November 2017

quinn emanuel

quinn emanuel urquhart & sullivan, llp | business litigation report

los angeles | new york | san francisco | silicon valley | chicago | washington, d.c. | houston | seattle | tokyo | london
mannheim | hamburg | munich | paris | hong kong | sydney | brussels | zurich | shanghai | perth | stuttgart

The Un-Crisis Crisis Law and Strategy Group

No Two Situations Are Alike—That's the Challenge

"How fast can you get to…"

"Let's see. I just got back from London. We'll be there tomorrow."

As our founder John Quinn says, "We pack our bags and we go." Quinn Emanuel always works as a team. You are our clients, not one particular partner's—everyone and anyone, from John Quinn on, will jump in as needed to offer advice or deliver a message.

But there are certain first principles that experience teaches.

Keep It as Small as You Can

The first goal in a crisis is to contain it—ideally, to prevent it altogether. You know your product may have a defect. Call us. You think the Government may be investigating you. Don't wait. Your competitors are on the firing line. Who is next? A crisis is a lot like pain: if it gets too far ahead of you, it's hard to catch up. Do a risk assessment. We'll do it with you. In this climate, always assume someone is looking. Why do CEOs come and go so fast? Or perhaps, why don't they go even faster, considering the enormous pressures? Even if you face litigation—

(continued on page 2)

INSIDE

Quinn Emanuel Launches Crisis Law and Strategy Group

After securing its place as the largest and fiercest trial firm in the world, Quinn Emanuel Urquhart & Sullivan has set its sights on conquering another challenge: becoming the first choice of companies facing major challenges, even before the litigation starts. Leveraging a broad spectrum of public and private sector experience in the United States and abroad, Quinn Emanuel's newly formed Crisis Law & Strategy Practice Group will advise clients on all facets of crisis management, as well as develop effective communications and provide counsel on pressing longer-term strategic legal and policy issues. The new group is co-chaired by firm founder and Managing Partner John Quinn, communications and legal strategist Susan Estrich in Los Angeles, and former Special Counsel to the President Bill Burck in Washington, D.C. In addition to Quinn, Estrich, and Burck, the group is comprised of leading specialists from around the world who possess a wealth of senior experience in the public and private sectors, including "bet-the-company" litigation; government investigations; privacy and data issues; whistleblower incidents; and communications and strategic advice on high-profile legal and policy issues. Q

Quinn Emanuel Hires Litigation and White Collar Team in Paris

Kami Haeri has joined the firm as a partner based in the firm's Paris office. He will chair the Commercial Litigation and White Collar practices of the firm's Paris office. Kami was previously a partner at August Debouzy, where he chaired that firm's Litigation, Arbitration, and White Collar groups. In the last 20 years, he has represented a broad array of clients in industries such as aeronautics, defense and space, tobacco, chemicals, information technology communications, and entertainment. Kami is recognized as an expert in international regulatory compliance and has worked extensively on domestic and international investigations. Many of his investigations have concerned multiple regulators from different countries, as well as the review and implementation of compliance programs.

Also joining the firm's Paris office as counsels will be Benoit Javaux and Valérie Munoz-Pons, along with two associates, Helen J. Adler and Noémie Coutrot-Cieslinski. Q

or especially when you face litigation—our goal is to limit its scope and nature, cabin the consequences and potential damages to make sure that nothing you do now contributes to punitive damages later. Whatever is coming, let us address it.

Get the Facts

Not every crisis is real. Rumors are regularly reported as news. The first step in a potential crisis is to collect as many facts as you can as fast as you can. Given the speed with which news—good and bad, true and not-so-true, unfortunately—spreads, you can't afford to be silent for very long. It often takes time to collect all the facts, and you need a message before you can conduct a full investigation. Often the message is just that: "No one is more troubled by what we are hearing than the hardworking men and women of this company, from the CEO to the temporary employee. We will get to the bottom of this. If there is wrongdoing, we will find it. If there are amends that must be made, we will make them…"

Remember Your Audiences

Not just the reporters who call you, but all the people who need to hear it from the company or its lawyer first—directors, customers, suppliers, bankers. No news during a crisis is bad news, so we're ready to reach out on a variety of fronts—bloggers, opinion leaders, the academics who are going to tell the reporters that you're right. We work with senior government officials in the United States and around the world. We cover both sides of the aisle in Washington with relationships extending back decades based on friendship and mutual respect. We don't wander the halls of Capitol Hill with a different issue every day. We represent you. We resolve your dispute.

Counter Lies

If you're being smeared, have your lawyer say it and have others back it up. Silence is not golden. An unanswered charge is assumed to be true. Having no comment may make it true. Being unavailable for comment means you are intentionally avoiding the reporters, which is almost always a bad and utterly ridiculous idea if what they are reporting is not true. If you can't deny each specific allegation, then deny the conclusion. "That is not the man I know." The days when lawyers could avoid speaking to anyone but the judge and jury are gone, at least in big cases.

Define Your Message

Every dispute has a story to be told—to the press, to the opinion makers, to the prosecutors, to the court and to the jury. The story has to be told in the right way at the right time. We have built our reputation as a firm that is willing to be aggressive when needed, willing to put ourselves on the line when needed, willing to stand by you when others are heading for the hills. We have longstanding contacts in the major news and social media organizations. We know who to call and what to say. We know the importance of being credible.

Accepting Responsibility Is Not the Same as Accepting Liability

When you're in charge and something goes wrong, you're either part of the problem or part of the solution. We've heard many executives say, "But it wasn't my fault. Someone should have told me." This is all very important for the court case, in which duties and responsibilities will be individually defined, but not when you've got a frightened public or an angry Senator. Crises demand leadership. Sometimes, there are things you can't admit, and we all have examples. But the best approach to the problem is not always going to be the one we should take in court. Don't lowball damages—going up every day is worse than saying, "We don't know the number, but we do know this—we will fix the problem." Bring in the best technicians in the world, compensate the injured, rebuild what was destroyed. These are not legally binding commitments that you are liable for x dollars in damages. Showing compassion and leadership, getting to the bottom of matters, and committing to solve a problem—whoever created it—turns down the heat. Do the opposite of what is being done to turn the heat up. The rivers are full of snakes.

Don't Be Defensive

That may be the table we will be sitting at, but being defensive will make you sound guilty. The best companies—with the best workers and the best technology—are still run by humans, who are capable of errors and vulnerable to the acts of hoodlums, disasters of mother nature, and risks of the real world. Every company and every CEO has problems. If you've got critical directors on your board, they generally don't go away by ignoring them, and the same goes for angry customers and bottom-feeding lawyers. Define the problem. Outline your strategy. Be as transparent as you can be. Get as much news out (especially bad news) on the same day as you can. Remember, the public has the attention span of a gnat, and today's paper still does wrap some of tomorrow's fish. Having a strategy, hanging in, hanging tough, doing your politics, eating humble pie when needed

followed by dessert—all of this will make a better meal. And nine times out of ten, the cover-up—if you go that way—will cause you more problems than whatever you're trying to hide.

Finally, remember, Congress (and similar bodies) are courts of public opinion, not courts of law.

Be Proactive and Think Long-Term

As author Steven Covey says, "begin with the end in mind." That means figuring out the end-game from the very beginning: what your goals and objectives are, who your audience is, what benchmarks will help define success and provide opportunities for expansion, and where the obstacles and landmines are buried that must be avoided or overcome. As your strategic and communications advisers, we will help augment your strengths and identify and help sure up any potential legal risks and liabilities. We will anticipate issues, conduct internal reviews, and work with you to develop effective strategies to tackle some of your most perplexing and elusive challenges. Our goal is not only to get you out ahead of the curve, but to *be* the curve—the standard by which all your peers will be judged.

NOTED WITH INTEREST

Seven Supreme Court Cases to Watch This Term

Justice Neil Gorsuch began his first full Term on the Supreme Court this October, with court-watchers eagerly anticipating which cases the Supreme Court will take and waiting to see how Justice Gorsuch will affect the judicial balance. Of the 48 cases currently pending on the docket, we have identified the following seven as being of particular importance to the nation and its businesses.

Oil States Energy Services, LLC v. Greene's Energy Group, LLC *(No. 16-712)*

At issue in *Oil States Energy Services* is the constitutionality of the United States Patent and Trademark Office's inter-partes review process, which was created by the 2011 America Invents Act. Back in 2012, Oil States asserted infringement against Greene's Energy Group related to a patent for an oilfield pumping tool. Greene's responded by petitioning the USPTO for an inter-partes review proceeding. Ultimately, the USPTO invalidated the patent. Oil States appealed, arguing that invalidation by a government agency violates its constitutional Article III and Seventh Amendment right to a jury trial. The Federal Circuit rejected that argument without a written opinion. Previously, in *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), *cert. denied,* 137 S. Ct. 292 (2016), the Federal Circuit had addressed the same question and held that IPR proceedings do not violate the Constitution. How the Supreme Court resolves the case is likely to turn on whether patent grants are viewed as private or public property rights—and accordingly, whether or not a Seventh Amendment right to an Article III jury trial attaches.

Jesner v. Arab Bank, PLC *(No. 16-499)*

Jesner concerns the same statute that was at issue in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), in which Quinn Emanuel's own Kathleen Sullivan achieved a 9–0 victory. As framed then by the Supreme Court, *Kiobel* concerned whether liability under the Alien Tort Statute could apply extraterritorially (and found it could not). *Jesner* seeks a ruling on the original question presented in *Kiobel*, before the Supreme Court reframed the question for reargument. Namely, does the Alien Tort Statute completely foreclose corporate liability? The specific dispute has been brought by victims of Israeli terror attacks, who contend that Jordan's Arab Bank provided assistance to terrorism. These victims seek to use the Alien Tort Statute to hold the bank accountable for these alleged human rights abuses. The appeal arises from a sharply divided Second Circuit panel. The Second Circuit's holding—that no corporate liability can exist under the Alien Tort Statute—is at odds with the majority of circuits, which have permitted corporate liability. The Supreme Court's decision will have far-reaching implications for human rights lawyers, corporate defendants, and the future of Alien Tort Statute litigation.

National Labor Relations Board v. Murphy Oil USA, *(No. 16-307) (consolidated with two other cases)*

Murphy Oil deals with the intersection of two longstanding federal laws. On one hand, the

National Labor Relations Act protects employees who unionize or otherwise engage in concerted activities to negotiate with management. On the other, the Federal Arbitration Act rigorously enforces contractual agreements to arbitrate disputes. At the intersection of the two statutes is the question presented: Can an employment agreement contain an arbitration clause which forbids employees from collectively asserting labor disputes? The employees argue that arbitration agreements are just contracts, and contracts barring employees from pursuing joint action have long been held invalid. The employers, by contrast, rely heavily on the FAA's provision that arbitration agreements are "unequivocal" and "must be enforced" absent a contrary statute, and where the NLRA does not expressly provide that its provisions override arbitration agreements, the arbitration agreements must be enforced. Adding interest, the U.S. solicitor general's office has switched sides in this dispute—under the Obama Administration, the office petitioned for certiorari on behalf of the NLRB, and under the Trump Administration it now argues in support of the employers. Oral arguments were held on the first day of the new Term, October 2, and revealed a Court sharply divided between the two statutes. The addition of Justice Gorsuch to the Court may tip the result to a narrow victory in favor of arbitration.

Janus v. American Federation of State, County, and Municipal Employees, Council 31 ***(No. 16-1466)***
Decades ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that public sector employees could be required to pay public union fees (known as an "agency shop" arrangement), just as federal law permitted private unions to require private sector employees to pay union fees. The point of the fees is to recover the costs of "collective bargaining, contract administration, and grievance adjustment purposes." In recent years, *Abood*'s holding has been under attack by employees who wish to avoid the fees, and who view mandated support of public unions as compelled speech in violation of the First Amendment. Twice in the last five years, the Supreme Court has had an opportunity to overturn *Abood*, but has not done so. In the first instance, five conservative justices suggested that they would be willing to overturn *Abood*, but ultimately avoided the issue by concluding the home health aides who brought the suit were private, not public, employees. In the second instance, after oral argument, Justice Scalia passed away, with the decision later announced as a 4–4 deadlock. With Justice Gorsuch's appointment, there may now be the fifth vote to overturn *Abood*. The result would likely impact the financing and effectiveness of public sector unions.

United States v. Microsoft Corp. ***(No. 17-2)***
The internet operates on a worldwide scale—and the servers which house the internet's operation are scattered across the globe. For years, questions have been brewing about the extraterritorial enforcement of United States law as relates to global internet infrastructure. One area of dispute has been 18 U.S.C. § 2703, the provision of the 1986 Stored Communications Act, which requires the federal government to obtain a warrant before accessing certain stored electronic content. Here, the government sought information stored on Microsoft's servers in Ireland. The Southern District of New York permitted the warrant, but a panel of the Second Circuit reversed, holding that the SCA could not reach data stored abroad. The Government petitioned for *en banc* review, but an evenly divided Second Circuit declined to overturn the panel opinion. Resolution of this question is likely to have far-ranging effects on the application of United States law to the global internet.

Cyan, Inc. v. Beaver County Employees Retirement Fund ***(No. 15-1439)***
At issue in *Cyan* is the fundamental ability of state courts to hear certain types of securities class actions. Originally, the Securities Litigation Reform Act of 1933 Act provided for concurrent jurisdiction between state and federal courts. The Private Securities Litigation Reform Act provided for, among other things, heightened pleading standards for securities class actions filed in federal court. This led to an increase in securities class actions being filed in state courts. The Securities Litigation Uniform Standards Act, passed in 1998, is generally seen as a response to that trend. SLUSA provides that at least certain "covered class actions" can only be maintained in federal court. However, certain courts—particularly in the Ninth Circuit and even more particularly in California—have found that state courts nonetheless maintain subject matter jurisdiction over "covered class actions" as long as they do not involve "covered securities." In *Cyan*, a defendant corporation attempted to dismiss a securities class action, but the California state court denied the motion because the case did not involve

"covered securities." The Government has signaled its support for Cyan's position that *all* "covered class actions" belong exclusively in federal court; the Supreme Court's resolution will affect the balance between state and federal adjudication of securities class actions.

Trump v. International Refugee Assistance Project *(No. 16-1436)*

At the end of the last Term, the intense national debate over President Trump's "travel ban" cases had already found its way to the Supreme Court. Silicon Valley, Fortune 500 companies, and major universities banded together to file *amicus* briefs opposing the travel ban, citing their employment of and reliance on nationals from the affected Middle East countries. In a June stay order, the Supreme Court allowed limited parts of the ban to go into effect—namely, for foreign nationals who lacked a preexisting *bona fide* connection to the United States. The Court separately granted certiorari on multiple questions related to the President's executive power, the scope of the injunction, whether the injunction violated the Establishment Clause, and whether the temporary nature of the travel ban would render it moot by the time argument was heard. In late September, the Supreme Court took the scheduled October argument off-calendar and ordered supplemental briefing due to President Trump's signing of a new Executive Order, which constituted the third iteration of the travel ban. Following that briefing, the Supreme Court dismissed one of the two pending "travel ban" cases as moot, and it is expected the Court will dismiss the second as moot shortly. Litigation over the third instantiation of the travel ban has now commenced in district courts. Whether the Supreme Court will take up the question of its constitutionality at a later point in the Term remains to be seen.Q

PRACTICE AREA NOTES

Asia-Pacific Litigation Update

Safe Harbors in,* Ipso Facto *Clauses out: A (Long Overdue) Shake Up of Australian Insolvency Laws.

The federal government has this month passed a suite of insolvency reforms with the consequence of significantly elevating the levers available to companies in distress (or in administration), and redistributing control away from key creditors.

The Australian insolvency regime, as a consequence of the major banks that control most business and consumer lending, can be accurately labelled as a "creditor friendly" environment. It avails considerable powers on creditors and effectively disconnects a distressed company from its managers, its board and shareholders, quite distinct from the U.S. Chapter 7 and Chapter 11 regimes.

The current amendments that have now passed both houses of parliament (below) will have the effect of bridging part of the divide between individual creditor-interests and the company's survival in a pre-insolvency context, and maximizing a company's value or restructure prospects if it is ultimately moved into a formal insolvency/bankruptcy process.

There are two critical (and principal) changes to the Australian insolvency regime:

- **Invocation of a new "safe harbor rule".** In the Australian pre-insolvency landscape, where companies are facing financial distress, and wavering on insolvency, its directors (including, importantly, its non-executives who are typically disconnected from its day-to-day operations) can be held personally liable for the company's debts if the company is "insolvent" at the time of their incurrence, pursuant to Australia's insolvent trading laws: *Corporations Act* 2001, section 588G. The consequence of this is that in many cases, directors that are sitting on boards (and receiving modest director-fees) can be personally liable for vast debts incurred by the company they oversee during a period of financial distress. Unsurprisingly, under this regime, the scent of financial distress has been enough to cause them to "call in the administrators" – a step which has an immediate effect of diminishing the business' value. And while the personal liability 'stick' was intended to help preserve assets (for the benefit of all creditors), in practice it has the effect of discouraging boards from proactively pursuing informal turnarounds or restructures. The new safe harbor rules, which have now come into effect, will allow boards to invoke a turnaround

strategy immune from the risk of personal liability for possible insolvent trading, and that immunity will remain in place for as long as the turnaround strategy continues to be justifiably pursued.

- **Revocation of *ipso facto* contract termination rights**. The other major change to the insolvency laws concerns the operation of *ipso facto* clauses in contracts. Under the existing legal framework, contracting parties are able to (and nearly always do) incorporate termination or step-in rights upon the occurrence of an 'insolvency event'. Such rights create considerable uncertainty for businesses in an administration / bankruptcy process, as their previously valuable contracts or essential supply chains become immediately terminable by their counterparty as a consequence of that insolvency. The corollary of this (in an administration process designed to preserve value) is enormous value leakage, and the transfer of important leverage away from the company in distress, and in favour of its contracting counterparty (who then hold valuable termination rights). The new laws, which will come into effect in July 2018, will invalidate any *ipso facto* clauses from contracts; meaning the 'insolvency event', if it occurs, will not disrupt the business' status-quo or its favourable contracts (except as determined by the administrator him or herself). *Ipso facto* clauses have for years now consistently hampered, and caused harm to companies seeking to utilize administrations as a tool for essential formal restructuring – the current change should mark the death knell for such obstacles to corporate turnaround, and provide a much needed transfer of leverage to distressed companies. (In a last-minute arm-wrestle with industry – mostly with Australia's largest banks and corporates – the Australian Government agreed to amend the final bill to only apply to 'new' contracts entered into after its commencement, meaning there will remain a few additional innings in the existing regime before the curse of *ipso facto* clauses are finally at an end.)

In summary, the current changes will together encourage the proliferation of a proactive turnaround culture amongst Australian corporates, and remove some of the hurdles that historically benefited only a distressed company's secured creditors and financiers. Practically, the changes will lead to companies proactively engaging with restructuring lawyers and advisers at an earlier stage (with the benefit of 'safe harbor'), and in pursuit of their own turnaround before (or in lieu of) handing the company's keys to an external administrator or bankruptcy trustee.

Japan Enacts Changes to Protect Consumers. Changes to three different laws evince an effort by Japanese regulators to offer better protection to Japanese consumers.

First, changes to Japan's Consumer Contract Act were recently implemented to advance the interests of individual consumers involved in transactions with business operators. The changes came into effect on June 3, 2017.

Under the revised Consumer Contract Act, consumers can now more easily rescind agreements if they misunderstood certain conditions. The ability to rescind agreements is not without limit, however. The new balance struck by the law allows consumers to rescind agreements for goods and services where the contact involves "important matters," defined more broadly now to mean matters essentially concerning consumers' lives, bodies, or important assets. For example, consumers can now rescind an agreement to buy items like tires for their car if they made the agreement believing a false claim that the car was now dangerous to drive without them.

In addition, in light of the aging population and concern for excessive and unnecessary purchasing by a class perhaps more easily misled, the Act more regulates contracts involving excessive purchases.

In addition, under the revised Act, certain clauses will no longer be recognized. The Act permits nullifying any clauses, in part or in whole, that exempt business operators from liability for damages, that stipulate the amount of the damages paid by consumers, or that unfairly harm the interests of consumers, including clauses that would waive or limit a consumers' right to cancel where there are latent defects in the goods purchased.

Second, amendments to the Civil Code were enacted on May 26, 2017, and will take effect within three years. While the amendments covered a number of areas, including changes to the statute of limitations and revising statutory interest, certain changes here as well were directed toward better protecting Japanese consumers.

Japanese law currently has no general regulations governing "general terms and conditions," which are often found in one-sided transactions, such as when

purchases are made from internet sites, or when consumers buy insurance. Provided they did not violate other laws, business operators were free to include favorable terms even though it was understood that many people did not read the general terms and conditions when making purchases. The revisions will add a requirement that the consumer takes some steps to affirmatively agree to those terms, or that the business show that the terms were presented to the consumer in advance of the agreement. Moving forward, businesses can also only make unilateral changes to the terms of the purchase if the change benefits the consumer or is otherwise reasonable and not just for the business' benefit.

And third, amendments to the Financial Instruments and Exchange Act were made and will take effect by May 24, 2018. These revisions add a Fair Disclosure Rule and a registration requirement to better protect Japanese investors. The new registration requirement applies to high-frequency trading companies, which are currently not required to register. The amendments add reporting requirements for entities making frequent trades, as defined in the Act, so that the Financial Services Agency can ensure that they are properly managing their trading system, have appropriate asset balance, and report its strategy for high-frequency trades.

China's New Cybersecurity Law, Effective June 1, 2017. China's new Cybersecurity Law took effect on June 1, 2017, marking an important milestone in China's push to tighten control of domestic data. The Cybersecurity Law defines parameters protection for personal and sensitive data; it also imposes a series of requirements on operators of networks and China's "critical information infrastructure." However, because the new law provides only a framework of rules, actionable regulations and implementation plans are still under formulation.

The Cybersecurity Law imposes a strong set of obligations on network operators. It defines a "network operator" broadly as any "owner or administrator of network or a network service provider" and will likely encompass any entity with an intranet. The network operators, prior to collection of personal data, are required to disclose the method, purpose and scope of data collection, and also obtain consent from individuals involved. The operator may not share the data to third parties without the individuals' consent. A separate set of obligations applies to "important data"—defined broadly in proposed draft regulations as any data closely related to national security, economic development, and societal interest. For instance, in e-commerce, it would include accounts, transaction records, data regarding consumption habits, and credit information. According to the Cybersecurity Law, as a general rule, this data must be stored inside China. For both personal and "important data", the operator can only export the data out of China if it is for a "legitimate business purpose", and it must first perform a security assessment; and additionally, for personal data, it must inform the individuals and obtain prior consent.

For all types of data stored by a network operator, the operator is required to implement a series of standard protective measures, including: anti-virus protection, data encryption, anti-hacking safeguards, and self-reporting to authorities of any data theft or unlawful disclosures (and in the instance of personal data, notification to the affected individuals and efforts to cure).

Furthermore, the Cybersecurity Law has heightened requirements for "critical information infrastructure" ("CII"). The Law defines CII as any network or information system the destruction or disclosure of which may harm national security or the public interest. According to draft regulations, it would include networks managed by companies in financial, online services, cloud computing, big data, food and pharmaceuticals, and/or chemicals industries. Although authorities are preparing guidelines for what exactly qualifies, it is quite clear that the scope will be broad. The heightened duties CII operators bear include extra protective measures (e.g. employee training and security background checks on key personnel), security reviews before purchase of any online products the use of which may affect national security, and submission to spot-checks by authorities. For any security assessment before export of personal or important data, the CII operator must notify the assessment to authorities and obtain their approval before proceeding. Administrative penalties for violations involve fines of up to RMB 1 million, and in serious circumstances, the suspension or even termination of business licenses. The Cybersecurity Law also states that violations could constitute offenses under the Criminal Law.

The potential implications of the Cybersecurity Law for companies operating in China are profound. Any company with its own intranet will likely qualify as a "network operator," and many will also be CII operators based on their industry or business. For

those affected, resources needed to ensure compliance will likely be substantial. However, the degree to which the requirements pose new obstacles will largely depend on forthcoming regulations and the enforcement of such regulations.

Trial Practice Update

The Admissibility of Social Media Evidence. The rise of social media continues to have profound effects on litigation. Attorneys who embrace social media as part of an overall litigation strategy can reap substantial benefits. Today around seven-in-ten Americans use social media to stay in touch, engage with content, and share information. Social media can contain critical evidence, such as party admissions, inculpatory or exculpatory photos, and extensive communication records. While traditional evidentiary concepts still govern the admissibility of social media evidence, a proper understanding of the unique challenges associated with social media evidence will maximize its effectiveness.

Authentication is often the biggest obstacle to admitting social media evidence. In the age of aliases, phishing, and hackers, genuine concerns that such evidence is faked or forged has led to widely disparate decisions on authentication. In recent years, two main lines of cases have emerged. Courts in one line of cases advocate for stricter scrutiny of social media evidence, excluding such evidence absent substantial proof of authenticity. Courts in the other line of cases take a more traditional approach, admitting social media evidence so long as proof of authenticity suffices for a reasonable jury to find the evidence authentic.

The first line of cases is best exemplified by *Griffin v. State*, 419 Md. 343 (2011). There, the state sought to introduce a post from the MySpace profile of the defendant's girlfriend, stating, "snitches get stiches." Although the state showed that the profile displayed the girlfriend's photo, birthdate, and location, the state did not ask the girlfriend to authenticate the post or provide electronic evidence showing the girlfriend authored the post. The Maryland Court of Appeals held the post was not properly authenticated, explaining that the trial court "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the 'snitches get stitches' posting." *See id.* at 423. The Court said social media evidence may be authenticated by showing the purported creator made the post via (1) testimony from the purported creator, (2) evidence from the purported creator's internet history and hard drive, or (3) evidence directly from the social media platform. *Id.* at 427-28. Several courts have followed *Griffin*'s reasoning out of the concern that social media evidence could be a fake, a digital alteration of an alleged creator's profile, or a posting by another using the alleged creator's profile. *Smith v. State*, 136 So. 3d 424, 434 (Miss. 2014); *State v. Eleck*, 130 Conn. App. 632, 642 (2011); *see also Com. v. Williams*, 456 Mass. 857, 868 (2010); *People v. Beckley*, 185 Cal. App. 4th 509, 515 (2010).

The other line of cases is best represented by *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012). There, the state introduced the profiles of three MySpace accounts that implicated the defendant in a murder. The profiles displayed photographs and other personal information of the defendant, including his gender, birth year, and location. Several messages originating from the profiles also complained about wearing an electronic monitor, which the defendant also wore. The Court of Criminal Appeals of Texas held the trial court properly admitted the profiles over the defendant's authenticity objections. As the Court explained, the proponent only needs to make a preliminary showing to the trial court that "a jury could reasonably find [the] proffered evidence authentic." The Court added that the showing may be made directly or circumstantially, and that the circumstantial indicia here sufficed to satisfy that burden. Courts in many other states have followed *Tienda*'s rationale. *See, e.g.*, *State v. Burns*, 2015 WL 2105543, *12 (Tenn. Crim. App. May 05, 2015); *State v. Gibson*, 2015 WL 1962850, at *11 (Ohio Ct. App. May 1, 2015); *Com. v.* Foster, 20 N.E.3d 967, 971 (Mass. Ct. App. 2014); *State v. Snow*, 437 S.W.3d 396, 402-03 (Mo. Ct. App. 2014), *State v. Jones*, 318 P.3d 1020, at *6 (Kan. App. 2014) (Table); *Burgess v. State*, 742 S.E.2d 464, 467 (Ga. 2013); *State v. Assi*, 2012 WL 3580488, at *3 (Ariz. Ct. App. Aug. 21, 2012); *see also People v. Valdez*, 201 Cal. App. 4th 1429, 1435-36 (2011); *People v. Clevenstine*, 891 N.Y.S.2d 511, 514 (2009).

Other common evidentiary hurdles to admissibility, such as relevance, hearsay, and the best evidence rule do not raise major issues unique to social media evidence. An opposing party's social media accounts can be a resource for evidence related to damages and other key issues, but courts may exclude some social media evidence to the extent it is unduly prejudicial, irrelevant, or cumulative. *See, e.g.*, *People v. Nunn*, No. 3-14-0137, 2016 WL 2866361, at *8 (Ill. Ct. App. May 16, 2016) (defendant's Facebook message

relevant to show intent and impeach witness); *Nucci v. Target Corp.*, 162 So. 3d 146, 152 (Fla. Dist. Ct. App. 2015) (plaintiff's pre-accident Facebook photos "powerfully relevant" to personal injury damages); *Quagliarello v. Dewees*, 2011 WL 3438090, at *3–4 (E.D. Pa. Aug. 4, 2011) (plaintiff's MySpace photos partying relevant to emotional distress damages); *Sedie v. United States*, 2010 WL 1644252, at *23 (N.D. Cal. Apr. 21, 2010) (plaintiff's MySpace profile relevant to rebutting his claim his life is "hell on earth"). *But see Engman v. City of Ontario*, 2011 WL 2463178, at *11 (C.D. Cal. June 20, 2011) (plaintiff's MySpace profile about alcohol irrelevant).

Similarly, the hearsay rules applicable to other types of evidence apply just as readily to social media evidence. For example, an opposing party's statements in Facebook messages are not hearsay. *See* Fed. R. Evid. 801(d)(2); *U.S. v. Brinson*, 772 F.3d 1314, 1320 (10th Cir. 2014) (defendant's Facebook messages not hearsay); *People v. Oyerinde*, 2011 WL 5964613, at *10 (Mich. Ct. App. Nov. 29, 2011) (same); *cf. U.S. v. Encarnacion-Lafontaine*, 639 F. App'x 710, 713 (2d Cir. 2016) (Facebook threats not offered for truth). In the future, courts may address more novel hearsay issues, such as whether a party's "retweets" and "likes" constitute adoptive admissions, whether posts in "ALL CAPS" constitute excited utterances, or whether status updates are present sense impressions. Finally, although certain sophisticated software is available to obtain social media evidence, in many cases, the best evidence rule may be satisfied by taking a screenshot of the content, printing the content with the webpage and date in the header and footer, or obtaining a hard drive image. *See, e.g.*, Fed. R. Evid. 1002-1004. As social media continues to grow and become embedded in our daily lives, attorneys should continue to give careful thought and planning to the admissibility of social media evidence throughout all stages of litigation.

Trademark & Copyright Litigation Update

When Is a Copyright Owner Allowed to Sue? The Supreme Court May Decide. A recent decision by the U.S. Court of Appeals for the Eleventh Circuit, *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC*, 856 F.3d 1338 (11th Cir. 2017), has prompted a petition for certiorari to the U.S. Supreme Court, asking the Court to address a technical—but crucial—issue with respect to when a copyright action may properly be filed. Specifically, the Court has been asked to resolve a longstanding disagreement among courts of appeals as to whether a copyright owner may file a claim for infringement upon the mere filing of an application for a registration, or whether she must first wait until the Copyright Office actually issues the registration.

Before copyright owners may initiate a copyright claim in federal court, they must first "register their works." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010). To this end, section 411(a) of the Copyright Act provides, "no civil action for infringement of the copyright in any United States work shall be instituted until … registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). Courts of appeals, however, disagree whether the act of "registration" occurs when a copyright owner applies for a registration or when the Copyright Office actually issues the registration. The Tenth and Eleventh Circuits have adopted the "registration approach"—*i.e.*, "registration" occurs only after the Copyright Office has reviewed the owner's application and made a determination; the Fifth and Ninth Circuits, however have adopted the "application approach"—*i.e.*, "registration" occurs at the time the owner files an application for a registration. Which test a court applies has important repercussions for when a copyright owner may bring suit.

The Registration Approach. Under the registration approach, used by the Tenth and Eleventh Circuits, a copyright owner may sue for infringement only after the application for copyright has been approved and the registration has issued. *See, e.g., Fourth Estate*, 856 F.3d at 1341; *La Resolana Architects v. Clay Realtors*, 416 F.3d 1195, 1202 (10th Cir. 2005). Courts adopting this approach reason that the plain language of the Copyright Act, which requires that "registration … has been made," dictates this outcome. *See Fourth Estate*, 856 F.3d at 1341 ("[T]he text of the Copyright Act makes clear that the registration approach … is correct."); *La Resolana Architects*, 416 F.3d at 1202 ("Courts employing the Registration approach interpret the Act using the plain language of Title 17, as we have done."). As the Eleventh Circuit further explained, multiple sections of the Copyright Act together define "registration as a process that requires action by both the copyright owner and the Copyright Office," and other subsections of the Copyright Act confirm that "an application alone is insufficient for registration." *Fourth Estate*, 856 F.3d at 1341. While the Eleventh Circuit acknowledged

VICTORIES

Victory for State Farm in Labor Depreciation Class Action

"Labor depreciation" has become a *cause célèbre* in the insurance plaintiffs' bar. Across the country, lawyers representing classes of policyholders have filed suits challenging insurance providers' near-universal practice of calculating actual cash value ("ACV") of property to be replaced by factoring in all depreciation, including the cost of labor. This practice makes sense as a matter of basic economics, but courts around the country have reached differing conclusions on whether labor depreciation can be factored into ACV. *Compare, e.g.*, *Henn v. Am. Family Mut. Ins. Co.*, 894 N.W.2d 179, 189-91 (Neb. 2017) (holding that labor depreciation was permissible), and *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1021 (Okla. 2002) (same), *with Arnold v. State Farm Fire & Cas. Co.*, 2017 WL 3308990, at *11 (S.D. Ala. Aug. 3, 2017) (denying motion to dismiss after determining that policy did not unambiguously allow for labor depreciation), and *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675, 679 (Ark. 2013) ("We … simply cannot say that labor falls within that which can be depreciable.").

Quinn Emanuel recently achieved a significant victory in the developing law of labor depreciation on behalf of State Farm Fire & Casualty Company in *In re State Farm Fire & Cas. Co.*, --- F.3d ----, 2017 WL 4227475 (8th Cir. Sept. 25, 2017). State Farm had been sued by a policyholder in Missouri on behalf of a putative statewide class, who challenged State Farm's calculation of the ACV of her hail-damaged roof. During discovery, the master appointed by the district court ordered State Farm to respond to detailed interrogatories for tens of thousands of policyholders at an astronomical cost. Quinn Emanuel stepped in to prepare a mandamus petition to the Eighth Circuit for immediate relief. Although such petitions are rarely granted, Quinn Emanuel's briefing persuaded the court to hear the petition and – more importantly – stay the burdensome discovery. The Eighth Circuit also decided to hear State Farm's Rule 23(f) appeal of the district court's class certification order, which was also prepared by Quinn Emanuel's team of Sheila Birnbaum, Douglas Dunham, David Cooper, Guyon Knight, Ellen Quackenbos, and Bert Wolff.

After full briefing and argument, the Eighth Circuit reversed the class certification order, vacated the discovery orders, and dismissed the complaint itself – in the process, issuing the first published opinion by any U.S. Court of Appeals addressing labor depreciation. The Eighth Circuit examined State Farm's method of calculating ACV – which starts with the full replacement cost of damaged parts and subtracts depreciation (including of embedded labor costs) – and concluded that it was a reasonable business practice. In fact, by using the *replacement* cost as the starting point, State Farm's method is often better for the policyholder and results in quicker claim payments. And while the court held out the possibility that this method could result in errors for some individual policyholders, the unique nature of those instances precluded the certification of any class. Thus conclusion led the court to decertify the class, vacate the order directing State Farm to engage in "premature classwide discovery," and to dismiss the complaint as a whole – a perfect trifecta.

Appellate Victory for FHFA in the Second Circuit

The firm's historic partnership with the Federal Housing Finance Agency ("FHFA"), as Conservator for Fannie Mae and Freddie Mac, has resulted in yet another resounding win for the agency against financial institutions concerning their conduct in the run-up to the 2008 financial crisis. As previously mentioned in these pages, the firm filed fourteen complaints against major investment banks, asserting billions of dollars of damages for federal and state "strict liability" statutory claims, as well as common law fraud claims in certain cases. The complaints alleged that these financial institutions misrepresented the quality of the mortgage loans underlying the residential mortgage-backed securities that the banks sold Fannie Mae and Freddie Mac from 2005 to 2007.

All cases but one settled; the case against Nomura and RBS went to trial. Quinn Emanuel won a number of key pre-trial rulings for FHFA, including partial summary judgment rulings that FHFA did not have knowledge of the banks' falsity and that the banks did not exercise reasonable care. In May 2015, following a nearly four-week trial in the S.D.N.Y., the firm prevailed against both Nomura and RBS in full. The court awarded FHFA over $800 million.

On appeal, Defendants raised five separate challenges to the pretrial rulings and an additional five challenges to the trial rulings. In September 2017, the Second Circuit unanimously affirmed each one of those rulings in an exhaustive, 147-page opinion authored Judge Wesley and joined by Judges Livingston and Droney. The decision made important precedent out of litigation strategies pursued but not adjudicated by virtue of FHFA's settlements, and thus

helps set important standards for securities markets in the future, recognizing the Securities Act's imposition of "an affirmative duty on sellers to disclose all material information fully and fairly prior to public offerings of securities." For example, in a virtually unprecedented affirmance of a summary judgment ruling that the banks failed to exercise reasonable care, the court rejected the banks' attempt to hide behind industry standards, citing Judge Learned Hand's 1932 *T.J. Hooper* decision and stating, "The RMBS industry in the lead up to the financial crisis was a textbook example of a small set of market participants racing to the bottom to set the lowest possible standards for themselves." The court likewise rejected the banks' attempt to resuscitate their loss causation defense, holding that "[d]efendants may not hide behind a market downturn that is in part their own making simply because their conduct was a relatively small part of the problem." Recalling the origins of the 1933 Securities Act in the wake of the Great Depression, Judge Wesley's opinion emphasized the *caveat venditor* nature of that Act, and concluded that "defendants failed to discharge their duty under the Securities Act to disclose fully and fairly all of the information necessary for investors to make an informed decision whether to purchase the certificates at issue." The Court praised the district court's "exceptional effort in analyzing a huge and complex record and close attention to detailed legal theories ably assisted by counsel for all parties." The total recovery for the U.S. Treasury from settlements and judgments in these actions is now over $25 billion.

(Practice Area Updates continued from page 9)

that an owner who files an application late in the three-year statute of limitations period for copyright claims "risks losing the right to enforce his copyright in an infringement action because of the time needed to review an application," such a risk should encourage owners to register their copyrights promptly. *Id.* at 1342.

The Application Approach. In contrast, under the application approach, a copyright owner can sue for infringement any time after it has properly filed a valid application for a registration to the Copyright Office. *See, e.g., Cosmetic Ideas, Inc. v. IAC/InterActiveCorp*, 606 F.3d 612, 616-19 (9th Cir. 2010) (discussing and adopting the application approach); *Positive Black Talk Inc. v. Cash Money Records*, 394 F.3d 357, 365 (5th Cir. 2004) ("[T]he Fifth Circuit requires only that the Copyright Office actually receive the application, deposit, and fee before a plaintiff files an infringement action."). In the Ninth Circuit's view, for example, the statutory language of the Copyright Act is unclear with respect to the meaning of "registration": While some language in the Act suggests that registration requires some action on the part of the Copyright Office, other language suggests that a copyright owner's compliance with application formalities is alone sufficient. *Cosmetic Ideas*, 606 F.3d at 617. Finding that the statutory language does not compel the adoption one approach over the other, the Ninth Circuit looked to the "broader context of the statute as a whole," including that the 1976 Copyright Act intended to broaden the scope of works subject to copyright protection, while simultaneously creating incentives for copyright holders to register their works. *Id.* at 618-19. The application approach, the Ninth Circuit reasoned, better fulfilled these purposes because: (1) it allows a copyright owner to initiate suit right away rather than having to wait an indeterminate time for a decision by the Copyright Office; and (2) it avoids the risk of the copyright owner losing its ability to sue. *See id.* at 619-20. Because the statute of limitations for a federal copyright claim is only three years, an owner who wishes to bring suit toward the end of that period would lose the ability to initiate a claim if she had to wait for the Copyright Office to issue a registration; the application approach removes that risk. *Id.* at 620.

In *Fourth Estate*, the test applied proved outcome determinative—the plaintiff had filed an application for, but had not yet received, a registration, resulting in dismissal of its complaint. Should the Supreme Court grant the petition for certiorari and resolve when the act of "registration" occurs for the purpose of initiating a copyright action, it would bring much needed clarity to copyright plaintiffs and defendants alike, and eliminate the regional disparity resulting from the differing approaches.

quinn emanuel
865 South Figueroa Street, 10th Floor, Los Angeles, California 90017

business litigation report

quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

- We are a business litigation firm of more than 720 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of November 2017, we have tried over 2,645 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 $60 billion in judgments and settlements.
- We have won five 9-figure jury verdicts.
- We have also obtained thirty-four 9-figure settlements and fifteen 10-figure settlements.

LOS ANGELES
865 S. Figueroa St.,
10th Floor
Los Angeles, CA 90017
+1 213-443-3000

NEW YORK
51 Madison Ave.,
22nd Floor
New York, NY 10010
+1 212-849-7000

SAN FRANCISCO
50 California St.,
22nd Floor
San Francisco, CA 94111
+1 415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr.,
5th Floor
Redwood Shores, CA 94065
+1 650-801-5000

CHICAGO
191 North Wacker Dr.,
Suite 2700
Chicago, IL 60606
+1 312-705-7400

WASHINGTON, D.C.
777 6th Street NW,
11th Floor
Washington, DC 20001
+1 202-538-8000

HOUSTON
Pennzoil Place
711 Louisiana St.,
Suite 500
Houston, TX 77002
+1 713-221-7000

SEATTLE
600 University Street,
Suite 2800
Seattle, WA 98101
+1 206-905-7000

TOKYO
NBF Hibiya Bldg., 25F
1-1-7, Uchisaiwai-cho,
Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
90 High Holborn
London WC1V 6LJ
United Kingdom
+44 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 40 89728 7000

MUNICH
Hermann-Sack-Straße 3
80331 Munich
Germany
+49 89 20608 3000

PARIS
6 rue Lamennais
75008 Paris
France
+33 1 73 44 60 00

HONG KONG
1307-1308 Two Exchange Square
8 Connaught Place
Central Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth Street
Sydney, NSW 2000
Australia
+61 2 9146 3500

BRUSSELS
Blue Tower
Avenue Louise 326
5th floor
1050 Brussels
Belgium
+32 2 416 50 00

ZURICH
Dufourstrasse 29
8008 Zürich
Switzerland
+41 44 253 80 00

SHANGHAI
Level 20, The Center
989 Changle Rd
Shanghai 200031
+86 21 5117 5859

PERTH
Level 24, Suite 24.28
Allendale Square
77 St Georges Terrace
Perth, WA 6000
Australia

STUTTGART
Büchsenstraße 10, 4th Floor
70173 Stuttgart
Germany
+49 711 1856 9000

Prior results do not guarantee a similar outcome.