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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,600 professionals in 31 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, oil and energy, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 31 个办公室的 1600 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、石油及能源、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

Patterns of Trade Secret Issues

By Charles A. Weiss

This article is the first in a series addressing different issues that arise from the law of trade secrets. It will start by introducing in broad terms the legal concepts, and then present typical patterns in which trade secret claims arise. Future articles in this series will discuss in greater detail specific fact patterns, cases and practice pointers.

INTRODUCTION TO TRADE SECRET LAW

In general, a trade secret is information held by an owner that 1) derives independent economic value from not being generally known to others who can obtain economic value from its disclosure or use, and 2) is the subject of reasonably efforts by the owner to maintain it in secrecy. Misappropriation of a trade secret can take different forms, but can be generalized as occurring when a person acquires another's trade secret through means that it knows, or should have known, are improper.

One important difference between liability for misappropriation of trade secrets and liability for patent infringement is the concept of "improper means." A company can be liable for infringing a patent without even knowing that the patent exists, which is why patent infringement is referred to as a "strict liability" tort. By contrast, liability for misappropriation of trade secrets almost always requires an element of culpable knowledge or intent.

Historically, protection of trade secrets was a matter of state law, with the result that rules and practices varied from state-to-state, sometimes resulting in disputes over which state's law applied to a particular case. In 2016, the U.S. Congress passed legislation, called the "Defend Trade Secrets Act," which created a uniform federal standard applicable throughout the United States. This legislation did not, however, displace existing state law, which means that many claims for misappropriation of trade secrets can be 1) brought under federal law, state law or both concurrently, and 2) adjudicated in state court or federal court.

In addition to civil actions for misappropriation of trade secrets — which are usually the type faced by industry, and which will be the focus of this series of articles — both federal and state laws provide for criminal penalties including fines and imprisonment for more egregious types of misappropriation. Accordingly, a company victimized by theft of its trade secrets is not limited to seeking money damages and injunctive relief against the wrongdoer in civil court, but has the option of seeking intervention from federal or state law enforcement agencies. The greater power of law enforcement agencies to conduct investigations can enable the identification and apprehension of wrongdoers who would be largely beyond the reach of ordinary civil litigation, but a victimized company that decides to involve law enforcement may sometimes regret its decision because the criminal investigation and prosecution may actually impede the company's pursuit of civil remedies that would otherwise be available to protect its economic interests. For these reasons, decisions to involve law enforcement are best made with the assistance of experienced counsel.

Here are common patterns of trade secret issues that large companies may face from time to time.

OUTRIGHT THEFT

In some ways, the simplest pattern seen in trade secret cases is one of out-and-out theft. We describe this as the "simplest" pattern because there is no gray area, no question of fine judgment and no arguable justification. This type of misappropriation is also the most likely to result in criminal prosecution, especially when the trade secrets are taken from a U.S. company to benefit a non-U.S. company.

A recent example in the pharmaceutical industry involved a company in Taiwan that arranged for several employees of a California biotechnology company to download and transfer hundreds of files containing confidential and trade secret information concerning the manufacturing of several biopharmaceuticals. The goal was to make biosimilar versions of these products, and recognized that it could save itself the time, money and effort needed to develop them from scratch by using the trade secrets as its starting point. As described in a press release from the U.S. Attorney's Office reporting several guilty pleas, the stolen documents and information allowed the Taiwanese company "to cheat, cut corners, solve problems, provide examples, avoid further experimentation, eliminate costs, lend scientific assurance, and otherwise help [it] start-up, develop, and operate its business secretly using the intellectual property and scientific know-how taken from" the California company.

The brazen nature of this theft of trade secrets serves as a stark example of the need for companies to adequately secure their trade secrets against large-scale, outright theft by dishonest employees. To be sure, it is uncomfortable to have to consider the possibility of such actions being taken by one's own employees, but the technological measures taken to help keep honest people honest also enable the company to demonstrate in the event of more common instances of misappropriation that it has satisfied the legal standard of taking reasonable steps to maintain secrecy.

THE NEW HIRE WHO TRIES TO BE HELPFUL

The above-described case involved a company that actively sought and facilitated the theft of trade secrets. But instances of less dramatic theft can expose a company to claims for misappropriation of trade secrets without it having done anything wrong.

For example, a not-uncommon fact pattern is the new hire who decides on his own to bring files from his prior employer, thinking that they will be appreciated by the new employer, or that they may be useful in his new position. Upon arrival, the new hire may discuss and show them to his colleagues or supervisors — thinking that he has done the new employer a favor by bringing helpful information — or may use them surreptitiously to improve his performance while knowing that his actions in taking them were wrongful.

If the company learns that the new hire has brought a competitor's trade secrets, it should act promptly to avoid or limit its exposure. There is no "one size fits all" response to this situation, so it is advisable to involve counsel without delay to help determine the best way to proceed.

This type of risk can be limited by a proper onboarding process. For example, new hires should be given oral and written instructions to refrain from bringing or using any files from prior employment, and acknowledge in writing that they have not and will not use any prior employer's confidential or proprietary information. In certain circumstances, it may be advisable to have some new hires begin work in a position that avoids a direct overlap with products, processes or customers from their prior employment.

UNSOLICITED OFFERS TO PROVIDE A COMPETITOR'S TRADE SECRETS

In 2006, soft drink company PepsiCo received a letter offering to sell it trade secrets of its archrival the Coca-Cola Company. The letter was sent to PepsiCo using an official Coca-Cola envelope last May. PepsiCo reported the letter to Coca-Cola, which brought in law enforcement.

During a sting operation, the letter writer gave to an undercover FBI agent 14 pages of Coca-Cola documents marked "Classified -- Confidential" and "Classified -- Highly Restricted," and requested $10,000. He stated in a subsequent letter that "I can even provide actual products and packaging of certain products, that no eye has seen, outside of maybe five top execs," the letter states. "I need to know today, if I have a serious partner or not. If the good faith money is in my account by Monday, that will be an indication of your seriousness."

In this case, the documents were real, having been stolen by dishonest Coca-Cola employees (who eventually pled guilty and were sentenced to several years in prison). Perhaps more common is the situation in which a scam artist with no access to a company's trade secrets nevertheless offers to sell such trade secrets to an competitor. Except in the most obvious case, a company that receives an offer to buy a competitor's trade secrets may be unable to determine if the offer is genuine or fraudulent. But regardless of the apparent "legitimacy" of such an offer, the recipient would be well advised to report illicit offers to the victim of the purported theft or to appropriate law enforcement. Counsel can provide guidance as to the best way to proceed.

EFFORTS TO OBTAIN TRADE SECRETS BY PHISHING

In 2005, the principal of a small pharmaceutical company attempting to duplicate another company's product created a Yahoo email using the name of a senior employee of the originator company, and emailed an urgent request for manufacturing information to the company's contract manufacturer. The recipient company contacted its customer to follow-up on the request, and was informed that it had not made any such request. The matter was referred to law enforcement, and the miscreant pled guilty to wire fraud. As a result of the conviction, he was also debarred from the industry by the U.S. Food and Drug Administration (FDA).

This attempt to obtain a competitor's trade secrets was made before most people had heard the term "phishing," and modern techniques are more sophisticated. It still, however, serves as a good example of a phishing attack and the way to avoid compromise of trade secrets: the recipient of the phishing email was suspicious and checked directly with a known contact at the company to inquire.

As with other attempts to compromise trade secrets, it is advisable for the recipient of a phishing scheme to report it to the victim or law enforcement.

TRADE SECRET CLAIMS IN THE CONTEXT OF EMPLOYEE MOBILITY

Moving away from brazen criminal conduct, we reach the fact patterns of the most common type of litigated trade secret claims. These cases arise from employees that change employers, or who leave a company to start their own business. The validity of the resulting claims can range from well-founded and ultimately substantiated to largely frivolous, and with every degree of nuance in between. A common middle ground pattern is the company that has good reason to believe that a side-switching employee has valuable trade secrets, but no evidence that he has shared them with a competitor that has hired him.

THE SUSPECTED BUT UNSUBSTANTIATED TRADE SECRET CASE

Consider the situation in which a valued research and development scientist who had worked on formulating an important product gives notice that she is leaving the company to accept employment at its closest competitor. There is no doubt that she is privy to valuable trade secrets, and would be in a position at the competitor to use them for its benefit. She is also regarded as an ethical, responsible and thoroughly professional scientist. At her exit interview, she confirms that she is aware of her obligation to protect the company's trade secrets, and assures the company that she would never breach this obligation. The IT department analyzes her computer usage, and it is entirely normal, i.e., no unusual opening, inspecting, downloading or emailing documents in the past few weeks and months.

Generally speaking, no claim for misappropriation of trade secrets arises from such facts. Employees are entitled to change jobs, and competitors are generally free to hire them. To be sure, it is the obligation of both the employee and her new employer to refrain from using a former employer's trade secrets, but it can be difficult, if not impossible, to determine from the outside if this obligation is being honored.

Some courts recognize the "inevitable disclosure" doctrine, which permits a trade secret suit to proceed upon an adequate showing that the employee's new job at a competitor will inevitably result in the improper disclosure and use of trade secrets. The showing required to rely on this doctrine varies even among the courts that recognize it, and it is constrained in part by public policy in favor of people's freedom to pursue new employment opportunities. In any event, this scenario poses a challenge both for the former employer, which is concerned about protecting its trade secrets, and the new employer, which seeks to avoid being sued. We will explore approaches to this issue in subsequent articles in this series.

ASSERTION OF UNWARRANTED TRADE SECRET CLAIMS TO INTERFERE WITH LEGITIMATE COMPETITION

In the scenario presented above, the former employer has a legitimate concern about the protection of genuine trade secrets. However, this is not always the case.

Some companies file and pursue trade secret claims against former employees and their new employers as a way to discourage employees from leaving for new employment at a potential competitor (or to start their own business), develop a reputation as highly litigious in order to dissuade competitors from hiring away their employees and interfere with legitimate competition.

Similarly, companies may use trade secret lawsuits as a substitute for unenforceable or nonexistent non-compete agreements. For example, some jurisdictions (notably, California) either prohibit employee non-competes entirely or greatly restrict their enforceability. In such cases, or when a company wishes that it had obtained a non-compete from a valued employee but had neglected to do so, some companies will attempt to use trade secret claims as a substitute for the nonexistent or unenforceable non-compete agreement.

Again, we will explore responses to such tactics in subsequent articles in this series.

LEGITIMATE TRADE SECRET CLAIMS

Lest the reader conclude that all claims for misappropriation of trade secrets are lacking in merit or brought for improper purposes, we close with the scenario of misappropriation in the context of employee mobility that is substantiated but well short of the brazen, criminal-level theft discussed above.

Consider the scenario in which a company knows from its experience in the marketplace that it has a unique product: its customers are "sticky" (they stay with the company or occasionally try out a competitor but end up returning in short order), the players in the industry know and recognize the company's unique offering and price increases bring grumbling from customers but little or no loss of business. An employee who knows the company's trade secrets leaves to join the closest competitor — which has tried and failed to launch a successful competing product — and within a few months the competitor launches a close match for the company's unique offering. To the extent possible, the company acquires and analyzes samples of its competitor's product and identifies markers indicating that they were made with the trade secrets. Facts such as these provide a strong inference that the competitor has misappropriated the company's trade secrets — brought to it by the side-switching employee — and merit a strong response if warranted by the company's business case.

In subsequent articles, we will explore both the assertion and defense of trade secret claims like this case.

商业秘密问题的态样

原文作者：**Charles A. Weiss**

本文是一系列论述商业秘密法中产生的不同问题的文章的第一篇。它将从广义上介绍法律概念开始，然后介绍商业秘密索赔产生的典型态样。本系列的后续文章将更详细地讨论特定的事实态样、案例和实践要点。

商业秘密法概论

一般而言，商业秘密是由所有者持有的信息，且该信息 1）因一般不为可因其揭露或使用而获取经济利益的其他人所知而产生独立的经济价值，且 2）是所有者合理努力保密的标的。盗用商业秘密可以采取不同的形式，但可以概括为发生于当一个人通过其所知或应可得知的不正当手段获取另一个人的商业秘密时。

盗用商业秘密的责任和专利侵权责任之间的一个重要区别是“不正当手段”的概念。一家公司可能在不知道专利存在的情况下对侵犯专利而承担责任，这就是为什么专利侵权被称为“严格责任”的侵权。相比之下，盗用商业秘密的责任几乎总是需要一个应受指责的知情或意图。

从历史上看，保护商业秘密是一个州法问题，而各州的规则和做法各不相同，有时会导致关于那一州法律对特定案件适用的争议。2016 年，美国国会通过了一项名为“保护商业秘密法”的立法，该法案制定了一项适用于整个美国的统一联邦标准。然而，这项立法并没有取代现有的州法律，这意味着许多关于盗用商业秘密的主张可以 1）根据联邦法律、州法律或两者同时提出，且 2）由州法院或联邦法院来裁决。

除了商业秘密盗用的民事诉讼——这通常是行业面临的态样，也是本系列文章的重点——联邦和州法律都规定了刑事处罚，包括对更严重的盗用型态的罚金和监禁。因此，因商业秘密被盗而受害的公司除了在民事法庭上寻求金钱赔偿和对不法行为人的禁令救济外，还可以选择寻求联邦或州执法机构的干预。执法机构开展调查的更大权力可以确认和逮捕不法分子，而这些不法分子在很大程度上超出了普通民事诉讼处理的范围，但决定寻求执法机构参与协助的受害公司有时可能会后悔它的决定，因为刑事调查和起诉实际上可能会阻碍该公司寻求民事救济措施，而这些救济措施本来可以用来保护其经济利益。出于这些原因，涉及寻求执法机构协助的决定最好在有经验的律师的协助下作出。

以下是大型公司可能不时面临的商业秘密问题的常见态样。

赤裸裸的盗窃

在某些方面，商业秘密案件中最简单的态样就是彻头彻尾的盗窃。我们将此描述为“最简单”的态样，因为没有灰色地带，没有需要作精细判断的问题，也没有可辩正的理由。这种类型的盗用行为也最有可能导致刑事起诉，尤其是当商业秘密是从美国公司窃取以使非美国公司受益时。

最近制药行业的一个例子涉及一家台湾公司，该公司安排加州一家生物技术公司的几名员工下载和传输数百份文件，其中包含有关几种生物制药生产的机密和商业机密信息。其目的是制造这些产品的生物仿制品，并认识到它可以通过使用商业秘密作为起点，节省从头开始开发这些产品所需的时间、金钱和精力。正如美国联邦检察官办公室发布的一份新闻稿中所述，报告了几个认罪请求，被盗的文件和信息让这家台湾公司“得以欺骗、偷工减料、解决问题、提供样品、避免进一步的实验、消除成本、提供科学保证，并以其他方式帮助[它]利用从加州公司那里获得的知识产权和科学诀窍秘密启动、发展和运营其业务”。

这种明目张胆的商业秘密盗窃行为是一个显示公司需要充分保护其商业秘密以防不诚实的员工大规模、赤裸裸地盗窃的一个鲜明例子。可以理解必须考虑员工可能从事这类行为可能让人感到不适，但是，为使诚实的人保持诚实而采取的技术措施也使该公司能够在发生更常见的盗用案件时证明它已经达到了采取合理措施保密的法律标准。

试图提供帮助的新员工

上述案件涉及一家积极寻求和促使窃取商业秘密的公司。但不太引人注目的盗窃事件可能会让一家公司在没有做错任何事情的情况下被指控盗用商业秘密。

例如，一种常见的事实态样是，新员工决定自己携带前雇主的文件，认为新雇主会欣赏这些文件，或者认为这些文件在新职位上可能有用。到达后，新员工可能会讨论这些信息，并将其展示给同事或主管——认为他通过提供有用的信息帮了新雇主的忙——或者在知道自己采取这些信息的行为是错误的情况下，偷偷地使用这些信息来提高自己的绩效。

如果公司得知新员工带来了竞争对手的商业秘密，应立即采取行动避免或限制其责任的暴露。对这种情况没有“一刀切”的回应方法，因此建议立即让律师参与进来，帮助确定最佳的处理方式。

这类风险可以通过适当的入职流程加以限制。例如，应向新员工发出口头和书面指示，禁止携带或使用以前雇佣的任何文件，并书面承认他们没有也不会使用以前雇主的任何机密或专有信息。在某些情况下，建议让一些新员工开始工作时，避免与先前雇佣的产品、流程或客户直接重叠。

主动提供竞争对手的商业秘密

2006 年，软饮料公司百事可乐（PepsiCo）收到一封信，提议向其出售其主要竞争对手可口可乐公司的商业秘密。这封信是去年 5 月用可口可乐的正式信封寄给百事可乐的。百事可乐公司向可口可乐公司告知了这封信，而可口可乐公司请执法机构进来协助。

在一次诱捕行动中，写信人向一名卧底 FBI 探员提供了 14 页标有“机密——机密信息”和“机密——高度限制”的可口可乐文件，并索要 1 万美元。他在随后的一封信件中表示，“我甚至可以提供某些产品的实际产品和包装，除了可能的五位高管之外，没有人见过这些产品。”。“我今天需要知道，我是否有一个认真的合作伙伴。如果到星期一我的账户上有诚信的钱，那将表明你的认真。”

在本案中，这些文件是真实的，被不诚实的可口可乐员工偷走（他们最终认罪并被判处数年监禁）。也许更常见的情况是，一个无法接触到公司商业秘密的骗子却主动向竞争对手出售此类商业秘密。除最明显的情况外，收到购买竞争对手商业秘密的要约的公司可能无法确定该要约是真实的还是欺诈的。但是，无论这种要约表面上看来是否“正当”，接收者都应该向所谓盗窃的受害者或适当的执法部门报告非法要约。律师可以就最佳的处理方式提供指导。

尝试通过网络钓鱼获取商业秘密

2005 年，一家小型制药公司的负责人试图复制另一家公司的产品，他用发信人公司的一名高级员工的名字创建了一封雅虎电子邮件，并通过电子邮件向该公司的承包制造商发送了一封紧急要求生产信息的请求。接收方公司联系其客户跟进该请求，并被告知其未提出任何此类请求。这件事被提交给了执法部门，这个不法之徒承认犯有电汇诈骗罪。由于定罪，他还被美国食品和药物管理局（FDA）禁止从事该行业。

这种试图获取竞争对手商业秘密的行为是在大多数人还没有听说“网络钓鱼”这个词之前就已经发生的，现代技术更加复杂。然而，它仍然是描述网络钓鱼攻击及避免泄露商业秘密的做法的一个好的例子：即网络钓鱼电子邮件的收件人感到可疑时，直接与公司的一位已知联系人联系询问。

与其他危害商业秘密的企图一样，建议网络钓鱼诈骗计划的接收者告知受害者或执法部门。

员工流动情况下的商业秘密主张

谈了一些明目张胆的犯罪行为后，我们现来谈论最常见的商业秘密诉讼索赔类型的事实态样。这些案例发生于员工更换雇主，或离开公司开始自己的业务的情况。由此产生的主张的有效性可以从有充分根据并最终得到证实到基本上是琐碎的，其间有各种程度的细微差别。一种常见的中间态样是，公司有充分的理由相信一名跳槽员工拥有宝贵的商业秘密，但没有证据表明他与雇佣他的竞争对手分享了这些秘密。

涉嫌但没能证实的商业秘密案

在一个情形中参与制定一个重要产品一位有价值的研究和开发科学家通知她将离开公司去接受公司最近的竞争对手的雇佣。毫无疑问，她知道有价值的商业秘密，并可能在竞争对手中为其利益使用这些商业秘密。她也被视为是一位有道德、负责任和完全专业的科学家。在离职面谈中，她确认自己意识到自己有义务保护公司的商业秘密，并向公司保证她永远不会违反这一义务。IT 部门分析了她的电脑使用情况，这是完全正常的，也就是说，在过去的几周和几个月里，没有异常的打开、检查、下载或通过电子邮件发送文档。

一般来说，此类事实不会导致商业秘密被盗用。员工有权换工作，竞争对手通常可以自由雇用他们。平心而论，雇员及其新雇主都有义务避免使用前雇主的商业秘密，但如果不是不可能的话，也很难从外部确定这一义务是否得到履行。

一些法院承认“不可避免的披露”原则，该原则允许在充分证明员工在竞争对手的新工作将不可避免地导致不当披露和使用商业秘密的情况下提起商业秘密诉讼。即使在承认这一原则的法院中，要求依据这一原则的表现也各不相同，而且这一原则在一定程度上受到有利于人们自由追求新就业机会的公共政策的限制。无论如何，这种情况对前雇主和新雇主都构成了挑战，前者担心保护其商业秘密，后者则试图避免被起诉。我们将在本系列后续文章中探讨解决此问题的方法。

提出无正当理由的商业秘密主张来干扰合法竞争

在上述情况下，前雇主对保护真正的商业秘密有合理的担忧。然而，情况并非总是如此。

一些公司对前雇员及其新雇主提起商业秘密诉讼，以此阻止雇员前往潜在竞争对手就职（或自己创业），及树立高度好讼的名声，以使令竞争对手不愿聘用其员工并干扰合法竞争。

类似地，公司可以使用商业秘密诉讼代替不可执行或不存在的竞业禁止协议。例如，一些司法管辖区（尤其是加州）要么完全禁止员工竞业禁止，要么极大地限制其可执行性。在这种情况下，或者当公司希望从有价值的员工处获得竞业禁止但却忽略了这样做时，一些公司将试图使用商业秘密索赔来替代不存在或不可执行的竞业禁止协议。

在本系列后续文章中，我们将再次探讨对此类策略的反应。

正当的商业秘密主张

为了避免读者认为所有关于盗用商业秘密的诉讼主张都是没有正当理由的，或者是出于不正当的目的提出的，我们在员工流动的情况下的商业秘密主张的议题最后来谈不属上述明目张胆的犯罪盗窃但经确认的盗用情形。

考虑一个公司从市场经验中知道它有一个独特的产品：它的客户是“紧跟的客户”（他们紧密跟随公司或偶尔尝试竞争对手但最终还是仓促回归）；该行业的参与者知道并认识到该公司独特的产品和价格上涨带来了客户的抱怨，但几乎没有或根本没有业务损失。知道公司商业秘密的员工离开公司，加入最接近的竞争对手——该竞争对手曾尝试推出一款成功的竞争产品，但未能成功推出。几个月后，该竞争对手推出了一款与该公司独特产品势均力敌的产品。在可能的范围内，该公司获取并分析其竞争对手的货样并发现其显示产品的生产使用了其商业秘密的标记。这类事实提供了一个强有力的推论，即竞争对手盗用了公司的商业秘密——这是由跳槽员工带来的——如果公司在商业上有其必要，则应予以强力回击。

在随后的文章中，我们将探讨像本案这样的商业秘密主张的主张和辩护。

Fiduciary Responsibilities When Auctioning Property

By Stacie L. Chau

An increasingly popular option for fiduciaries to dispose of properties that are particularly difficult to maintain or sell is via an auction. Although auctions can yield successful outcomes, they can also be a pitfall for fiduciaries and a basis for claims of breach if the auction isn't handled properly, leading to less than desirable results.

WHY AUCTION?

The National Association of Realtors recommends adhering to the "two-thirds" rule: out of market, seller and property, if two of the three are suited for auction, then auctioning the property will likely achieve good results.[1] A good market for auction is typically: (1) either constantly changing or too dull, (2) currently lacking the specific property type (for example unique, lakefront), (3) emerging, or (4) one with high demand and a lot of competition. The seller best-suited for auction is one who needs immediate cash, is moving out of the property quickly, wants to liquidate its assets and has high carrying costs. The ideal properties for auction are those with lots of equity (more than 25%), are unique enough to encourage competition among bidders, have high carrying costs for the owner and are currently vacant. Auctions work best when the seller is looking to attract a specific category of unique buyer.

PROS AND CONS

The pros and cons of disposing of property at auction are:

Pros:

- **Seller controls terms controlled** – The seller controls the terms and timing of the auction, which can be advantageous to a fiduciary who needs to dispose of properties quickly due to liquidity or maintenance issues. It also allows the seller to structure the sale in a way that maximize tax benefits – for example, doing an Internal Revenue Code Section 1031 exchange or selling the property to recognize a loss to offset capital gains in a taxable year. There's no need to negotiate terms with a buyer or risk the deal falling through if the parties don't come to an agreement.

- **Prequalified buyers** – The property is only exposed to vetted and prequalified buyers, allowing the seller to focus on serious buyers and reducing risks that a transaction will fall through due to a buyer's financing issues.

- **The property is sold as is** – The property is often sold as-is, with no home inspection or requests for repairs or credits, decreasing the possibility that a transaction will fall through due to inspection issues. This is particularly attractive for properties that have deferred maintenance issues, and the trust/estate lacks the liquidity to perform those repairs prior to a sale or is pressed for time.

- **Portfolio sale** – This permits the seller to list a large portfolio of properties at once, solicit bids and then determine how to sell each property in a way that maximizes financial benefit. If the fiduciary determines that certain properties in the portfolio have very low bids, it may decide not to proceed with the sale of those properties if its generated sufficient liquidity by auctioning other properties with better terms.

Cons:

- **Commission** - Auction companies generally charge commissions based on a percentage of the gross bid amount. The percentage is often higher than it is in a conventional sale. (In California, a conventional sale normally charges 4% to 5% commission, whereas an auction charges 5% to 8% commission).

- **Buyer's premium** - Besides the auction commission charged to the seller, auction companies often charge the buyer a "buyer's premium," which is a percentage of the gross bid amount – often another 5%, which will cut into the amount the buyer is willing to offer for the property (as they'll have to factor in the premium's cost).

- **Marketing fees** - Depending on the terms of the auction contract, the seller may separately be responsible for marketing costs of the auction. This could be a flat fee charged to a third party marketing company or an additional percentage fee of the gross bid amount. Often, the seller is responsible for the marketing fees even if the auction isn't successful.

- **Marketing plan** – The marketing for auction properties needs to be tailored to specific audiences to be effective and worthwhile. Because the properties for auction are unique or have high carrying costs, the potential buyers for these properties are a targeted group. Mass marketing that isn't tailored to an audience is a waste of the estate's assets and will hinder the auction's efforts and results, ending in detriment to the estate and exposing the fiduciary to liability.

- **Liability** - An agency relationship is created between the fiduciary and the auction company, potentially making the fiduciary liable for the auction companies' actions, negligence or misconduct.

AUCTIONEER/FIDUCIARY RELATIONSHIP

Fiduciaries aren't professionals in all areas of asset management and often rely on delegating specific tasks to third party professionals. However, there's a limit on what a fiduciary can reasonably delegate to a third party, and there's an important degree of responsibility arising from the delegation. For example, in California a "trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform" and "where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a *duty to exercise general supervision* over the person performing the delegated matter."[2] Even when a fiduciary decides to retain an auction company and delegate the auction of the estate's real property to that auction company, the fiduciary still has an obligation to supervise the auction company and can be held directly liable for failing to do so.

The auction contract creates an agency relationship between the auction company and the fiduciary, imposing potential liability. Fiduciaries aren't automatically liable for the acts of their agents, but can be under certain circumstances. For example, in California, the Probate Code provides that trustees generally aren't liable for the acts of their agents, except when the trustee: (1) directs the act of the agent; (2) delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate; (3) doesn't use reasonable prudence in the selection of the agent or the retention of the agent selected by the trustee; (4) doesn't periodically review the agent's overall performance and compliance with the terms of the delegation; (5) conceals the act of the agent; or (6) neglects to take reasonable steps to compel the agent to redress the wrong in a case in which the trustee knows of the agent's acts or omissions.[3]

Therefore, a California fiduciary can be held liable for the acts of the auction company when it fails to: periodically review the auction company's performance, use reasonable prudence when selecting the auction company or adequately supervise the auction company's actions. Ultimately, the fiduciary owes its duties to the trust/estate and its beneficiaries and must ensure that the auction company carries out its duties in a way that will also benefit the trust.

The fiduciary should watch out for any breaches by the auction company that may damage the trust/estate, as they may potentially open the fiduciary to liability for breach of fiduciary duty under an agency theory. For example, if the auction company fraudulently misrepresents information about the property to prospective buyers, then the fiduciary may be held liable for that misconduct if they failed to adequately supervise the auction company or failed to conduct reasonable due diligence when hiring the auction company.

FIDUCIARY CHECKLIST

There are several countermeasures the fiduciary can take to protect itself when auctioning a property and reduce risk of liability for breaching its fiduciary duties.

Confirm the property is suitable for auction. The fiduciary should always consult the relevant governing estate-planning instrument and ensure that there are no restrictions attached to the property that would preclude its sale by auction. Further, when deciding whether to sell the property via auction, the fiduciary must make sure that it's complying with the relevant jurisdiction's Prudent Investor Act (PIA).[4] Even if the trust instrument states that the property can't be sold, the fiduciary may have a duty to dispose of it under the PIA. For example, if a large trust consists solely of extremely unique real properties with high maintenance costs and the trust has low liquidity, the duty to diversify may require the fiduciary to diversify the investment and sell a portion of the portfolio to be invested in other investments to diversify the risks. In such a case, the fiduciary may want to petition the court for instructions granting an order to sell or auction the property, even if the trust instruments doesn't allow the disposition of the real properties.[5]

Document every stage of the process. From choosing the auction company, to negotiating the listing agreement, creating the marketing plan and drafting the auction sale documents — the information obtained and the fiduciary's rationale behind each decision should be carefully documented. If litigation arises, this documentation will be valuable evidence that the fiduciary performed the necessary due diligence and, given the information known to the fiduciary at that time, performed accordingly.

Research auction companies and make careful selection. The fiduciary should solicit proposals from various reputable auction companies and compare them. For example, the fiduciary should investigate whether the auction company has: (1) experience and expertise to auction the type of property at issue; (2) experience and expertise in the local market; (3) a marketing platform and resources to market the property; (4) a reasonable charge for fees and commissions; (5) information on a closing ratio and price; and (6) references and number of repeat customers. Performing this due diligence is essential in limiting the fiduciary's liability for selecting and delegating the sale to the auction company.

Ensure a targeted and effective marketing strategy. The fiduciary should carefully work with the auction company and approve a marketing plan that's comprehensive and sufficiently tailored to the targeted audience, with an eye on the fees associated with it. The marketing plan should cover a time period long enough to attract all prospective buyers but should be short enough to prompt the buyers to bid quickly. The price of the starting bid, or the reserve, should be low enough to encourage multiple bids and a potential bidding war, but not too low that it wouldn't solicit fruitful bids.

Assemble due diligence/disclosure packets for potential bidders. The fiduciary can reduce the risk of liability by working with the auction company and an attorney to assemble a comprehensive due diligence

packet for all prospective buyers. The packet should make disclosures (in compliance with the law in the applicable jurisdiction) regarding the condition of the property and any defects, making the auction process fully transparent. Doing so will lessen the danger of the buyer later suing the auction company or the seller for failure to disclose certain issues with the property or making misrepresentations.

Get a lawyer involved. An auction company, however experienced with auctions, typically doesn't have the requisite legal knowledge regarding the heightened scrutiny and liability a fiduciary faces when auctioning a property on behalf of a trust/estate. That's where a lawyer comes in. A fiduciary should always get a lawyer involved in the auction process to review all agreements, point out areas of due diligence for the fiduciary and advise on a course of action that will diminish liability. For example, in the face of contentious beneficiaries or ambiguous trust language, an attorney may advise the fiduciary to petition the court for instructions and obtain an order instructing the fiduciary to proceed with an auction or certain terms of an auction.

The law governing auctions, real property transactions and fiduciary responsibilities also differ across jurisdictions. It's important to have an attorney to make sure the fiduciary and auction company is acting in compliance with all applicable laws to avoid any future claims by the buyers or the beneficiaries. For example, in California, the sale of real property by a trust can be exempt from traditional seller disclosure requirements.[6] Failing to use the appropriate disclosure form could be basis for a claim of breach against the fiduciary.

Tricky clauses in auction agreements. The lawyer should draft an auction contract or carefully review a draft of an auction contract provided by the auction company. Some auction contracts provide that if the auction property is sold within a certain amount of days (usually 120) of the auction date, even if it's not sold to a buyer via auction, the seller is responsible to pay the auction company a buyer's premium on behalf of the buyer. This is a tricky clause and premised on the argument that the non-auction buyer was a result of the auction marketing efforts, thus the auction company is still entitled to a buyer's premium. This clause should be carefully considered and preferably revised to ensure that the auction company doesn't benefit if the non-auction buyer didn't purchase the property due to the auction company's marketing efforts. The auction contract should also clearly address whether the seller is responsible for costs, such as marketing fees, even if the property fails to sell.

The purchase and sale agreement. Similarly, the lawyer should draft or carefully review a draft of the sale contract with the buyer after a successful bidder has been selected. For example, the contract should address: contingency periods and removal, whether the sale is subject to court confirmation, whether fixtures or personal property items/furnishings for the property are to be included or excluded, whether there should be liquidated damages and whether to include arbitration or mediation clauses in the event of breach or dispute.

Be personally present during auction and necessary decisions. The fiduciary should involve itself in each step of the auction process and, if at all possible, be personally present at the auction to show its involvement (no matter what format the sale takes place—if electronic, the fiduciary should still be monitoring it virtually).

MOST COMMON CLAIMS

The most common claims for breach against a fiduciary relating to an auction of real property are: (1) the property shouldn't have been auctioned; (2) the marketing for the auction was poorly conducted, and didn't expose the property to qualified bidders, resulting in undesirable outcomes; or (3) the terms of the auction agreement or purchase and sale agreement weren't favorable. When considering an auction, the fiduciary should always keep these points in mind, take any actions necessary to investigate the options at hand and document all analyses and resulting decisions.

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Notes

[1] See What Properties Are Suited for Auction? for more information.

[2] California Probate Code Section 16012, subdivision (a) (emphasis added).

[3] California Probate Code Section 16401.

[4] For example, in California, the Prudent Investor Act is codified at California Probate Code Sections 16045-16054.

[5] California Probate Code Section 17200.

[6] California Civil Code Section 1102.2, subdivision (d).

拍卖财产时的信托责任

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受托人处置特别难以维护或出售的财产的一种越来越流行的选择是通过拍卖。虽然拍卖可以产生成功的结果，但如果拍卖处理不当，也可能成为受托人的陷阱，成为违约索赔的依据，导致不理想的结果。

为什么要拍卖？

全国房地产经纪人协会建议遵守“三分之二”规则：即如市场、卖家和房产三者中有两个适合拍卖，那么拍卖财产可能会取得好的成效[1]。一个好的拍卖市场通常是：（1）不断变化或过于沉闷的市场、（2）目前缺乏特定的房产类型（例如独特的坐落在湖滨的房产）的市场、（3）新兴的市场、或（4）需求高且竞争激烈的市场。最适合拍卖的卖家是那些需要立即现金、正在迅速搬出房产、想要清算资产且具有高持有成本的人。拍卖的理想房产是那些拥有大量所有人权益（超过25%）的房产、房产的独特性足以鼓励竞拍者之间的竞争、及对所有人来说拥有较高的账面成本并且目前处于空置状态的房产。当卖家希望吸引特定类别的独特买家时，拍卖效果最佳。

优缺点

透过拍卖来处分财产的优缺点如下：

优点：

- **拍卖受卖方所控制的条款控制**——卖方控制拍卖的条款和时间，这对因流动性或维护问题而需要快速处置财产的受托人有利。它还允许卖方以最大化税收优惠的方式进行销售——例如，按照《国内税收法典》第 1031 节的规定进行交易或出售财产，以认列损失而抵消纳税年度的资本收益。如果双方没有达成协议，就没有必要与买方谈判条款，也没有必要冒交易失败的风险。

- **买家需通过资格预审** - 该房产仅开放给通过审查和资格预审的买家，从而使卖方能够专注于认真的买家，并降低因买家融资问题而导致交易失败的风险。

- **房产按现有状况出售** - 房产通常按现有状况出售，没有房屋检查或维修或信贷申请，降低了因检查问题导致交易失败的可能性。这对于存在延期维护问题的房产、及信托/财产在出售前欠缺进行这些维修的流动资金或者时间紧迫者尤其具有吸引力。

- **组合销售** - 这允许卖方立即列出一个大型组合的财产，征求投标，然后确定如何以最大化财务效益的方式出售每个财产。如果受托人确定投资组合中的某些财产的出价非常低，且如果其以其他条件更好的条件拍卖其他财产得以产生足够的资金，则其可能决定不继续出售这些财产。

缺点：

- **佣金**–拍卖公司通常根据投标总额的百分比收取佣金。这一比例通常高于传统销售。（在加州，传统销售通常收取 4%至 5%的佣金，而拍卖收取 5%至 8%的佣金）。

- **买方附加费**——除了向卖方收取拍卖佣金外，拍卖公司通常还向买方收取“买方附加费”，即总投标金额的一个百分比——通常是再收取 5%，这将减少买方愿意为该财产出价的金额（因为他们必须考虑费用成本）。

- **营销费用**–根据拍卖合同的条款，卖方可能独自负责拍卖的营销费用。这可以是第三方营销公司收取的固定费用，也可以是总投标金额的额外百分比费用。通常，即使拍卖不成功，卖家也要承担营销费用。

- **营销计划** – 拍卖房地产的营销需要针对特定对象进行调整，才能有效并值得。由于拍卖的房产是特殊的，或具有较高的账面成本，因此这些房产的潜在买家是特定针对的群体。不特别针对特定对象制订的大规模营销是对财产的资产的浪费，会阻碍拍卖的努力和结果，最终损害财产并使受托人承担责任。

- **责任**–在受托人和拍卖公司之间建立代理关系，可能使受托人对拍卖公司的行为、疏忽或不当行为负责。

拍卖人/信托关系

受托人并非资产管理所有领域的专业人士，且通常需将特定任务委托给第三方专业人士。然而，受托人可以合理地委托给第三方的内容是有限制的，委托产生的责任也很重要。例如，在加州，“受托人有义务不将受托人可能被合理要求亲自履行的行为委托给他人”，且受托人将某事项妥善地委托给代理人、共同受托人或其他人时，受托人有责任对执行该转授事项的人行使一般监督。[2]即使受托人决定聘请一家拍卖公司并将财产的不动产的拍卖委托给该拍卖公司，受托人仍有义务监督该拍卖公司，并可能因未能这样做而直接承担责任。

拍卖合同在拍卖公司和受托人之间建立了一种代理关系，从而产生了潜在的责任。受托人不会自动对其代理人的行为负责，但在某些情况下可能会承担责任。例如，在加州，《遗嘱认证法》规定，受托人一般不对其代理人的行为负责，除非受托人：（1）指示代理人的行为；（2）授权代理人执行受托人有义务不不授权的行为；（3）在选择代理人或聘请受托人选择的代理人时未能合理谨慎行事；（4）未能定期审查代理人的整体表现和对委托条款的遵守情况；（5）隐瞒代理人的行为；或（6）在受托人知道代理人的行为或不行为时，忽略采取合理措施迫使代理人纠正错误。[3]

因此，如果加州的受托人未能定期审查拍卖公司的表现、选择拍卖公司时未能合理谨慎行事，或未能充分监督拍卖公司的行为，则该受托人可能会对拍卖公司的行为承担责任。最终，受托人对信托/财产及其受益人负有责任且必须确保拍卖公司以有利于信托的方式履行其职责。

受托人应注意拍卖公司可能损害信托/财产的任何违约行为，因为根据代理理论，这些违约行为可能会使受托人承担违反信托义务的责任。例如，如果拍卖公司欺诈地向潜在买家谎报财产信息，那么受托人如果未能充分监督拍卖公司，或在聘用拍卖公司时未能进行合理的尽职调查，则可能会对该不当行为负责。

信托检查表

在拍卖财产时，受托人可以采取几种对策来保护自己，并降低违反受托人义务的责任风险。

确认该物业适合拍卖。受托人应始终咨询相关的管辖房地产规划文书，并确保不存在妨碍通过拍卖出售的财产限制。此外，在决定是否通过拍卖出售财产时，受托人必须确保其符合相关司法管辖区的《审慎投资者法》（PIA）。[4]即使信托文书规定该财产不能出售，受托人也有义务根据PIA处置该财产。例如，如果大型信托仅由维护成本高的独特的不动产组成，且该信托的流动性低，则分散投资的义务可能要求受托人将投资分散，并出售投资组合的一部分以投资于其他投资，以分散风险。在这种情况下，即使信托文书不允许处分不动产，受托人也可能希望请求法院发出指令，批准出售或拍卖不动产。[5]

记录过程的每个阶段。从选择拍卖公司，到谈判上市协议，制定营销计划和起草拍卖文件——应仔细记录获得的信息和每个决策背后的受托人理由。如果发生诉讼，本文件将是受托人进行了必要尽职调查，并根据受托人当时已知的信息，相应地进行了尽职调查的重要证据。

对拍卖公司进行调查并进行仔细选择。受托人应征求各知名拍卖公司的提议，并进行比较。例如，受托人应调查拍卖公司是否具有：（1）拍卖此类财产的经验和专业知识；（2） 本地市场的经验和专业知识；（3）营销该财产的营销平台和资源；（4） 合理收取费用和佣金；（5） 有关交割比率和价格的信息；（6）推荐人和回头客数量。进行此尽职调查对限制受托人就选择和委托拍卖公司进行拍卖的责任至关重要。

确保有针对性和有效的营销策略。受托人应仔细与拍卖公司合作，批准一份特别为有针对性的对象制订的全面、充分的营销计划，并关注相关费用。营销计划应涵盖足够长的时间以吸引所有潜在买家，但也应足够短到足以促使买家迅速出价。起拍价或底价应低到足以鼓励多个竞拍和潜在的竞拍战的程度，但也不能太低到没能招揽到有成效的竞拍。

为潜在投标人准备尽职调查/披露信息包。受托人可以通过与拍卖公司和律师合作，为所有潜在买家准备一份全面的尽职调查信息包，从而降低责任风险。该信息包应披露（符合适用司法管辖区的法律）财产状况和任何缺陷，使拍卖过程完全透明。这样做将减少买方随后起诉拍卖公司或卖方未披露财产的某些问题或作出虚假陈述的危险。

让律师参与进来。拍卖公司无论在拍卖方面有多丰富的经验，通常都不具备有关受托人在代表信托/财产拍卖财产时面临的严格审查和责任的必要法律知识。这就是让律师参与进来的时间点。受托人应始终让律师参与拍卖过程，以审查所有协议，指出受托人的尽职调查领域，并建议可以减少责任的一些做法。例如，面对可能提出争议的受益人或含糊不清的信托语言，律师可能会建议受托人向法院申请指示，并获得指示受托人继续进行拍卖或按某些条款进行拍卖的命令。

管辖拍卖、不动产交易和信托责任的法律也因司法管辖区而异。重要的是要有一名律师来确保受托人和拍卖公司的行为符合所有适用法律，以避免买家或受益人未来提出任何索赔。例如，在加州，通过信托出售不动产可以免除传统的卖方披露要求。[6]未能使用适当的披露表格可能成为对受托人提出违约索赔的依据。

拍卖协议中的棘手条款。律师应当起草拍卖合同或者仔细审查拍卖公司提供的拍卖合同草案。一些拍卖合同规定，如果拍卖财产在拍卖日期后的一定天数（通常为120天）内出售，即使未通过拍卖出售给买方，卖方也有责任代表买方向拍卖公司支付买方附加费用。这是一个棘手的条款，其是基于未透过拍卖的买家也是拍卖营销努力的结果的论点，因此拍卖公司仍有权获得买家的附加费用。应仔细考虑该条款，最好对其进行修订，以确保如果未

透过拍卖的买家不是因为拍卖公司的营销努力而购买该财产，拍卖公司不得受益。拍卖合同还应明确规定，即使财产未能售出，卖方是否应承担营销费用等成本。

买卖协议。同样地，在选定中标人后，律师应与买方起草或仔细审查销售合同草案。例如，合同应说明：条件成就期间和免除规定、出售是否需经法院确认、是否包括或不包括房产的固定装置或个人财产项目/家具、是否应有定额违约金，以及是否包括发生违约或争议时的仲裁或调解条款。

亲自参与拍卖和必要决定的作出。受托人应参与拍卖过程的每一步骤，并在可能的情况下亲自出席拍卖，以显示其参与（无论销售是以何种形式作成----如以电子形式作成时，受托人仍应透过虚拟方式加以监督）。

最常见的索赔

与不动产拍卖有关的针对信托人的最常见违约索赔是：（1）不应拍卖该财产；（2） 拍卖的营销工作开展得很差，没有向合格的竞拍人展示该房产，导致了不良结果；或（3）拍卖协议或买卖协议的条款不利。在考虑拍卖时，受托人应始终牢记这些要点，采取任何必要措施调查面临的选择，并记录所有分析和最终决定。

本刊行获 Trust & Estate Magazine 的许可。

附注

1 有关更多信息，请见那些财产适合拍卖。

2 《加州遗嘱认证法》第 16012 节，第（a）小节（特别强调）。

3 《加州遗嘱认证法》第 16401 节。

4 例如，在加州，《谨慎投资者法》编列于《加州遗嘱认证法》第 16045-16054 节中。

5 《加州遗嘱认证法》17200 节。

6 加州民法典第 1102.2 节第（d）小节。

Maintaining the Integrity of Corporate Internal Investigations: What Corporate and Legal Officers Should Know

By Eddie A. Jauregui, Wifredo A. Ferrer and Michael E. Hantman

A corporate internal investigation is typically undertaken following a serious allegation of wrongdoing, be it from a company insider, industry watchdog, or government investigator. When such an allegation is made, the company should:

- learn if there is a problem;
- if one exists, identify the nature and scope of the problem;
- fix the problem and put measures in place to prevent it from happening again; and, if necessary,
- be able to show that a proper investigation was conducted.

To best protect the company, the investigation must be conducted carefully and with integrity. A well-conceived and well-executed investigation will allow a company to take the right corrective action and mitigate the company's civil or criminal exposure. But a poorly planned or poorly executed investigation can create even more problems for the company, including potentially exposing it to civil litigation or, worse, criminal charges.

Internal investigations are rife with pitfalls, particularly in high-profile and sensitive matters. The most important thing corporate and legal officers can do is ensure the investigation is conducted in the right way, by the right people. Below are our top tips for protecting the integrity of the investigation and, by extension, the company.

1. Put the right people in charge. For an internal investigation to have maximum effect and credibility, it is important at the outset to determine who is in charge of the investigation, i.e., who determines the nature and scope of the investigation and who chooses the investigators. In some instances, it is appropriate for management to maintain control. In others, a special board committee of independent directors should be created to retain outside counsel and oversee the investigation. In others still, the board of directors or the audit committee of the board might be in charge. *The key is this: the person or entity retaining counsel –and ultimately responsible for the size and scope of the investigation –should not be someone conflicted (that is, potentially involved in the conduct under investigation).* Not only is it untenable for investigating counsel to answer to someone who does not want the investigation to uncover the truth, the investigation will be deemed worthless by any outside entity assessing its credibility. To avoid that, the reporting line should always be "clean" and the person in charge and giving directions day-to-day should always be legal counsel.

2. Choose the right investigators. Deciding who conducts the internal investigation is crucial. *If possible, all internal investigations, whether low- or high-risk, should be initiated and supervised by in-house counsel in order to protect the confidentiality of the investigation through the attorney-client privilege and the work-product doctrine*. Where the allegation is especially serious, or where there is potential for government enforcement or criminal sanctions, the company will be better served retaining experienced outside counsel– who were not involved in the matter at hand– for several reasons.

First, outside counsel will be free from conflicting interests, thereby protecting the integrity of the investigation and allowing investigators to ask difficult questions without undermining key relationships.[1] *Second*, utilizing

outside counsel will help ensure that the investigation itself remains privileged and confidential. Often in-house counsel are assigned non-legal, as well as legal, duties and maintain reporting responsibilities to company constituencies and outside parties that are not part of the investigation (e.g., auditors or government regulators). Utilizing outside counsel avoids the risk of waiver of the attorney-client privilege or the loss of attorney work product protections by ensuring that counsel is acting solely in a legal capacity. *Third*, outside counsel will be experienced in conducting internal investigations and familiar with the areas of law, government agencies, and processes involved (and ideally, but not necessarily, even the government personnel involved in the matter). Moreover, in criminal matters, prosecutors will sometimes divulge information to outside counsel but not to internal lawyers, in part because of their view that internal lawyers wear multiple hats, serving as both legal and business advisors.

3. Preserve evidence right away. Whether the investigation involves a civil or potential criminal matter, it is key to preserve evidence right away. Documents are important to finding relevant information and to establishing an evidentiary trail of information, communication, and knowledge among persons involved in the alleged misconduct. It is therefore crucial at the start of any investigation to ensure that all potentially relevant documents are preserved and are not inadvertently or intentionally destroyed. Because of the importance of relevant documents and edata, it is essential that the company do two things at the start of the internal investigation: (1) prevent the destruction of potentially relevant information; and (2) identify what documents and e-data are or might become relevant to the investigation.

And because it is sometimes difficult and time-consuming to identify relevant documents and data at the beginning of an internal investigation, and because what is relevant may change as the investigation progresses, it is generally a best practice – especially when a government subpoena has been issued or litigation has started – to immediately suspend routine document destruction policies until further notice. After the investigation has become more focused and an understanding of what is relevant is more certain, some limited routine document destruction policies may be reinstated. The company should also implement a litigation hold.[2] Note that in a criminal investigation, the government is likely to view the destruction of *any* relevant documents as either criminally reckless or obstruction of justice.

4. Understand and protect the company's attorney-client privilege. Recent high-profile cases have highlighted the importance of understanding the nature and scope of the attorney-client privilege in corporate settings. While the privilege analysis in any given case will depend on the facts, there are some basic rules corporate and legal officers should know:

- In an internal investigation, the attorney-client relationship generally exists between the entity that retained counsel (e.g., senior management, an audit committee, or the board) and counsel. This is important and officers/employees should understand that counsel conducting the investigation are not their personal lawyers, nor can they (the officers/employees) assert privilege over their communications with counsel. The privilege belongs to the client (i.e., the entity that retained counsel), and it is the client's privilege to assert or waive.

- The essential element in establishing attorney-client privilege is that the communication with counsel is made for the purpose of securing legal advice. Thus, in every step of an internal investigation, there should be a record of the purpose of the internal investigation activity, which should be to enable counsel to gather the necessary information to provide legal advice to the company concerning the events and conduct under investigation.

- When conducting officer/employee witness interviews, counsel should remind witnesses that they represent the company and are not the witness's lawyer.[3] They should also maintain a record that

such a warning was provided to the witness. This reduces the risk of a witness later claiming that the warning was not complete or clear and trying to prevent the company from utilizing the interview report in whatever fashion the company deems appropriate.

- The attorney-client privilege and the work-product protection can be waived either intentionally or inadvertently. Should the company choose to voluntarily waive the privilege– as part of settlement or plea negotiations with the government, for instance– it should understand that such waiver could be considered a complete waiver, opening previously protected information to civil discovery.

5. Message appropriately with employees. An investigation– particularly in a high- profile or sensitive matter– can impact employee productivity and morale and can lead to the circulation of rumors and misinformation within the company, causing more damage than perhaps even the truth. While the company will not be able to (and should not attempt to) tamp down every rumor, it should give careful consideration to how it communicates with its employees about the investigation.

Depending upon the scope of the internal investigation and the size of the company, counsel should consider notifying appropriate employees that the investigation has begun. The notice should be sent to the appropriate managers, who should in turn distribute it to the appropriate employees under their supervision.[4]

If the matter involves a grand jury subpoena or a criminal or regulatory investigation, the notice should briefly and clearly explain in a neutral fashion that the company has received a subpoena or is under criminal or regulatory investigation without editorializing on the validity of the investigation or the facts involved. While the company may consider stating that it is confident no wrongdoing has occurred (if that is the truth), and that it is complying with the subpoena or with the government's investigation (if that is the truth), it should refrain from any aggressive statements like characterizing the subpoena or investigation as being "illegitimate," "illegal," or a "witch hunt." Any statements characterizing a government subpoena or investigation will accomplish little other than causing acrimony and distrust with the government and may reduce the company's credibility inside the company and with the government.

The notice should also inform employees of who is conducting the internal investigation; that the company expects their *full and truthful* cooperation with the investigation; that all documents and electronic data should be preserved in accordance with the litigation hold; that employees' loyalty must be to the company and not to any particular individual, colleague, supervisor, or group; and that the matter should not be discussed outside the company or with any person inside the company who does not have a need to know.[5]

The company's words and actions during an investigation matter a great deal. If framed correctly, the company's messaging will demonstrate to insiders and outsiders that it took the investigation seriously, comported itself professionally and ethically, and was committed to getting to the truth.

* * *

In conducting and overseeing an investigation, companies should be mindful that the integrity of the investigation is key. A properly conducted internal investigation is often the only way to determine the facts, prepare an effective defense, and minimize or avoid potential criminal punishment, civil or regulatory liability, and reputational damage to the company. In addition, a properly conducted internal investigation can enable a business, in conjunction with its compliance program, to take proper corrective action to halt any ongoing misconduct and prevent it from happening again. This can be critical in reaching a palatable resolution with the government and other parties.

More detailed and in-depth guidance on conducting and navigating internal investigations can be found in *Corporate Compliance Answer Book*, published by Practising Law Institute (www.pli.edu).

Notes

[1] The appearance of improper influence on an investigation may fatally compromise its integrity to the government, thereby destroying its utility and credibility. The appearance of internal management influence on counsel conducting the investigation can also result in avoidable civil litigation.

[2] In some districts, courts impose a duty on counsel to make certain that all potentially relevant electronic data are identified and placed "on hold." This places a heavy duty on counsel. The company and its counsel (in-house or outside) can be sanctioned for failing to perform this duty. For more information on Document and Data Preservation and Collection, see Corporate Compliance Answer Book, Q 6.10.

[3] This is known as an Upjohn warning and it is discussed in depth in Q 6.11 of Corporate Compliance Answer Book.

[4] The "appropriate" managers and employees include those who may have any potentially relevant documents, emails or other electronic documents in their possession, custody, or control, and those who may be interviewed during the investigation.

[5] If the company itself is involved in a criminal investigation, it is likely that law enforcement agents will either ask the company to make certain employees available for interviews, or that law enforcement agents may directly contact certain employees for interviews. Under these circumstances, employees should be warned that this may occur. In giving such notice, the company should stress that it is imperative that all employees be entirely truthful with law enforcement and that providing false information may be a crime. In addition, employees may be advised by the company of their rights, in a neutral fashion, if they are approached by law enforcement agents for an interview. The company should consult carefully with counsel before providing any explanation of employees' rights, as it does not want to be seen as in any way impeding or obstructing the government's investigation. See QQ 6.12.5, 6.12.6, and 6.12.10 of Corporate Compliance Answer Book.

维护公司内部调查的真实完整性：公司和法律主管须知

原文作者： Eddie A. Jauregui, Wifredo A. Ferrer 及 Michael E. Hantman

公司内部调查通常是在受到严重不当行为指控后进行的，无论指控是来自公司内部人士、行业监管机构还是政府调查人员。当受到此类指控时，公司应：

- 了解是否存在问题；
- 如果存在问题，确定问题的性质和范围；
- 解决问题并采取措施防止再次发生；且如有需要，
- 能够显示进行了适当的调查。

为了更好地保护公司，调查必须谨慎、诚信地进行。良好规划和执行的调查将使得公司得以采取正确的纠正措施，并减轻公司的民事或刑事风险。但计划不周或执行不力的调查可能会给公司带来更多问题，包括可能使其面临民事诉讼，甚至更糟糕的是面临刑事指控。

内部调查充满了陷阱，特别是发生在高度引人注目和敏感的事件时。公司和法律主管能做的最重要的事情是确保调查是由正确的人士以正确的方式进行。以下是我们就维护调查的真实完整性而进而保护公司一事所提出的主要建议。

1. 让对的人负责。为了使内部调查具有最大的效力和可信度，一开始就确定由谁负责调查（即由谁来决定调查的性质和范围及由谁来选择调查人员）是重要的。在某些情况下，管理层保持控制权是适当的。在其他情况下，应设立一个由独立董事组成的特别董事会委员会来聘请外部律师并监督调查。而又在其他情况下，可能由董事会或董事会审计委员会来负责此事。*关键在于：聘请律师——并最终对调查的规模和范围负责的个人或实体——不应该是有利益冲突的人（也就是说，不应该是可能涉及被调查行为的人）*。调查律师对不希望透过调查得到真相揭露的人负责不仅站不住脚，而且任何评估其可信度的外部实体都会认为调查毫无价值。为了避免这种情况，报告管道应始终“干净”且负责的人和给予日常指示的人应始终是法律顾问。

2. 选择合适的调查人员。决定谁进行内部调查至关重要。*如果可能，所有内部调查，无论是低风险还是高风险，都应由内部律师发起和监督，以便通过律师-客户特权和工作成果原则来保护调查的机密性*。如果指控特别严重，或有可能受到政府强制执行或刑事制裁，有几个原因公司最好聘请不涉及参与该事情的有经验的外部律师来协助处理。

首先，外部律师将不受利益冲突的影响，从而保护调查的真实完整性，并允许调查人员在不损及重要关系的情况下提出艰难的问题。[1] *第二*，利用外部律师将有助于确保调查本身保持特权保护的权利和机密性。通常，内部律师被分配非法律和法律职责，并向公司人员和不属于调查范围的外部各方（如审计师或政府监管机构）保持报告责任。通过确保律师仅以法律身份行事，利用外部律师可以避免放弃律师-客户特权或失去律师工作产品保护的风险。*第三*，外部律师将在进行内部调查方面具有丰富经验，熟悉法律、政府机构和相关流程（虽非必要，但理想情况下，也熟悉参与该事项的政府人员）。此外，在刑事案件中，检察官有时会将信息透露给外部律师，但不会透露给内部律师，部分原因是他们认为内部律师身兼法律和商业顾问的多重角色。

3. 立即保存证据。无论调查涉及民事或潜在刑事问题，立即保存证据是一关键。文件对于查找相关信息以及对建立涉嫌不当行为的人员之间的信息、通信和知情的证据线索非常重要。因此，在任何调查开始时，确保所有可能相关的文件都得到保存，并且不会被无意或故意销毁，这一点至关重要。由于相关文件和电子数据的重要性，公司在开始内部调查时必须做两件事：（1）防止潜在相关信息的破坏；及（2）确定哪些文件和电子数据与调查相关或可能相关。

而且，由于在内部调查开始时识别相关文件和数据有时既困难又耗时，而且随着调查的进展，那些事情是相关的可能会发生变化，因此在直至另行通知前先立即暂停常规的文件销毁的政策通常是一种最佳做法– 特别是在当政府已经发出传票或诉讼已经开始时。在调查变得更加集中并且对相关内容的理解更加明确之后，可能会恢复一些有限的常规文件销毁政策。公司还应实施诉讼暂停措施。[2] 请注意，在刑事调查中，政府可能会将销毁任何相关文件视为涉及刑事的草率行为或妨碍司法公正的行为。

4. 理解并保护公司的律师-客户特权。最近一些引人注目的案件突出了理解公司情况下律师-客户特权的性质和范围的重要性。尽管任何特定案例中的特权分析都将取决于事实，但公司和法律主管应了解以下一些基本规则：

- 在内部调查中，聘请律师的实体（如高级管理层、审计委员会或董事会）与律师之间通常存在律师-客户关系。这一点很重要，且高级职员/员工应了解，进行调查的律师不是他们的私人律师，他们（高级职员/员工）也不能在与律师的沟通中主张特权。该特权属于委托人（即聘请律师的实体），主张或放弃该特权是委托人的特权。

- 建立律师-客户特权的基本要件是与律师的沟通是为了获得法律建议。因此，在内部调查的每个步骤中，都应记录内部调查活动的目的，而该目的是使律师能够收集必要的信息以就调查中的事件和行为向公司提供法律建议。

- 在进行公司主管/员工证人访谈时，律师应提醒证人他们代表公司，而不是证人的律师。[3] 他们还应保留向证人提供此类警告的记录。这降低了证人后来声称警告不完整或不清楚，并试图阻止公司以公司认为合适的方式使用采访报告的风险。

- 律师-客户特权和工作产品保护权利可以有意地或无意地被放弃。如公司选择自愿放弃该特权– 例如，作为与政府和解或抗辩谈判的一部分条件– 它应该理解，这种弃权可以被视为完全弃权，将使以前受保护的信息受到民事揭露程序适用。

5. 适当地向员工传达信息。调查– 特别是在一个高度引人注目的或敏感的事项– 可能会影响员工的生产力和士气，并可能导致谣言和错误信息在公司内部传播，造成的损害甚至可能超过真相。虽然公司无法（也不应该试图）压制每一个谣言，但它应该仔细考虑如何与员工就调查事项进行沟通。

根据内部调查的范围和公司的规模，律师应考虑通知适当的雇员调查已经开始。通知应发送给相应的经理，而经理应在其监督下将通知分发给相应的员工。[4]

如果该事项涉及大陪审团的传票或刑事或监管调查，则通知应以中立的方式简要明确地解释公司已收到传票或正在接受刑事或监管调查，而无需对调查的有效性或相关事实发表评论。虽然公司可以考虑表示其有信心没有任何违法行为（如果这是事实），且其正遵守传票或政府调查（如果这是事实），它应该避免作出任何有攻击性的声

明，例如将传票或调查刻画为 “不具正当性的”、“非法的” 或 “政治迫害”。任何刻画政府传唤或调查的声明都只会引起对政府的尖锐的态度和不信任，并可能降低公司内部其与政府的信誉。

该通知还应告知员工谁正在进行内部调查；且公司预期他们将会全面、真实地配合调查；所有文件和电子数据都应根据诉讼暂停措施予以保存；员工必须忠于公司，而不是任何特定的个人、同事、主管或团体；不得在公司外或与公司内任何不需要知道的人讨论该事项。[5]

公司在调查过程中的言行关系重大。如果处理正确的话，将会向内部人士和外部人士展现出公司认真对待调查、以专业和道德的态度行事、并致力于了解真相的信息。

* * *

在进行和监督调查时，公司应注意调查的真实完整性是一关键。适当进行的内部调查通常是确定事实、准备有效辩护、以及尽量减少或避免潜在刑事处罚、民事或监管责任以及公司声誉损害的唯一途径。此外，适当进行的内部调查可以使企业结合其合规计划，采取适当的纠正措施，制止任何正在进行的不当行为并防止其再次发生。这对于与政府和其他各方达成令人满意的解决方案至关重要。

有关开展和引导内部调查的更详细和深入的指导，请参见 *Practising Law Institute*（*www.pli.edu*）的《企业合规回答手册》。

附注

[1] 对调查施加不当影响可能会致命地损害其对政府的诚信，从而破坏其效用和信誉。内部管理层对进行调查的律师的影响也可能导致本可避免的民事诉讼。

[2] 在一些地区，法院规定律师有义务确保识别所有潜在相关的电子数据并将其“置于停止状态”。这给律师带来了沉重的负担。公司及其律师（内部或外部）可能因未能履行此职责而受到处罚。有关文档和数据保存和收集的更多信息，请参阅《企业合规性回答手册》中的第 6.10 问题。

[3] 这被称为 Upjohn 警告，并在《企业合规性回答手册》中的第 6.11 问题中进行了深入讨论。

[4] “适当”的经理和员工包括那些可能拥有、保管或控制任何潜在相关文件、电子邮件或其他电子文件的人，以及那些可能在调查期间接受采访的人 。

[5] 如果公司本身涉及刑事调查，执法人员可能会要求公司安排某些员工接受访谈，或者执法人员可能会直接联系某些员工接受访谈。在这种情况下，应警告员工可能发生这种情况。在发出此类通知时，公司应强调，所有员工必须完全对执法单位诚实，提供虚假信息可能构成犯罪。此外，如果执法人员与员工接触要求进行访谈，公司可以中立的方式告知员工他们的权利。在解释员工权利之前，公司应仔细咨询法律顾问，因为公司不希望被视为以任何方式妨碍或阻碍政府的调查。请参阅《企业合规性问答手册》中的第 6.12.5、6.12.6 和 6.12.10 问题。

An Introduction to Georgia's Statewide Business Court

By Patrick Reagin

Georgia's Statewide Business Court (SBC) began operations on Aug. 1, 2020. Holland & Knight has been closely monitoring developments related to the new court, which is intended to provide an efficient and specialized forum for complex commercial cases, similar in certain respects to Delaware's Complex Commercial Litigation Division (CCLD). This article highlights key pointers and potential tradeoffs for parties and practitioners who may be interested in litigating their Georgia commercial disputes in the SBC.

Business courts in some other states, including Delaware's CCLD, were stood up as divisions of their state superior court systems, but Georgia's SBC constitutes a new constitutional class of court. Accordingly, it has not supplanted the ability of local jurisdictions to create their own business court divisions. For example, Fulton County Superior Court continues to operate the Metro Atlanta Business Case Division. Parties with actions pending in the state superior court systems retain their ability to refer those matters to the particular business divisions of those courts. Following are key pointers related to practice in the SBC. In brief, the court has broad subject matter jurisdiction to hear high-dollar commercial disputes and will prioritize efficiency and swift disposition of complex matters by leveraging technology and making its judges available to parties and counsel through a "hands-on" approach.

WHEN DID THE SBC BEGIN OPERATIONS?

The SBC began taking cases on Aug. 1, 2020, and held its first in-person hearing on May 11, 2021. Its operative rules of practice, the Business Court Rules (BCR), became effective Aug. 1, 2021, and are available on the SBC website.

WHERE DOES THE SBC SIT?

The SBC is formally housed in the new Nathan Deal Judicial Center in Atlanta, which also houses the Supreme Court of Georgia and Georgia Court of Appeals. However, the court's first presiding judge, Hon. Walter W. Davis, will "ride circuit," hearing cases in localities throughout the state.

Venue for all pretrial proceedings in SBC matters will remain where the case was originally filed or removed from, or where the matter could have been filed originally under Georgia's standard venue provisions, which have not been disturbed by the SBC's enabling legislation. Where a party initiates a matter directly in the SBC and more than one venue is proper, the party will be required to designate its preferred venue at the time of filing. Judge Davis has publicly emphasized that the SBC is intended to have truly statewide operations and not be physically restricted to the Atlanta metro area.

WHAT TYPES OF CASES CAN THE SBC HEAR?

The SBC's enabling legislation is codified at O.C.G.A. § 15-5A-1, *et seq.* The legislation is modeled after the Delaware Court of Chancery and other state business courts, with an eye toward efficiency and responsiveness (e.g., a policy of issuing orders on motions within 90 days of the close of briefing). The SBC has expansive subject matter jurisdiction over 17 categories of commercial disputes, including those arising under the Uniform Commercial Code, Georgia Business Corporation Code, Uniform Partnership Act and Uniform Limited Liability Company Act – provided that the following amount-in-controversy requirements are met:

- real property disputes, $1 million

- all others, $500,000

O.C.G.A. § 15-5A-3.

The SBC does not have jurisdiction over cases involving physical harm, threats of physical harm, emotional injury, domestic relations, family farming, residential landlord and tenant disputes, foreclosures, or individual (as opposed to potential mass or class action) consumer claims. *Id.*

Importantly, the SBC shares equity jurisdiction with the state's Superior Courts over all matters for which it has subject matter jurisdiction. There is no amount-in-controversy requirement for such claims. *Id.*

> Example: A party seeking a temporary restraining order to enforce a noncompete agreement will not be required to show potential damages above either of these thresholds, so long as the case is tied to one of the subject matter jurisdiction prongs.

The SBC also has broad supplemental jurisdiction over "related" claims that might not otherwise fall within the express scope of the court's subject matter jurisdiction. *Id.*

Appeals are made to the Court of Appeals, unless otherwise taken by the Supreme Court.

HOW CAN I HAVE MY CASE HEARD IN THE SBC?

There are three ways into the SBC: direct filing, transfer from state or superior court, or agreement (e.g., contractual forum-selection clauses designating the SBC). The SBC requires a $3,000 filing fee be paid by the filing party or parties (or an equal allotment where the matter is transferred by joint consent). The filing fee, coupled with the court's categories of subject matter jurisdiction, are intended to reserve its capacity for true complex litigation matters. E-filing is available through PeachCourt, and existing PeachCourt accounts work in the SBC.

There is an important nuance in BCR vernacular to be aware of with regard to distinction between "transfer" and "removal."

- Transfer (unilateral and initiated by a defendant): A defendant may petition to transfer a case into the SBC within 60 days after service on all defendants of a lawsuit. – BCR 2-4(a).

  If the basis for transfer is not apparent until after the initial complaint is filed, a defendant may transfer within 60 days after receipt of a "copy of an amended pleading, motion, order, or other document from which the party petitioning to transfer may first ascertain that the action is transferable." - BCR 2-4(f). This is similar to the familiar rule for federal removal.

  The petition to transfer should contain "a short and plain statement of the grounds for the transfer, together with a copy of all process, pleadings, and orders served upon each party." See BCR 2-4(f). A party opposing transfer must file an objection to jurisdiction within 30 days of the filing of the petition to transfer. *Id.*

- Removal (mutual consent): If the parties agree that a case originally filed in superior or state court may be heard in the SBC (where SMJ is present), the parties may file a "petition for removal" within

60 days of the action being filed. – BCR 2-4(a); O.C.G.A. § 15-5A-4(a)(2).

A petition for removal must contain "a short and plain statement of the grounds for removal and all parties' agreement to remove the action, together with a copy of all process, pleadings, and orders served upon each party." – BCR 2-4(e).

Parties file a notice of transfer or removal with the clerk of superior/state court. – BCR 2-4(j).

WHAT IF ONE PARTY DOES NOT CONSENT TO HAVING ITS CASE HEARD IN THE SBC?

A unique feature of the SBC, which resulted from legislative compromise while its enabling legislation was being debated, is that proceeding before the SBC requires joint consent of the parties. O.C.G.A. § 15-5A-4(a)(1).

A defendant has 30 days to object by filing an objection to jurisdiction with a proposed order transferring the case to a venue-appropriate court, which must be granted. – BCR 2-4(b). A possible exception exists if the parties jointly selected the SBC through a contractual forum-selection clause (although in these cases, joint consent is present in the contractual designation).

This feature has been the subject of much controversy, and Judge Davis has publicly called on the General Assembly to modify the SBC's enabling legislation to eschew the joint consent requirement, reasoning that numerous cases otherwise appropriate for resolution in the SBC never have the opportunity to benefit from the court's specialization.

A recent report on the SBC's first full year of operations revealed that 17 of 43 (approximately 40 percent) of directly filed cases in the SBC between Aug. 1, 2020, and Aug. 1, 2021, were met with transfer petitions that automatically removed them from the SBC's docket.

A similar consent rule was removed from the legislation authorizing creation of the Metro Atlanta Business Case Division of Fulton County Superior Court when that court experienced difficulty building a full case load. Holland & Knight continues to closely monitor the status of SBC procedures and enabling legislation, which may similarly eschew the joint consent requirement for the SBC.

HOW DOES PRACTICE IN THE SBC DIFFER FROM GEORGIA'S OTHER STATE COURTS?

The SBC is intended to have streamlined operations oriented around the needs of sophisticated business litigants.

- The SBC's focus is on efficiency and swift resolution of disputes (e.g., the 90-day order policy).
- Judge Davis will hold regularly scheduled status conferences, likely including a monthly date for the parties to come in and discuss issues in the litigation, with a focus on resolving logjams ahead of these conferences.
- The SBC is focused on maximizing the use of technology and will prioritize being available to the parties for swift action as needed.
- The SBC's enabling legislation presumes that trials held in the court will be bench trials; however, the legislation has not disturbed each party's rights to request a jury.

- The Rules Committee has been informed by best practices of the Delaware Chancery Court, Federal Rules of Civil Procedure and Metro Atlanta Business Court.

- The SBC will regularly report its decisions and opinions to Westlaw and LexisNexis in an effort to promote predictability in matters of Georgia business law and to develop a body of law for Georgia's courts of review to work with on appeal.

HOW WILL THE SBC BE STAFFED?

For its first few years, the SBC will operate with a single judge, who is appointed by the governor and confirmed by the Georgia House and Senate. Judge Davis is a former business litigator who practiced with a prominent international law firm and has experience in securities litigation, shareholder disputes and corporate governance matters. Judge Davis was appointed by Gov. Brian Kemp on July 15, 2019, and confirmed to a five-year term.

SBC judges will employ two term law clerks and one staff attorney. The SBC clerk of court is subject to the same appointment and confirmation process as the court's judges.

SUMMARY

Holland & Knight continues to monitor and will provide updates regarding the SBC as the court continues to flesh out its docket and begins to report decisions. Our Atlanta attorneys are fully prepared to assist business clients in evaluating whether filing in or transferring to the SBC is a suitable approach for particular Georgia complex business disputes.

For more information on a specific situation involving your organization, contact author Patrick Reagin or another member of Holland & Knight's Atlanta litigation team, which has deep experience counseling clients in high-stakes commercial litigation across the state and country.

佐治亚州商业法庭简介

原文作者：**Patrick Reagin**

佐治亚州全州商业法庭（SBC）于 2020 年 8 月 1 日开始运作。Holland & Knight 一直在密切关注与此一新法院相关的发展，该法院的目的是在为复杂的商业案件提供一个高效和专业的争议解决机构，在某些方面类似于特拉华州的复杂商业诉讼部门（CCLD）。本文向可能有兴趣在 SBC 中提起佐治亚州商业纠纷诉讼的各方和执业人员重点介绍了关键要点和潜在问题。

其他一些州的商业法院，包括特拉华州的 CCLD，被视为州高等法院系统的一部分，但佐治亚州的 SBC 构成了一个新的法院组成类别。因此，它并没有取代地方司法机构建立自己的商业法庭部门的能力。例如，富尔顿郡高等法院继续运行亚特兰大都会区商业案件部门。在州高等法院系统中有未决诉讼的当事人仍然保有将这些事项提交给这些法院的特定业务部门的能力。以下为在 SBC 执业的相关关键要点。简言之，法院拥有审理高额商业纠纷的广泛的对事管辖权，并将通过利用技术和 “实际操作”的方式向各方当事人和律师提供其法官来优先有效和快速地处理复杂事项。

SBC 什么时候开始运作的？

SBC 于 2020 年 8 月 1 日开始受理案件，并于 2021 年 5 月 11 日举行了首次当面听证会。其业务规则《商业法庭规则》（BCR）于 2021 年 8 月 1 日生效，可在 SBC 网站上查阅。

SBC 位于哪里？

SBC 正式设在亚特兰大的 Nathan Deal 司法中心，该中心还设有佐治亚州最高法院和佐治亚州上诉法院。不过，终审法院第一任主审法官沃尔特 • W • 戴维斯法官将在全州各地巡回审理案件。

SBC 事项的所有审前程序的法庭地点将维持在案件最初提交或撤销的法庭，或者根据佐治亚州的标准法庭地规定在原来可以提交的法庭，而 SBC 的授权立法并未对这些法庭地造成影响。如果一方直接向 SBC 提起一个诉讼，且不止一个法庭地是合适的，则该方将被要求在提交时指定其首选的法庭地。戴维斯法官已公开强调，SBC 目的是真正在全州范围内运作，而不是实体上限制于亚特兰大都会区。

SBC 可以审理哪些类型的案件？

SBC 的授权立法编入《加具附注的佐治亚州正式法律》（O.C.G.A. ）的§15-5A-1 节及其后各节。该立法仿效特拉华州衡平法院和其他州商业法院，着眼于效率和回应速度（例如，在动议提出后 90 天内发布动议决定的政策）。SBC 对 17 类商业纠纷拥有广泛的对事管辖权，包括根据《统一商法典》、《佐治亚州商业公司法典》、《统一合伙法》和《统一有限责任公司法》产生的纠纷，只要满足以下争议金额要求：

- 不动产纠纷，100 万美元
- 所有其他纠纷，50 万美元

O.C.G.A. 第§ 15-5A-3 节。

SBC 对涉及人身伤害、人身伤害威胁、精神伤害、家庭关系、家庭耕作、住宅业主和承租人纠纷、止赎或个人（相对于潜在的集体或集体诉讼）消费者索赔的案件没有管辖权。*同上。*

重要的是，SBC 在其拥有对事管辖权的所有事项上与州高级法院共享衡平法管辖权。此类索赔没有争议金额要求。*同上。*

> 示例：寻求临时限制令以强制执行竞业禁止协议的一方，只要案件与对事管辖权的任一相关，则无需显示高于上述任一最低金额要求的可能损害。

SBC 还对“相关”索赔拥有广泛的补充管辖权，这些索赔可能没有规定在法院对事管辖权的明确范围内。*同上。*

除非最高法院另有决定，否则向上诉法院提出上诉。

我怎样才能让我的案件在 SBC 中被审理？

到 SBC 解决纠纷有三种方式：即直接提交、从州或上级法院移转或协议提交（例如，于合同纠纷选择条款中指定选择 SBC）。SBC 要求提交方支付 3，000 美元的申请费（或在共同同意移转的情况下由各方支付同等分摊金额）。申请费的收取及法院关于对事管辖权的类别规定的目的是在保留其能力以处理真正复杂诉讼事项。可通过 Peach Court 进行电子归档，现有 Peach Court 账户可使用于 SBC。

《商业法庭规则》中关于“移转”和“移送”的用词有一个重要的细微差别需要注意 。

- 移转（单方移转，由被告发起）：被告可在向所有诉讼被告送达后 60 天内申请将案件移转到 SBC。《商业法庭规则》第 2-4（a）条。

  如果移转的依据在首次申诉提交后才明确，被告可在收到“请求移转的一方可首先从该副本中确定诉讼可移转的经修订的诉状、动议、命令或其他文件的副本后”60 天内进行移转。《商业法庭规则》第 BCR 2-4（f）条。这类似于熟悉的联邦移送规则。

  移转申请书应包含“一份简短明了的移转理由陈述，以及向各方送达的所有诉讼程序、诉状和命令的副本。”见 《商业法庭规则》第 2-4（f）条。反对移转的一方必须在提交转移申请后的 30 天内提交管辖权异议。*同上。*

- 移送（双方同意）：如果双方同意最初在上级法院或州法院提起的案件可以在 SBC（如有对事管辖权的话）进行审理，双方可以在提起诉讼的 60 天内提出“移送申请”。《商业法庭规则》第 2-4（a）条；O.C.G.A.§15-5A-4（A）（2）。

  移送申请必须包含“一份简短明了的移送理由声明和各方同意移送的协议，以及送达各方的所有诉讼程序、诉状和命令的副本。” 《商业法庭规则》第 2-4（e）条。

  双方向上级/州法院的书记官提交移转或移送通知。《商业法庭规则》第 BCR 2-4（j）条。

如果一方不同意在 SBC 中审理其案件，该怎么办？

SBC 的一个独特特征是，在 SBC 授权立法正在辩论期间，立法妥协导致 SBC 的程序需要各方的共同同意。O.C.G.A.§15-5A-4（A）（1）。

被告有 30 天的时间提出管辖权异议，并提出将案件移转至适当地点法院的拟议命令，该命令必须被批准。《商业法庭规则》第　BCR 2-4（b）条。如果双方通过合同争议解决地选择条款共同选择 SBC（尽管在这些情况下，合同指定中存在共同同意），则可能存在例外情况。

这一特点引起了许多争议，戴维斯法官公开呼吁州议会修改 SBC 的授权立法，以避免共同同意要求，理由是许多本来适合在 SBC 解决的案件从来没有机会受益于此专业化的法院。

最近一份关于 SBC 第一个全年运作的报告显示，在 2020 年 8 月 1 日至 2021 年 8 月 1 日期间，直接向 SBC 提交的 43 个案件中，有 17 个（约 40%）遇到了移转申请并自动从 SBC 的案卷中移除。

当富尔顿县高等法院难以处理全满的案件量时，类似的同意规则被从授权设立富尔顿县高等法院亚特兰大市商业案件分庭的立法中删除。Holland & Knight 将继续密切观察 SBC 程序和授权立法的状态，这可能同样删除 SBC 的共同同意要求。

SBC 的做法与佐治亚其他州法院有何不同？

SBC 的目的是为高端的商业诉讼人士的需要提供一流畅的争议处理平台。

- SBC 的重点是效率和快速解决争议（例如，90 天做出命令的政策）。
- 戴维斯法官将定期召开情况会议，可能包括双方每月一次的会面日期，讨论诉讼中的问题，并重点在这些会议之前解决僵局。
- SBC 专注于最大限度地利用技术，并将优先考虑各方可根据需要采取的快速行动。
- SBC 的授权立法假定在法院进行的审判将是法官审判；然而，这项立法并没有影响各方要求陪审团的权利。
- SBC 的规则委员会已了解特拉华衡平法院、联邦民事诉讼规则和亚特兰大市商业法院的最佳做法。
- SBC 将定期向 Westlaw 和 LexisNexis 报告其裁决和意见，以促进佐治亚州商业法事项的可预测性，并制定一套法律系统，以便上诉时佐治亚州的审查法院可以参考使用。

SBC 将如何配备人员？

在成立的最初几年里，SBC 将由一名法官负责运作，该法官由州长任命，并由佐治亚州众议院和参议院确认。戴维斯法官曾担任商业诉讼律师，在一家著名的国际律师事务所工作，在证券诉讼、股东纠纷和公司治理事务方面具有丰富经验。戴维斯法官于 2019 年 7 月 15 日由州长布赖恩 • 肯普任命，任期五年。

SBC 法官将雇佣两名固定任期的法律书记员和一名律师。SBC 法院书记员的任命和确认程序与法院法官相同。

总结

Holland & Knight 将继续关注 SBC 的发展，并在法庭继续充实其案卷并开始报告判决时提供有关 SBC 的最新信息。我们的亚特兰大律师已做好充分准备，协助商业客户评估是否合适向 SBC 提出或移转特定的佐治亚州复杂商业纠纷。

有关与贵司相关的具体情况的更多信息，请联系作者 Patrick Reagin 或 Holland & Knight 亚特兰大诉讼团队的其他成员，该团队在为各州和全国的高风险商业诉讼客户提供咨询方面具有丰富的经验。

About This Newsletter
有关本期刊

Information contained in this newsletter is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel. Holland & Knight lawyers are available to make presentations on a wide variety of China-related issues.

本期刊所刊载的信息仅供我们的读者为一般教育及学习目的使用。本期刊并不是为作为解决某一法律问题的唯一信息来源的目的所设计，也不应被如此使用。此外，每一法律管辖区域的法律各有不同且随时在改变。如您有关于某一特别事实情况的具体法律问题，我们建议您向合适的律师咨询。美国霍兰德奈特律师事务所的律师能够对许多与中国相关的问题提出他们的看法及建议。

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Stacie L. Chau focuses her practice on complex trusts and estates litigation and administration. She aims to provide the most efficient resolution to disputes, always keeping in mind the best interests of her clients and the complex issues and emotions that probate litigations often involve. Whether through mediation, alternative dispute resolutions or trial, she is with her clients every step of the way to navigate through the dispute and achieve successful results.

Wifredo A. Ferrer is the chair of Holland & Knight's Global Compliance and Investigations Team. He focuses his practice primarily on internal corporate investigations, corporate compliance and training, and white collar criminal defense. He counsels and defends corporations and individuals in a wide range of criminal and regulatory matters, including allegations involving bribery and the Foreign Corrupt Practices Act (FCPA), complex fraud, financial improprieties, securities law violations, healthcare fraud, false claims, cybercrime and government contract fraud.

Michael E. Hantman focuses principally on white collar criminal defense, internal corporate investigations, compliance counseling and complex business litigation. He assists companies and individuals to investigate, respond to and defend against government scrutiny, whistleblower complaints and enforcement actions involving allegations of bribery, fraud, accounting misrepresentations, kickbacks, money laundering and other ethical lapses. He regularly helps companies design, implement and enforce comprehensive compliance and training programs throughout the enterprise to reduce their potential legal exposure.

Eddie A. Jauregui focuses on internal corporate investigations, corporate compliance and training, False Claims Act matters, white collar criminal defense and complex business disputes. His clients include senior corporate officers and directors, financial institutions, product manufacturers, energy companies, entertainment companies, real estate developers and other corporate entities. He previously served as an Assistant U.S. Attorney in the Los Angeles U.S. Attorney's Office, where he prosecuted high-profile fraud and public corruption cases.

Patrick Reagin focuses on complex business and commercial disputes. He has extensive experience supervising the day-to-day aspects of multibillion-dollar cases and is a go-to lawyer in the firm for high-profile and significant exposure matters. He has handled numerous disputes on behalf of companies, their officers and directors in connection with business tort, fraud, contract, fiduciary duty, restrictive covenant, trade secret, unfair competition, Lanham Act, antitrust and civil Racketeer Influenced and Corrupt Organizations (RICO) claims in courts around the country and in international arbitrations.

Charles A. Weiss concentrates his practice on technology-driven litigation and transactions, primarily in pharmaceutical, biotechnology and adjacent fields. He also counsels clients on questions of patent validity and infringement, provides a litigator's perspective on prosecution matters, and assists with regulatory and compliance matters. He litigates patent, trade secret, license and false advertising cases in diverse technical areas. He has handled cases over the years involving expression of recombinant proteins and antibodies, controlled release pharmaceuticals, medical diagnostic agents, endocrine and hormone products, nutritional supplements, industrial control systems, food chemistry, nucleic acid diagnostic assays and commercial detergents. He also has extensive experience in the investigation of product counterfeiting and pursuit of those responsible.

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