to which each of the businesses from which those purchases were made passed on the interchange fees. He proposed to make annualized distributions to all class members for the years that they were in the class.

MasterCard claimed that the CAT should refuse to certify the proposed collective proceedings because (i) an award of aggregate damages in this case would be inimical to the compensatory nature of damages; and (ii) the proposed distribution mechanism to individual members of the class would also be inimical to the compensatory nature of damages as the amounts received by individuals would bear no reasonable relationship to their actual loss.

In early 2017, a three-day hearing took place to determine whether the CAT should grant a collective proceedings order (CPO) to allow the claim to proceed. The CAT refused to certify the class on essentially two grounds: (i) that whilst Mr. Merricks' experts had presented a methodologically sound basis for assessing damages, including pass-on, they had failed to establish that there was sufficient evidence to actually carry out the pass-on analysis; and (ii) that it was not sufficient to establish the aggregate damages of the class, it was necessary to show that there was a distribution method that would provide for compensation to each class member on a broadly compensatory basis, which Mr. Merricks was neither proposing to do, nor could he. Having refused to certify, the CAT then also determined there was no right of appeal from that decision, holding that Mr. Merricks' remedy was instead the more limited right of judicial review.

Mr. Merricks thereupon applied to the Court

of Appeal for permission to appeal, needing first to establish that such a right of appeal existed. In a decision delivered in November 2018, the Court of Appeal upheld the arguments presented by Quinn Emanuel and ruled that the CAT was wrong and there *was* a right of appeal against a refusal of class certification.

Certification Appeal

The substantive appeal against the refusal of certification was heard over two days in February 2019, with judgment being delivered quickly thereafter, on 16 April 2019. The Court of Appeal once again accepted and adopted entirely the arguments of Quinn Emanuel, ruling that the CAT had committed multiple errors of law and misdirected itself as to the correct legislative test. In a unanimous decision, the judgment of the CAT was set aside, the Court of Appeal finding that the CAT had been wrong to refuse certification on the grounds that it did. The matter has been remitted back to the CAT for re-hearing because there are funding issues that need to be resolved before certification. However, once those issues are resolved, certification now seems inevitable.

The key points coming out of the judgment are:

- the test that the proposed class representative has to satisfy at the certification stage is whether the claim has "a real prospect of success," rather than having to demonstrate that the claims are certain to succeed. In this regard, the test is no different to the test applied by the English courts in any other interlocutory assessment of the prospects of success in litigation made before the completion of disclosure and the filing of evidence.
- in considering how the UK certification regime was to operate, the Court of Appeal, like the CAT, relied on Canadian authorities, which appears appropriate given that the UK regime is modelled on the regime in place in Canada.
- the certification hearing is not to be a mini-trial on the merits. Under English law, the function of the CAT at the certification stage is to be satisfied that the methodology proposed by the class representative is capable of, or offers a realistic prospect of, establishing loss to the class as a whole and that data sufficient to allow the methodology to be operated can be made available at trial. In conducting a mini trial, and cross-examining Mr. Merricks' experts, the CAT had gone too far.
- aggregate damages is a new type of damages introduced by the collective action regime. In that regard, the traditional common law principles needed to be adapted to accommodate this new type of damages.
- so long as damages are compensatory at the aggregate level to the whole class, there is no requirement that damages be compensatory to each individual class member. Whilst the Court of Appeal stated that if it is possible to assess damages down to the individual class members, that should be the preferred approach, it was not mandated by the legislative regime and the failure to establish compensatory damages to the individual class members was not a reason to refuse class certification.
- the issue of how to distribute damages was a matter for the trial judge to be decided at the end of the proceeding, and was not a matter that the CAT should consider at the certification stage. The Court of Appeal also observed that distribution was not a matter for the defendant.
- the statutory regime expressly envisages certification as a continuing process, under which a CPO may be varied or revoked at any time.

Of potentially broad significance was the Court of Appeal's finding that the issue of whether the interchange fee overcharge was passed-on to consumers generally, and in what amounts, was an issue common to all the individual claims. The UK's opt-out class actions regime permits a class to include sub-classes to enable class actions to encompass claims that are not identical in all respects and it appeared likely that a substantial area of dispute in *Merricks* would concern precisely this issue.

Comment

This judgment sends a clear signal that the English courts are open for class actions and are able and willing to innovate to ensure that the Parliament's goals in introducing this new regime are realized. The hurdle for initial certification, which had been set by the CAT at a level that commentators feared would stifle the new regime, has been lowered considerably by the Court of Appeal in a move that will encourage more actions to be brought. In particular, the clarification of the approach to certification is likely to provide particular encouragement to those contemplating bringing claims in smaller and less complex cases.

Undoubtedly, companies that sell consumer products, that find themselves infringing competition law, should consider this decision carefully as it increases the likelihood of consumer claims. Funders too will be encouraged as this approach is likely to

(continued on page 9)

Insurance Litigation Update

Developments in Computer Fraud Coverage.

Over the course of one week in July 2018, the Second and Sixth Circuits issued rulings on the scope of insurance coverage for "spoofing" attacks, in which hackers target companies with fraudulent emails disguised to appear as if they originate from different (usually legitimate) addresses. Such attacks can be a major source of loss for companies and insurers; the FBI has estimated that schemes involving fraudulent electronic communications caused $675 million in adjusted losses in 2017 alone. While the Second and Sixth Circuits both found that spoofing attacks were covered as a form of "computer fraud," the differences in the Courts' analysis provide important insight for both policyholders and insurers.

The Second Circuit case was brought by Medidata, a provider of cloud-based computer services to research scientists. *Medidata Solutions, Inc. v. Federal Insurance Co.,* 729 Fed. App'x 117 (2d Cir. 2018). On September 16, 2014, a Medidata employee in the accounts payable department received an email which appeared to be from Medidata's president and which instructed her that she would shortly be contacted by counsel for a potential acquisition partner to facilitate a wire transfer. *Medidata Solutions, Inc. v. Federal Insurance Co.,* 268 F. Supp. 3d 471, 473 (S.D.N.Y. 2017). The employee then received a phone call, purportedly from the acquiree's counsel, who requested that the employee prepare and process a wire transfer. The employee explained that she could not do so without an explicit written request from Medidata's president and approval from two other executives at the company. Shortly after the phone call, the employee and those two executives received an email, which again appeared to be from Medidata's president, confirming the request. *Id.* The employee then wired approximately $4.7 million to a bank account for which the supposed-acquiree's counsel had provided information. When the fraud was discovered, investigation revealed that an unknown actor in China had deployed code which caused Medidata's email systems (provided by Google) to display the email address of Medidata's president, rather than the hacker's email address, as the source of emails. *Id.* at 476.

Medidata sought coverage from its insurer Federal Insurance Co. under a New York policy which covered losses caused by "Computer Violations," defined as "the fraudulent: (a) entry of Data into . . . a Computer System" or "(b) change to Data elements or program logic of a Computer System." Federal denied the claim on two grounds. *First,* Federal argued that in *Universal America Corp. v. National Union Fire Insurance Co.*, 25 N.Y.3d 675 (2015), the New York Court of Appeals had limited coverage under a similar provision to instances where a insured's computer system was directly accessed. Federal claimed spoofing emails did not qualify, because the emails did not constitute the "fraudulent entry of Data" into Medidata's systems and did not directly "cause any fraudulent change to data elements or program logic of Medidata's computer system." *Id.* at 475. *Second*, Federal argued that there was no "direct nexus" between the emails and Medidata's losses because Medidata employees also received phone calls and took independent steps to authorize the wire transfer. *Id.* at 477-78.

The district court granted Medidata's motion for summary judgment, which was affirmed by the Second Circuit in a Summary Order. 729 Fed. App'x 117 (2018). The Court found that there was "a fraudulent entry of data into the computer system" and "a change to a data element" when the hacker used computer code to mask the spoofed email's true origins. *Id.* at 118. The Court further found that Medidata's loss were directly caused by the computer fraud, because "[t]he chain of events was initiated by the spoofed emails, and unfolded rapidly following their receipt." *Id.* at 119. As such, the Court held that the policy provided coverage for Medidata's losses.

A week after the Second Circuit's opinion was released, the Sixth Circuit issued an opinion in a factually similar case, *American Tooling Center, Inc. v. Travelers Casualty & Surety Co. of America*, 895 F.3d 455 (2018). Plaintiff ATC, a tool and die manufacturer in Michigan, was targeted by hackers who posed as an outsourcing vendor used by ATC. ATC regularly corresponded with its vendors by email, including regarding invoices and payment details. In the spring of 2015, hackers intercepted the emails of one of ATC's vendors and, posing as employees of the vendor, informed ATC's Vice President and Treasurer that the vendor's bank account details had changed. *Id.* at 458. ATC wired three payments, totaling approximately $834,000, to the fraudulent account before the scheme was discovered when the vendor demanded payment on the overdue invoices. *Id.* at 457-58.

ATC made a claim under the "Computer Fraud" provision of an insurance policy from Travelers Insurance Co. *Id.* at 459. Travelers denied coverage, arguing that, *inter alia*, its policy's definition of "Computer Fraud" "require[d] a computer to 'fraudulently cause the transfer.'" *Id.* Here, ATC employees had knowingly transferred funds, albeit directed by the fraudulent email. *Id.* at 461. The district court granted summary judgment in favor of Travelers.

The Sixth Circuit reversed, holding that "Travelers' attempt to limit the definition of 'Computer Fraud' to hacking and similar behaviors in which a nefarious party somehow gains access to and/or controls the insured's computer is not well-founded." *Id.* at 462. Applying the same logic as the Second Circuit, the Sixth Circuit found that the actions of the ATC employees in transferring funds were "all induced by the fraudulent email," and therefore were directly caused by computer fraud within the meaning of the policy.

However, in construing Travelers' policy the Sixth Circuit noted that "[i]f Travelers had wished to limit the definition of computer fraud to such criminal behavior it could have done so." *Id.* As an example of a policy that was appropriately limited, the Sixth Circuit cited to the policy interpreted in *Universal*, the New York Court of Appeals decision. However, the Court did not address the Second Circuit's analysis, which had just concluded that "*Universal* in fact support[ed] Medidata's claim" for coverage of its spoofing attack, because the attack "entail[ed] a 'violation of the integrity of the computer system through deceitful and dishonest access.'" 729 Fed. App'x at 119 (quoting 25 N.Y.3d at 681). Therefore, while the Second and Sixth Circuits reached similar conclusions as to coverage under their respective policies, they appear to disagree about the appropriate application of *Universal* to spoofing attacks.

The differing approaches of the Second and Sixth Circuits to the holding in *Universal* demonstrate that, although the Circuits have reached similar conclusions, differences remain in their analysis of computer fraud provisions in insurance policies. Both insurers seeking to clarify the scope of coverage in future policies, and insureds who wish to understand their policies, should remain mindful of those differences when approaching coverage issues.

NOTED WITH INTEREST (cont.)

reduce the costs – and possibly risks - of certification. More broadly, the traditional defence tactic of arguing that direct purchases did not suffer loss because they passed it on (an argument that MasterCard ran in defence of merchant claims) is now dangerous, as it essentially invites indirect consumer class claims.

But it is important to recognize that this is a single judgment, albeit an important one. The Court of Appeal (unlike the more sanguine CAT) clearly found it unacceptable that if certification was refused, the consumers in Mr. Merricks' proposed class would be wholly without redress (for limitation reasons) and in the months and years to come, this may form a basis for distinguishing the Merricks approach from the approach that is to be adopted in non-consumer claims and/or where no such limitation issues arise. Another element of the Court of Appeal's approach that already appears ripe for refinement concerns its approach to the definition of common issues. Sub-classes are expressly envisaged in the UK's regime and their role is completely unclear in the approach taken by the Court of Appeal. This is something that the courts will need to define as the regime continues to mature. Certification issues, including sub-classes, will be before the CAT again in June 2019, when it will be considering whether to certify either, both or neither of the two class actions that have been brought following on from the European Commission's trucks decision.

Quinn Emanuel's competition litigation practice in London is at the forefront of this new developing and important area of competition litigation. We were the architects of Mr. Merricks' landmark victory in the Court of Appeal. We are also defending the next major class actions currently before the CAT in relation to the truck cartel. No firm has more experience in these cases and sees the issues and strategies from both sides. The competition team in London would be happy to discuss the *Merricks* judgment or any wider issues about the new collective action regime.

(New Partner Elaine Whiteford Joins Competition Litigation Team in London continued from cover)

Appeal, the General Court of the European Union, and the European Court of Justice, including one of the few abuse of dominance claims to go to trial in England (Arriva the Shires v LLAOL). She has represented a number of clients facing investigation by the European Commission, the FCA, the CMA, Ofwat, and Ofcom. Prior to commencing professional practice, Elaine was a law lecturer teaching EU law and UK Constitutional law at universities in the UK and the Netherlands.

VICTORIES

Qualcomm Settlement on the Heels of Quinn Emanuel Trial Wins

Quinn Emanuel client Qualcomm recently reached a global settlement with Apple following opening statements in an antitrust and breach of contract case in which Quinn Emanuel represented Qualcomm, with tens of billions of dollars at stake. This settlement follows years of litigation between Qualcomm and Apple in dozens of cases across the world, and comes shortly following Quinn Emanuel victories in patent suits in district court, the International Trade Commission, and abroad. Although the terms of the settlement are confidential, the stock market spoke loudly about how it viewed the settlement, with Qualcomm stock up approximately 25% on the day of settlement, and about 50% total since the settlement, adding over $30 billion to Qualcomm's market capitalization.

By way of background, Apple's phones are manufactured by one of several contract manufacturers. Qualcomm did not have a patent license with Apple, but instead had patent licenses with Apple's contract manufacturers. Apple initially sued Qualcomm in January of 2017, alleging various contract and antitrust claims, including antitrust claims relating to Qualcomm's patent licensing business, and in particular licensing of standards-essential patents. Fundamentally, Apple alleged that Qualcomm's royalty rate for its patents was too high. Qualcomm then sued Apple's contract manufacturers in May of 2017 for withholding patent royalties due to Qualcomm at Apple's direction, and those two cases were consolidated. Separately, Qualcomm brought numerous suits against Apple for infringement of Qualcomm non-standards-essential patents in United States district court, the United States International Trade Commission, and in Germany. Quinn Emanuel also represented Qualcomm in an antitrust suit in the United Kingdom, and advised Qualcomm on antitrust matters out of its Brussels office.

In the past five months, Quinn Emanuel teams obtained a number of patent victories against Apple across the globe. In December of 2018, Qualcomm obtained an injunction against sales of the accused Apple iPhones in Germany after a finding of infringement. In March of 2019, Quinn Emanuel tried a patent infringement case asserting three patents against Apple to a Southern District of California jury. On March 15, 2019, the jury found that Apple infringed all three patents asserted against Apple, and awarded $1.41 per infringing iPhone. The jury rejected Apple's only invalidity defense as well, rejecting Apple's claims to have been an inventor on one of the patents. Then, on March 26, 2019 and following a September, 2018 trial, the International Trade Commission issued an initial determination that Apple infringed a Qualcomm patent, that the patent was not invalid, and recommending issuance of an order excluding Apple from importing the accused iPhones into the United States.

Following the series of Quinn Emanuel victories, trial in the consolidated contract and antitrust case against Apple and its contract manufacturers was set to begin April 16, 2019. By the time of trial, Apple's contract manufacturers owed Qualcomm over $8 billion in unpaid royalties. On the other side, Apple and the contract manufacturers argued that they had overpaid past royalties by $7-9 billion. Quinn Emanuel was one of two firms representing Qualcomm at trial. In its opening statement, Qualcomm explained that Apple had planned out this entire dispute years in advance, "creating evidence," attempting to "hurt Qualcomm financially," and exerting "commercial pressure" against Qualcomm, all merely to attempt to reduce its royalties paid to Qualcomm. The parties announced the settlement immediately after openings.

Alvogen Pine Brook LLC v. Celgene Corp

The firm recently secured Decisions Not to Institute Review against five petitions for *Inter Partes* Review ("IPR") challenging patents covering methods of using Celgene's blockbuster drug Revlimid®.

Revlimid® is approved to treat certain patients having three different cancerous conditions – mantle cell lymphoma ("MCL"), myelodysplastic syndromes ("MDS"), and multiple myeloma ("MM"). Three generic pharmaceutical companies seeking to make generic copies of Revlimid® joined forces to attack patents protecting each of these indications.

Quinn Emanuel quickly identified the weaknesses in each petition and worked to exploit them in Celgene's Patent Owner Preliminary Responses. Since the challenged patents were also involved in co-pending litigations, Quinn Emanuel had to balance positions across both forums. To achieve successful results, the firm convinced the Patent Trial and Appeal Board ("PTAB") to focus on discrete issues that were fatal to each petition. The PTAB agreed, liberally quoting from our briefs in its decisions not to institute.

Celgene's MCL patent faced a dual attack: obviousness and anticipation. For obviousness, we argued that the generic challenger's argument was strikingly similar to the challenge the patent faced during prosecution. While the generic challenger used different references than those considered during prosecution, the firm argued that those references did

not present any new information. The PTAB agreed, and invoked its discretion under 35 U.S.C. § 325(d) to deny institution. For anticipation, the firm argued that the petitioner had failed to prove that an asserted reference qualified as prior art. The PTAB agreed with our all-out attack, holding that the petitioner had presented no evidence of when, where, or to whom the asserted reference was available, or how it was allegedly accessible. The same strategy was successful for the petitions filed against the MDS patents.

For the MM petition, Quinn Emanuel crafted a Preliminary Response that invited the PTAB to focus on 9 single claim element, which we argued was missing from the prior art. This strategy—focusing on a single claim element—was not without risk, but it was a complete success. The PTAB held that none of the asserted references disclosed the claim element, and that the generic challenger could not use conclusory expert opinion and hindsight to fill the gap in the prior art. The PTAB also relied heavily on affirmative evidence that Quinn Emanuel presented, which showed that an ordinarily skilled artisan would not have arrived at the claim element, let alone the claimed inventions as a whole.

The firm's subject-matter expertise and our deep familiarity with the PTAB's approach to challenges in this space allowed us to stop each attack against Celgene's Revlimid® patents at the institution phase, with the PTAB finding that none of the five petitions warranted a full trial.

The Firm Pioneers a Path to Reorganization for Puerto Rico, and Attains Large Recoveries for Clients

The firm represented an ad hoc coalition of holders of senior bonds issued by the Puerto Rico Sales Tax Financing Corporation ("COFINA") in connection with the historic restructuring proceedings concerning the debts of Puerto Rico and its municipalities and instrumentalities. The coalition held over $5 billion in bonds issued by the Puerto Rico Sales Tax Financing Corporation ("COFINA") and secured by a dedicated stream of Puerto Rico's sales taxes. Beginning in 2015, when it became clear that Puerto Rico would not be able to pay its debts, the firm was hired to protect the interests of COFINA senior bondholders through negotiations and litigations against the Puerto Rico government and other holders of various municipal bonds. As the disputes heated up in 2016, the firm drafted and submitted to Congress what would become the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), a statute that would afford Puerto Rico and its instrumentalities the ability to initiate bankruptcy-like proceedings in District Court. The firm appeared before Congress and helped successfully push the legislation through to enactment in the summer of 2016. Then in 2017, Puerto Rico and COFINA filed for protection under PROMESA, and the firm's representation shifted to litigating numerous disputes concerning the validity and constitutionality of the COFINA structure, the existence of defaults under the COFINA bond resolution, and respective rights of COFINA's senior and subordinate bondholders. While the firm litigated these issues, we also engaged in protracted mediation over all of the COFINA-related issues. Ultimately, the firm engineered a court-approved settlement and plan of adjustment for COFINA that gave our clients over 93% recovery plus expenses while simultaneously shedding $6 billion in debt for the benefit of Puerto Rico's future generations. The settlement and plan of adjustment went effective on February 12, 2019, marking the first successful plan of adjustment for a reorganized entity under PROMESA. Q

Chinese Patent Litigation: Mock Trial

On Thursday, May 23 from 10:00 a.m. to 2:30 p.m. PST at the Four Seasons Hotel San Francisco, the firm will be sponsoring a live demonstration of a Chinese patent trial conducted by attorneys from China's Zhong Lun law firm with former Judge Yi Zhang from China presiding. With simultaneous translation, this mock trial will showcase a Chinese patent case in which a foreign company was able to enforce its patents in China. Then, a panel of Quinn Emanuel and Zhong Lun attorneys will lead a discussion on the enforcement of Chinese intellectual property rights and share their experiences in this important developing area. This is a rare opportunity because in China foreign lawyers are generally not permitted even to observe patent trials. Persons interested in attending should contact Selene Dogan at selenedogan@quinnemanuel.com. Q

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- We are a business litigation firm of more than 800 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of April 2019, we have tried over 2,300 cases, winning 88% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $70 billion in judgments and settlements.
- We have won five 9-figure jury verdicts.
- We have also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

Prior results do not guarantee a similar outcome.

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