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This is a special article written by Susan Estrich, Co-Chair of the Crisis Law & Strategy Practice. Susan is a well-known litigator, legal and political analyst, author and law professor.

You Too? Could Be. What to Do.

Introduction: Modern Life

"I believe all men are guilty," Barry Diller recently told *New York Times* columnist Maureen Dowd. He went on to make clear: Not in what he, and everyone else, calls the Harvey Weinstein way, but at least of flirtation, maybe inappropriate comments, a hug or a hand, the kind of thing that we would not be talking about, except amongst ourselves, a year ago, and that is grounds for what Diller called "capital punishment" these day.

And so great is the stigma of such an execution that former Congressman and almost Senator Harold Ford, who was fired from his job at Morgan Stanley, was prepared to sue if the company did not make clear, as they did, that he was fired for all manner of incompetence, but *not* for sexual harassment. And thus he avoided, if not the death penalty, then certainly an indefinite period of virtually solitary confinement.

Whew.

Here's the problem: Diller may be right. He often was in his Hollywood days, where he ran most of the studios in town before creating his own empire with IAC. Not right in the sense that 100% of all men are vulnerable to following in the footsteps of (fill in the blank with the last person you couldn't believe got summarily thrown down the stairs), but right in the sense that virtually any company is ripe for the picking.

Some years ago, eight female scientists, faculty members with tenure at MIT, began discussing things like lab space and research support and teaching responsibilities and what committees they were on, etc. Though none of them were "feminists," it did seem that they had more in common than they should have, and what they had in common was often finding themselves getting less and doing more. So, and this is the public version, instead of screaming bloody murder right then, as some of us might do,

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INSIDE

QE Obtains Order Enjoining Huawei from Enforcing Injunctions Against Samsung In China

In *Huawei Technologies, Co., et al. v. Samsung Electronics Co., et al.*, Case No. 3:16-cv-02787 (N.D. Cal. Apr. 13, 2018), Judge William H. Orrick issued an antisuit injunction barring Huawei from enforcing two injunction orders issued by a Chinese court against our client Samsung. The Intermediate People's Court of Shenzhen had found Samsung infringed two Chinese patents that Huawei declared potentially essential ("SEPs") to the 4G LTE standard, and enjoined Samsung from manufacturing or selling its 4G LTE smartphones anywhere in China. Given that Huawei and Samsung had both asked the Northern District of California court to decide whether either party was entitled to injunctive relief on their 3G and 4G SEPs in light of their competing breach of FRAND contract claims, Judge Orrick concluded that the Shenzhen injunctions, if enforced, might render meaningless the proceedings before him, and pose a serious risk of harm to Samsung's Chinese operations.

Background

Samsung and Huawei both own global portfolios of 4G LTE SEPs and agree they are contractually bound to license each other under them on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions. In 2011, the parties began discussing a cross-license for their respective patent portfolios, but disagreed on the scope and potential terms for those

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they did what scientists do: they asked for a scientific study to be conducted of the Institute, using rigorous scientific standards, to determine if there were patterns of discrimination – or differentiation – that negatively impacted women. (The private story is that one or more of them threatened to sue the Institute. Take your pick, again.)

To the surprise of some but not of others, the study found a pattern of discrimination – in the stuff that matters in academia, like research support and lab space and administrative support and the like; not to mention promotion and tenure. But the critical point was that it wasn't just women with children, the motherhood issue, the familiar balance challenge, that defined women's place. Many of the women who were being shortchanged did not have children, or had raised them. These were senior as well as junior women; the pattern of discrimination was as systemic as it was unconscious; sadly, many of those who were the hardest on women were other women, in this case administrative support staff.

The study was replicated at a number of universities; where it wasn't done, it was rarely for lack of asking. And where it was done, the results were always the same as MIT. Smart university Presidents turned the mirror on themselves, not in the public way that MIT was forced to do, but internally, to assure that they would not be written about.

Sometimes I tell this story to show that eight women who didn't see themselves as activists, by insisting that their skills be applied to examine gender discrimination, forced much of academia to take a look at themselves. For most of my audiences, this is inspirational. On the other hand, it can also be terrifying. Eight women can do that. Actually, it only takes three to make a pretty effective stand, if you're counting.

But there are other lessons in the story, equally applicable today. First, when the bright light gets shined on you (by you I mean your company or your client) no one is going to come out scott-free. One is tempted to make a very tasteless joke about the institutions in our society about we all assumed had no such problem – and turned out to have a bigger one, far bigger, than MIT. Unless yours is a small company, preferably run by women, it isn't likely you'll be one of the few. Consider:

Has anyone in your company made inappropriate comments to young women, told them how nice they looked, asked them for a drink, even. Has anyone gotten sloppy at a party, or afterward, made advances, tried to kiss, laid a hand somewhere close, sent a stupid email, sent a stupid text, sent a stupid picture even?

Is there no one with power who has ever abused it, even a little, with a more junior staff member?

I once asked Bob Squier, the late, great political consultant, how many of his clients had had an extramarital affair within two years of the election they were trying to win. He laughed and said "95 percent," and the only reason it wasn't 100 percent was my then-boss, Michael Dukakis, who made up the five percent. It was, he said, about power; about liking the applause, the adulation, the currying for favor from those who worked for them, heard them, volunteered, wanted to be close to power. Those people, he said, have a tendency. They have a tendency to be found at the top, or on their way there, whether it's in politics or business. They aren't all sinners. But they certainly aren't saints.

Which used to be okay, if not ethically, then certainly in practice.

It isn't anymore.

I have labored in these trenches for decades, mostly as an advocate for victims and recently in defense of fairness.

This much I know: we have never lived through anything quite like this. The younger generation in particular is, to quote the old movie, mad as hell and they are not going to take it anymore. They do not believe that it is any excuse that their mothers put up with it, or even that they have; what's wrong is wrong. And if you think about it, it is rather stunning that the actresses who have spoken out include some of the most beautiful and successful in Hollywood; if they felt no choice but to suffer in silence, and in anger, imagine what it must be further down the food chain. Impossible.

But it is not a question of imagination. This is happening in real time. And in real time, company after company, when it is caught in the headlights, does what is easiest, which is to operate and try to get the cancer before it spreads, which is to get rid of the accused, quickly. This is necessary even if it is not the CEO, indeed, especially if it is not, so that the CEO doesn't lose his own job for delaying or taking inadequate action. But if an inappropriate comment, a loose hand, a stray touch is enough….

Sound bad? It can be much worse, actually. Or better.

Worst Case Scenarios

How bad could it be?

Let's try an easy – and very plausible – one.

A relatively junior employee of one of the companies your client has invested in (actually, the fund is the major shareholder) walked into the HR department yesterday afternoon and asked to speak to a supervisor. She spoke to the Assistant Director. She gave her an envelope. In it was a note addressed to the chairman of the private equity fund you represent; or work for; or even chair. The letter

states that she has been having an affair with the CEO of the company where she works and while the affair was consensual, it was not always tasteful (there are pictures in the envelope, and really unwise texts and emails from his private account). She is coming to HR now because she was recently passed over for a promotion which she believes that she should have received, and she believes it is because the "girls" making the decision are ugly shrews who are jealous of her conquest, and that's discrimination, plain and simple. And it should come as no surprise to HR that the company discriminates because haven't you noticed that a number of the best looking young women in the Company who were "rumored" to be having affairs with their bosses had been steadily promoted. If the "big money guy" to whom this letter is addressed doesn't do something, she says in closing, she intends to go to the press not only with her story, but with the story of what is going on in the company, and how its owners have ignored it and refused to take action.

Good morning. Bad enough? Things like this get bucked upstairs with record speed, especially these days, which is how a letter like this from someone no one in headquarters has ever heard of could land on the desk of the client to whom it is addressed in a matter of hours.

What do you do? Call in the troops. The lawyers and the (spin) doctors and the crisis managers.

We will ask about where the emails were sent from and do you want to send someone in to get his hard drive right away, and pull all of his emails sent on the system, see if there are any of these pictures that have been within a million miles of his computer, a forensic image, right away, so we can see everyplace he has surfed, and her personnel record, and are there other personnel records we should look at? Does this woman have an employment contract and does it have an arbitration clause? They might even explain to you that there are two types of sexual harassment – quid pro quo and hostile environment, which must be severe and pervasive according to a reasonableness standard; and that the law is still murky as to the rights of third parties to complain about others being favored for granting favors, not to mention the bold new idea that a woman who is sleeping with her boss deserves to be free of the resentment of other women employees and has a right to second guess (and sue) over the practice of promoting other women who are more "forthcoming." I'm making this up, but someone somewhere has probably sued, or will. The lawyers might even tell you that, depending on where you are located and the details we learn, neither of those claims is likely to hold up in court. As if that matters right now. That's the problem.

The spin doctors may actually be even less helpful, although it is hardly their fault. They will tell you to get ahead of the story if there is going to be a story. They will tell you to at least be prepared for the story if there is going to be a story, to have talking points about what to say, and they've started to prepare some notes on that. They are busily writing. What they can't tell you is whether there is going to be a story or not. How would they know, unless someone calls you. And they can't even promise, not for sure, that they will call you, or call you much in advance. It all depends on who she goes to, and if she is a junior employee with pictures, I would not count on a call from a New York Times reporter. Their story would come later, if it came at all. And by the way, those notes they are taking? How quickly will it take opposing counsel, when we get there, to get them in discovery.

The crisis person, especially if he's not a lawyer, might turn to the big-boss, thinking he is making a connection with the boss, and ask him: what do you think? Could this be true? Have you heard such things about him?

There is a long pause before one of the outside lawyers tells the Chairman not to answer, not with all these people in the room, including PR people talking about the spin, and taking notes about what to say, activities which have been known to blow the lawyer-client privilege sky high. The GC nods but looks troubled; he asks the outside counsel, who represents the company, whether he should be advising the Chairman of what questions to answer, or whether separate counsel should be doing that. Everyone knew the guy was a player, that is why they're here so quickly.

There is a much longer pause as everyone considers the importance of that question. Could they really get booted because this jerk in a company they own slept with a junior employee and then (maybe) punished her for it, or at least didn't reward her? (More women, in my experience, sleep their way to the middle than the top.)

Someone breaks the silence.

Maybe we should just fire him. Suspend him for sure. Starting today. Without pay? People nod.

And get an independent investigator, someone who is not in this room, who none of us know, to look at the company – even look at us – from top to bottom and tell us what to do. People nod more.

What Is Wrong with This Picture

Let's start with the fact that we are now considering firing a senior executive who has not even heard of the charges on the basis of as of yet unsubstantiated report. And if not firing, then certainly publicly humiliating, a story that could become a story. Because a leak by anyone on this particular food chain is all too possible; the chain includes not only senior executives (who may see him as a rival) but the more junior folks who took the initial

report, and her boss, and her, not to mention (although people often forget) the secretaries and assistants who have access to everybody's email, and the people who might look at their phones, jealous wives who happen to be newspaper reporters, for instance.

But it is surely right that this is neither the time nor the place to ask the chairman what he knew about this guy, or when he knew it.

That was last month, or even a few months before that. That was before this particular woman walked in to HR. If someone has a heart attack waiting to happen, we don't wait for it to happen. We try to prevent it, treat and remediate with no headlines. We need to start treating sexual harassment the same way. Find the problems before the problems find you. Fix the culture if it needs fixing. Tell whoever needs to be told to knock it off and that they must. Pay attention to patterns of inequality. Look for yourself before someone looks for you.

Because the potentially innocent executive is not the only victim of this scene gone wrong. The first instinct of many executives these days is to bring in an independent investigator. They think this will protect them. It is, frankly, just as likely to do the opposite. There are wonderful independent investigators, but they don't play in the many horror stories I've been unfortunate enough to witness. In the horror stories, the investigations go out of control, which is to say, out of the control of everyone but the investigators. The original scope of the investigation, perhaps one incident or one individual, expands exponentially, as you should expect when you start asking people if they have every witnessed the sort of conduct that Barry Diller suggests most men may be guilty of. And no one dares to "interfere with the independent investigation," which means that no one can tell them that enough is enough, they should stop running the clock, spreading dissent, giving every whiner and dissident employee a chance to get even, or at least get attention. No, you can't say any of those things.

There are, to be sure, occasions where an independent counsel is the only solution, where everyone even remotely loyal to the company and its future cannot be in any way a part of it, or the investigation will have no credibility at all. But it is a last resort, or should be. The horror story is not even uncommon.

Do the Right Thing

My partner Bill Burck says that when he arrives at a crisis, which he does frequently, the first thing he tries to do is put a "warm blanket" over the assembled group. He tries to calm things down. The goal in a crisis or a would-be crisis is to contain it – not to fan the flames.

You need to get the facts. You may not get them all, and you may not get them all at once, but until you have some idea of what is going on, getting the facts is all you should do. Even if the reporter does call. The only thing you can say is that we take such complaints seriously and we will take any appropriate action. What you want to convey is that you will do the right thing. You will take it seriously. You will do it fairly. And then, you do.

You also need to get the right help. Ideally, you want people who know your company and care about it to examine the situation, to start asking questions, to look at the materials in the envelope, to talk to the woman involved, to engage her enough to make clear to her that you are taking her concerns seriously so she doesn't have to take them to the press.

In this day and age, you should assume that everything you write and everything you do will be leaked to whoever might be interested, whoever might be the last person you would voluntarily tell. If you assume this, in most cases you will be right. Do not assume that people will keep the juiciest gossip they know a secret. Who sleeps with the boss, the professor, the chairman, and doesn't at least tell a few friends? And what is the point of knowing juicy gossip if you don't tell others? Lawyers and doctors are bound by privilege, but everyone else is free to leak, And dare I say it, lawyers and doctors do it too.

But public exposure is not the only reason to do the right thing. In my experience, many of those who complain do so not only because they are upset about the slights to them, but because they feel the company doesn't take harassment/diversity/inclusion seriously. So they go to each other and tell their stories (corroboration), and they go to HR (complaint), and they go to the press (leak). That doesn't mean every complaint is valid or that every leak is true; far from it. But you can't know that unless you at least do some looking and some asking, especially if (when only the lawyers are in the room) you have to admit that you always wondered, or maybe suspected or maybe even knew.

Notice I said some looking. Review. Not a full-scale investigation. Not a special prosecutor. Looking. Fact-finding. Rational decision making.

Ideally, you've read this far not because you have already faced your crisis, but because you haven't. No one has walked into HR yet. No one has threatened to go to the press. You are the ideal candidate for preventive medicine, the heart attack that doesn't have to happen.

Get there first. If you know you have problems, do your own review. *We will do it for you*. The goal is not to collect scalps, but to collect facts and make recommendations. The goal is to communicate to whoever might ask later (like a reporter) that the company does take such concerns seriously, because it got there first, has credible people who can talk to the press, has a

Board that has been informed from the get-go and will listen to reason, not panic.

In such a review, the company can do what it can't do with an independent counsel. It can define the scope. It can ensure that there is no witch-hunt. It decides on the appropriate remedies. Steps can be taken to remediate: to retrain, seriously; to provide counseling, if needed; to impose penalties short of death and solitary confinement; in short, to handle the problems preemptively, before the complaint, and before the leak, before the Spotlight Team, before the whistleblower. And if people need to go, and settlements need to be entered into, you do that before any complaint is filed; you do it with the sort of agreements we have developed that make leaks less likely, and less effective, not only because of strict clauses in the settlement, but because the other provisions make it difficult to prove anything about anyone, not to mention that the money has been paid over time through our firm. Confidential settlements should remain confidential, not be done Stormy Daniels-style.

Such a review should not be limited to wrongdoing. We look at the culture of the company, at least if you ask us to, and we think there are certainly cases where you should. We look at the tone at the top, not for purposes of imposing sanctions, but in order to make sure that the values you hold are the values that are being communicated. We ask about diversity and inclusion; we talk about culture; we emphasize the values that the company's leaders have asked us to emphasize. And if the day comes when questions are asked publicly, you aren't standing there defenseless, trying to figure out what is going on, saying no more than "we take it seriously." I'll be standing there with you. And I've spent much of my life looking into a television camera, so you don't have to (unless we train you to do it, which we also do).

You took it seriously. You brought in the best team in the world, with people like Peter Calamari, the former head of HR for Credit Suisse, and the presiding partner of Quinn Emanuel, who sits with me as we prevent fires from breaking out, and prepares with me when they do. And we took steps to address each of the problems we found, because no workplace is perfect, all of us could use improving, new training, and better communication. Not to mention some preventive lawyering.

(Huawei Article continued from over)

licenses. On May 24, 2016, while negotiations were ongoing, Huawei sued Samsung in the District Court for Northern District of California asserting Samsung infringed eleven SEPs, breached its contractual FRAND commitments, and asking for the terms and conditions of a worldwide FRAND cross-license to be set. Huawei also asked the Court to restrain Samsung from seeking injunctions on its SEPs anywhere in the world. Samsung answered and filed counterclaims, including claims for infringement of its own SEPs and a competing breach of FRAND contract claim with a request that Huawei be restrained from seeking injunctions on its SEPs.

One day later, without alerting Samsung, Huawei filed eleven separate actions in China, including ten in its home court in Shenzhen, with eight seeking only injunctive relief for alleged infringement of Huawei SEPs. The Shenzhen court issued injunction orders in two of the SEP cases on January 11, 2018. On February 1, Samsung moved for an antisuit injunction in California to enjoin Huawei from enforcing the Shenzhen injunction orders.

Microsoft v. Motorola

Before addressing the merits of Samsung's motion, the Court summarized the Ninth Circuit's decision in *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012), which the Court applied. Microsoft had filed a breach of FRAND contract action against Motorola in the Western District of Washington based on the terms offered for a FRAND license to video coding SEPs, and then obtained an antisuit injunction when Motorola obtained injunctions in Germany on patents within the same portfolios. The Ninth Circuit affirmed.

Gallo *Analysis*

Judge Orrick relied on the *Microsoft* decision throughout his order, finding that all factors under the applicable Ninth Circuit *Gallo* test favor Samsung. The *Gallo* test looks at (1) whether the parties and the issues are the same in both actions, and the US action will therefore dispose of the foreign action; (2) whether any one of the *Unterweser* factors applies; and (3) whether the impact on international comity would be tolerable.

With no dispute that the parties were functionally the same, the Court agreed with Samsung that the "contractual umbrella" over the US claims would necessarily dispose of the question of whether Huawei could pursue injunctions in China.

The Court also agreed with Samsung that the first *Unterweser* factor—violation of US public policy—was present. Finding a threat to its "ability to determine the propriety of injunctive relief in the first instance," the Court noted it might later conclude Huawei is not entitled to seek injunction relief anywhere in the

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Securities and Structured Finance Litigation Update

New York Court of Appeals to Decide Slew of "Relation Back" and Accrual Cases. Almost three years ago, in the context of RMBS repurchase litigation, the New York Court of Appeals issued a seminal decision on the date of accrual for breach of express warranty claims, *ACE Sec. Corp. v. DB Structured Prod., Inc.*, 25 N.Y.3d 581 (2015). The Court held express warranty claims accrue when the warranty is made and breached—that is, the date the contract is signed. *Id.* at 630-31. In so holding, the Court rejected the plaintiffs' argument that accrual did not occur until their contractual sole remedy of repurchase was ripe. *Id.* (holding notice or discovery conditions to the repurchase remedy were procedural conditions precedent, and as such did not affect date of accrual). This holding was therefore informative not only as to RMBS repurchase claims, but also as to the accrual of express warranty claims, and the contractual classification of contracted-for remedial schemes subject to conditions precedent (such as notice).

In the year ahead, the Court will once again use RMBS repurchase claims as a springboard to examine basic legal questions which could affect many cases with thorny statutes-of-limitations issues. The Court has accepted no fewer than *four* such plenary appeals to be heard in 2018: *Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Markets Corp.*, APL-2016-00237 ("*Flagstar*"); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, APL-2017-00115 (the "*HEAT Trusts* Action"); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, APL-2017-00116 (the "*ABSHE* Action"); and *U.S. Bank Nat'l Ass'n v. GreenPoint Mortgage Funding, Inc.*, APL-2017-00072 (*GreenPoint*). These cases raise issues that encompass, both singly and in combination, limitations, standing, and remedies. In other words, anyone with a case where it matters when claims may be filed, who may file them, and what remedies, if any, they are entitled to receive, could be impacted. Summaries follow.

Flagstar raises several issues, including (similar to the *ACE* plaintiffs), the contract at issue evinces an intent that a repurchase claim not accrue until a demand for repurchase is made and refused and that their warranty claims could not have accrued until the securitization was completed—when all the loans were transferred in—as opposed to on the closing date of the at-issue trust.. However, the question raised by the *Flagstar* plaintiffs most broadly applicable outside the RMBS context is whether and when New York will enforce a contract provision purporting to extend the period of limitations that would otherwise be applicable. The contract at issue in *Flagstar* contains a provision providing that a breach of warranty claim shall not accrue until the discovery or notice condition to the repurchase remedy has been satisfied. Citing New York's public policy against potentially interminable limitations periods, the First Department held such provisions are impermissible under New York law. (Notably, neither the First Department nor the parties appear to have cited N.Y. Gen. Oblig. L. § 17-103(1), which provides that a promise to waive or extend the statute of limitations is valid only if made "after the accrual of the cause of action" and for a period no longer than the limitations period.) The plaintiffs challenge this holding on appeal, and the Court of Appeals decision should therefore provide guidance on the allowable scope of such accrual provisions generally, if not the ability to contract around the limitations period entirely.

The *HEAT Trusts* Action concerns the relationship between New York's "saving statute," CPLR 205(a), and its "relation back statute," CPLR 203(f). In the proceedings below, a representative party filed an action on behalf of the trust, but was held to lack standing. A party with standing (U.S. Bank) then re-filed the action under Section 205(a), the savings statute. The defendants moved to dismiss on limitations grounds, arguing the re-filed action did not relate back to the original action filed by a party without standing under Section 203(f). The question is whether U.S. Bank's subsequent action, filed under the saving statute (205(a)), can be saved by relating back to an earlier-filed action when that action was filed by someone that lacks standing.

ABSHE also involves the interaction between CPLR Sections 205(a) and 203(f). In *ABSHE*, a plaintiff without standing filed timely but (arguably) unripe claims. After that plaintiff's claims were dismissed without prejudice, a plaintiff with standing re-filed the action under CPLR 205(a), which permits re-filing for dismissals without prejudice. Because the re-filed action would be untimely had it been filed as an original matter, the second plaintiff sought to invoke relation-back under CPLR 203(f). *ABSHE* thus raises the issue of whether, to take advantage of relation-back, the original-filed action had to have been both timely *and* ripe at the time of the original filing. ((A further issue in *ABSHE* relates to when a backstop (or guaranty) obligation accrues under New York law. A now-defunct originator promised it would repurchase loans not in conformity with the originator's warranties, and the defendant-sponsor promised to backstop the originator's promise if the originator failed to carry it out. The *ABSHE* plaintiffs argue their

claims did not accrue until the defendant-sponsor's guaranty obligation kicked in, as opposed to when the originator's original warranty breach occurred. However, the Court may not reach this issue, as the relation back issue just discussed would resolve the case and played a starring role in the parties' briefing.))

Greenpoint, too, addresses issues relating to ripeness and relation back. It is helpful to contrast the case with *ABSHE*, where the principal question is whether a later-filed action asserting untimely, ripe claims may relate back to an earlier-filed action that was entirely unripe, but timely. In *GreenPoint*, the question is whether later-filed, untimely ripe claims may relate back to earlier-filed, timely, and ripe claims. The plaintiff brought timely claims based on both notice and discovery, but the notice-based claims were not ripe upon filing. A divided First Department panel dismissed the notice claims and upheld the discovery claims. The question on review is whether the notice claims, unripe upon filing, may be held to relate back to the discovery claims. In other words, the question in *GreenPoint* is whether it suffices for relation back to timely file some ripe claims, or whether *all* claims arising from the same set of transactions or occurrences must be ripe as of the original filing for that doctrine to apply.

In sum, the year ahead promises to bring much-needed clarity to issues relating to accrual, standing, and ripeness under New York law, which of course many other states often look to when complex issues arise. While these issues are raised in the context of RMBS repurchase cases, because the issues addressed are basic it is reasonable to suspect the Court of Appeals' resolution of those cases will offer guidance across a wide range of practice areas.

Patent Litigation Update

U.S. Supreme Court Expands Scope of Patent Exhaustion Doctrine. Under the patent exhaustion doctrine, in the United States, after a patentee or its licensee makes an "authorized sale" of its patented product, the patentee's rights under the U.S. Patent Act are "exhausted." In other words, any downstream purchaser of the patented product is free to use or resell that product without further restraint from patent law. In *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017), the Supreme Court significantly expanded the scope of patent exhaustion, holding that the patentee cannot rely on U.S. patent law to enforce a contractual post-sale restriction against patented toner cartridges resold in the United States even if those cartridges where originally sold outside the United States. The Court advised patentees in this situation to instead bring claims for breach of contract, not patent infringement, against resellers and customers who violate contractual post-sale use restrictions.

In *Impression Products*, patent holder Lexmark manufactured and sold toner cartridges worldwide, and held several patents on components of those cartridges and the manner in which they were used. Lexmark encouraged its customers to return depleted ink cartridges to Lexmark after they ran out of ink by offering these customers the opportunity to purchase new cartridges at a discounted price, pursuant to a contract. Aware of this contractual post-sale restriction, cartridge reseller Impression Products acquired discounted cartridges originally sold in the U.S. as well as cartridges lawfully sold abroad, refilled them, and resold them to U.S. customers in contravention of this contractual restriction. Lexmark sued Impression Products for patent infringement.

Overturning a Federal Circuit *en banc* decision finding for Lexmark, the Supreme Court held that Lexmark exhausted its patent rights domestically and internationally upon its original sale of its cartridges, and could not use patent law to enforce any contractual post-sale use restriction because doing so would impose too great a restraint on the alienation of goods and "clog the channels of commerce." Marking a significant change in the patent exhaustion doctrine, the Court held that Lexmark's U.S. patent rights were exhausted regardless of whether the original sale occurred in the U.S. or abroad, holding that once Lexmark made an "authorized sale" of a patented cartridge anywhere in the world, Lexmark could not sue subsequent purchasers of that same cartridge for patent infringement after that cartridge was refilled.

The Court extended this same logic to authorized sales by Lexmark's licensees, stating that a "patentee's authority to limit *licensees* does not … mean that patentees can use licenses to impose post-sale restrictions on *purchasers* that are enforceable through the patent laws." The Court explained that an "authorized sale" occurs whenever a licensee complies with the terms of the license when selling a patented product, and that for purposes of patent exhaustion the licensee's sale is treated "as if the patentee made the sale itself." For instance, although a patent license may require the licensee to have purchasers agree to a contractual post-sale use restriction, even if the licensee complies with this provision the sale "nonetheless exhausts all patent rights in the item sold." The Court noted, however, that Lexmark may avail itself to other contract law remedies. For example, if a patentee grants a license that includes a post-sale use restriction, and the licensee sells the product to a purchaser (informing

the purchaser of the restriction) who then violates this restriction, the patentee may have a viable breach of contract claim against the purchaser.

After the Supreme Court's *Impression Products* decision, a patentee's U.S. patent rights are exhausted in a patent product once an authorized sale of that product occurs anywhere in the world. Having significantly limited a patentee's ability to use U.S. patent law to enforce post-sale use restrictions, patentees may need to reconsider their current patent portfolio licensing practices. For example, a patentee may consider including terms in its licensing agreements that restrict licensees from selling to known violators of the patentee's post-sale use restrictions. If the license expressly names customers to whom a licensee cannot sell, and the licensee makes an *unauthorized* sale to one of these customers, courts may possibly determine that such an unauthorized sale does not exhaust the patentee's patent rights.

That said, identifying those purchasers who violate their post-sale restrictions can be difficult and expensive, so patentees should put themselves in a position to be able to make use of contractual remedies as well. To ensure that a patentee has standing to prosecute a breach of contract claim, patentees need to make sure they have privity of contract with subsequent purchasers, and make them aware of the post-sale use restrictions at the time of purchase. For example, patentees could include provisions in their licensing agreements mandating that the licensee enter into a contractual agreement with subsequent purchasers that (1) requires a purchaser to agree to the post-sale use restrictions, and (2) names the patentee as a third-party beneficiary of such agreement.

Moving forward, the Court's *Impression Products* decision will require patentees to reconsider their current licensing practices to ensure that their patent and contractual rights in their patented products are fully protected.

Construction Litigation Update

Expert Evidence in Construction Arbitrations: Some Key Pointers. Construction projects involve a wide range of technical trades and expertise. Disputes arising from construction projects, which are increasingly decided in the context of arbitration, therefore require significant reliance on expert evidence. Construction arbitrations often require programming experts and experts in technical disciplines such as architecture, mechanical engineering, electrical engineering structural engineering and the like and, in international commercial arbitrations, expert evidence on local law or quantum are also frequently necessary. Since construction arbitrations arising from major projects are inherently expert heavy and will often stand and fall on expert evidence, selecting and presenting the best possible expert evidence is imperative to a successful outcome.

This section of the newsletter will discuss key pointers and common mistakes to consider when selecting experts, best practice and potential pitfalls when briefing experts and practical tips to work effectively with experts in the preparation of their reports and testimony.

Expert Selection. There are three general factors to consider in expert selection: (i) The expert's eminence and experience in the relevant subject matter, (ii) the expert's credibility and (iii) soft skills transferable to the role of an expert witness (such as good oral presentation, organization, teaching abilities, and adherence to strict deadlines).

There are many experts who make their livings primarily from expert witness engagements. Because they are used to performing in a litigation context, these professional expert witnesses typically have stronger soft skills than subject matter experts who make their living practicing their trade. There is a certain ease in working with a professional expert, since they are likely to have good oral presentation skills, understand the arbitral process and legal jargon and will generally need less supervision.

While these soft skills do matter, much more important is the weight the arbitral tribunal will give to the expert's evidence. When deciding between two conflicting experts' opinions, a tribunal is likely to give significantly more weight to the opinion of an expert who has extensive day-to-day experience and credentials in the subject matter area on which the expert is opining than it will give to the opinion of a professional expert with great presentation skills but with more limited experience in the relevant subject matter. For example, in a case where Qatari law is pivotal to the outcome, expert evidence on Qatari law from a senior practicing lawyer who contributed to the drafting of key Qatari law legislation will have significantly more weight than the evidence of a Qatari law expert who might be well spoken, but who has never appeared before the Qatari courts. The deeper an expert's personal, hands-on experience with the subject matter, the greater the expert's credibility will be.

Also important to credibility is the expert's independence. It is very damaging to the expert's, party's and party's lawyers' credibility in the arbitration for an expert to be—or even be perceived to be—anything but completely independent. Experts are virtually always required to be independent under the rules that govern international arbitrations; (*see, e.g.,* the Ikarian Reefer principles, CPR 35 and the CJC guidance in England and Wales and the IBA Rules on the Taking of Evidence in International Arbitration (Article 5.2(c)). And, it

is against lawyers' ethical obligations to select a non-independent expert. However, even without these rules and obligations, it is in the client's best interest to select an independent and unbiased expert to support the client's case.

If an expert lacks independence, this lack of independence is highly likely to come to light during the arbitration. Certain experts have a reputation for being hired guns in the major construction arbitration community, and experienced arbitrators will often know who they are (and might even have worked on past cases in which they were the expert). Lawyers can also expose an expert's lack of independence careful cross-examination and by looking at the expert's past to identify potential conflicts of interest, conflicting past opinions and leanings towards one side or another, all of which can discovered through their publicly available credentials, publications, and any reported cases. It is thus important to conduct this research on your own before hiring an expert, so that you can anticipate and neutralize any potential perceived biases before the expert is engaged.

Briefing Experts. Properly briefing your expert witnesses at the outset is imperative to ensure the expert's evidence is focused, exhaustive, authoritative, cost effective and submitted on time.

The instructions to the expert should contain all the relevant background information, the nature of the expertise required, the purpose of the expert's report, a description of the matter(s) to be investigated and of the issues to be addressed, the statement(s) of case (if any), the witness statement(s) (if any), those documents which form part of disclosure and witness statements that are relevant to the report, the dates of any hearings, the deadlines for the exchange of experts' reports, a plan for completing the report, and any other relevant deadlines.

Critically, in international and other arbitral proceedings, instructions to experts are not privileged and are often ordered to be disclosed. Accordingly, such instructions should never contain material which would be embarrassing or otherwise undermine the expert's independence. It is also important to keep the expert's evidence focused on only (a) the relevant issues and (b) subjects about which the expert is qualified to testify. It never goes well to ask an expert to provided evidence on legal issues or on issues which are not within the expert's expertise. The expert must focus exclusively on the factual or technical issues within his or her expertise which underpin the legal case. Not only is there a danger that opinions outside of this scope will be excluded, but asking the expert to stretch is likely to undermine the expert's credibility on the subjects for which he or she is qualified and erode the persuasiveness of the expert's overall presentation.

Working with Experts Effectively in the Preparation of Their Reports and Testimony. In addition to issuing clear instructions from the start, the expert must work closely with the legal team and keep an ongoing dialogue throughout the arbitration. There should be a comprehensive "teach-in" at an early stage in the matter where the lawyers and the expert can identify key issues and relevant subjects. All the documentation and information requested by the experts should be provided to the expert as quickly and efficiently as possible (subject to lawyer review for relevance or privilege) and there must be regular communication and discussion on key issues and progress. In working with experts, it is important that the expert receive *all* relevant information—even information that may be potentially harmful to your position. No good comes of keeping information from the expert. First, the expert may have a deeper understanding of the potentially harmful evidence, so it is beneficial to share that information and obtain his or her views. Next, the expert cannot form credible opinions unless he or she receives all relevant information. It will be easy enough for the adversary to use the unsavory information in cross-examination; you do not want your expert to be surprised in that way. Relatedly, it will only serve to strengthen the expert's evidence if the expert has been able to metabolize and consider "bad" evidence when forming his or her opinions. Also, it is only when the expert has complete information that he or she can suggest whether additional experts, information or factual development might be necessary to strengthen your case.

A good expert report should include a full curriculum vitae of the expert (anything hidden will be found out), the instructions in full, an executive summary, details of the individuals to whom the work has been delegated (and a statement that despite delegation, the expert has checked, understood and endorses all work undertaken by others to prepare the report), identify the sources of all the information relied upon, identify the methods followed, identify all the assumptions made where information is not available, address the specific issues identified in the instructions, and set out the expert's conclusion directly and clearly.

Conclusion. Success in a construction arbitration will often fall on the strength of your expert evidence. Selecting the right experts and managing them efficiently will be critical. Equally, a thorough due diligence on your opponents' experts and their reports will assist greatly in exposing unethical practices, unsubstantiated opinions and biased experts.

VICTORIES

Valentine's Day Pro Bono Asylum Victory

The firm secured a victory in New York Immigration Court for *pro bono* client Kirill Likov, who was granted permanent asylum on February 14, 2018. Mr. Likov is of mixed Azerbaijani, Armenian, and Russian ethnicity. Born in the former Soviet Union, Mr. Likov and his family ultimately fled to Azerbaijan after facing years of persecution for being "black" (which is how many Russians refer to individuals from the Caucasus region, which includes Azerbaijan and Armenia). The persecution did not stop in Azerbaijan and only grew worse, as Mr. Likov and his family faced threats, continued physical assaults, and verbal abuse, now on account of being Russian and Armenian.

The persecution of Armenians and Russians by Azerbaijanis stems from a deep-rooted conflict between Armenia and Azerbaijan over the disputed territory of Nagorno-Karabakh that is controlled by ethnic Armenians but that was granted to Azerbaijan by Russia after the break-up of the Soviet Union. Persecution of Armenians in Azerbaijan is rampant, and perpetuated by the Azerbaijani government. Just calling someone "Armenian" is considered a curse. Over the course of the last several decades, Armenians have fled Azerbaijan because of the persecution, and the ones who remain live in hiding. Because of Russia's siding with Armenia over the Nagorno-Karabakh territory, Azerbaijanis commonly associate Russians with Armenians, discriminating against them as well.

Upon moving to Azerbaijan, Mr. Likov's family destroyed all documents evidencing their Armenian ethnicity. But this did not stop Azerbaijanis from persecuting Mr. Likov because of his part-Russian ethnicity. Mr. Likov suffered numerous beatings, including several that resulted in hospitalizations and permanent mental and physical injuries. However, the last straw came when, after gaining employment at a café and working there for several years, a co-worker learned of Mr. Likov's Armenian roots. Immediately, the coworker began an onslaught of threats and slurs that quickly escalated. Fearing for his safety, Mr. Likov was forced to resign. That did not stop the former coworker from tracking down Mr. Likov, and one evening, surrounding him in a dark alley with a group of friends, putting a knife to Mr. Likov's throat, threatening his life, and promising that this "visit" would not be the last for Mr. Likov or his family. It was after this attack that Mr. Likov fled to the United States to seek asylum.

Mr. Likov applied for asylum within the one-year deadline after entering the United States, but, likely due to a lack of preparation and poor translation during the interview, the asylum officer found inconsistencies in Mr. Likov's personal account of the persecution he suffered. The case was removed to Immigration Court. Enter Quinn Emanuel. Over the next four years, the firm met with Mr. Likov and learned every detail of his story. We filed a revised application for asylum. We worked with an expert on Azerbaijan country conditions to prepare a report corroborating the treatment of ethnic Russians and Armenians in Azerbaijan. We had Mr. Likov evaluated by a physician and psychiatrist to corroborate the physical and psychological trauma he had suffered. We met with a woman who was Mr. Likov's neighbor in Azerbaijan who witnessed an attack on him and helped her prepare an affidavit to the Court corroborating that attack.

At the merits hearing, it became clear how much our preparation and hard work paid off. After our direct examination and the government's cross-examination of Mr. Likov, the government waived its right to cross-examine any of our other four witnesses, the judge granted asylum, and the government waived appeal, rendering the judge's decision final – or, in Mr. Likov's words, "forever." Mr. Likov, who suffered a lifetime of abuse in two countries that he tried to call "home," and who has been living in limbo for four years, suffering from constant nightmares and anxiety attacks for fear of being returned to Azerbaijan, is finally at peace – and finally at home.

Complete Victory in Dismissal of Securities Class Action

The firm won another significant victory for E*TRADE Securities and E*TRADE Financial when Judge Koeltl of the SDNY dismissed, with prejudice, a putative class action pursuing claims under Sections 10(b) and 20(a) of the Securities Exchange Act for allegedly favoring venues that provided the highest payment-for-order-flow ("PFOF") in contrast to their representations that E*TRADE complied with best execution. *Schwab v. E*TRADE Financial Corporation*, 1:16-cv-5891 (SDNY). The decision is significant because it comes on the heels of other courts sustaining nearly identical claims brought by the same plaintiffs' counsel against both Charles Schwab and TD Ameritrade. *TD Ameritrade, Inc.*, 172 F. Supp. 3d 1055 (D. Neb. 2016); *Crago v. Charles Schwab & Co., Inc.*, 16-cv-3938, 2017 WL 2540557 (N.D. Cal. June 12, 2017).

Unlike the courts in the Charles Schwab and TD Ameritrade cases, Judge Koeltl held that the plaintiffs had not adequately pled reliance or scienter. On reliance, the Court held that plaintiff's third amended complaint primarily alleged affirmative misrepresentations and therefore was

not entitled to the *Affiliated Ute* presumption of reliance and Plaintiffs had made no attempt to plead actual "eyeball" reliance. The Court's decision affirms that alleged omissions that are the mere "flip side" of alleged affirmative misrepresentations do not suffice to invoke the *Affiliated Ute* presumption of reliance. On scienter, the Court held that "[t]he pursuit of PFOF is the type of generic profit motive that is insufficient to establish scienter."

This is the third victory Quinn Emanuel has won for E*TRADE in connection with its order routing practices: In July 2017, prior to the decision sustaining claims against Charles Schwab, Judge Koeltl granted E*TRADE's motion to dismiss the plaintiff's second amended complaint in this action. In April 2017, Judge Koeltl granted E*TRADE's motion to dismiss a separate putative class action alleging breach of fiduciary duty and unjust enrichment for the same underlying alleged conduct. The Court was persuaded that that the complaint was precluded by the Securities Litigation Uniform Standards Act ("SLUSA") and dismissed all claims on that basis.

(Huawei Article continued from page 5)

world, contrary to the Shenzhen orders, and agreed that Samsung will face imminent business harms across the world and might be forced to accept whatever royalty terms Huawei demands if the Shenzhen orders are enforced.

As for the final factor, comity, the Court agreed that granting the antisuit injunction would have a "negligible" effect on comity, since the California case was filed first, and because the scope of the injunction would be narrow, merely enjoining Huawei from enforcing injunctive relief on two patents for a time period "estimated to last less than six months."

Conclusion

The Court granted Samsung's motion, noting: "Samsung's motion to enjoin Huawei from enforcing the injunction orders issued by the Shenzhen court is GRANTED. Huawei should not seek to enforce those orders until I have the ability to determine the breach of contract claim it chose to present in this action prior to filing the Chinese actions."

Law360 Names Six Quinn Emanuel Partners 2017 "MVPs of the Year"

Law360 has named six Quinn Emanuel partners as 2017 "MVP's of the Year" in their practice areas. The publication recognizes individuals who are excelling beyond their peers with "high-stakes litigation, complex global matters and record-breaking deals." *Law360* had an incredibly competitive year, choosing only 157 attorneys for the prestigious award among over 1,000 submissions. The Quinn Emanuel partners named MVPs are: Kathleen Sullivan – Appellate, Jane Byrne – Insurance, Stephen Neuwirth – Competition, Victoria Maroulis – Telecommunications, Mark Cheffo – Product Liability, and William Burck – White Collar.

Quinn Emanuel Court of Appeal Win for Metropolitan Water District Named a 2017 Top Appellate Reversal by *The Daily Journal*

The Daily Journal recognized the Court of Appeal's decision in *San Diego County Water Authority v. Metropolitan Water District* as one of the "largest and most significant verdicts and appellate reversals in California in 2017." In a case involving water distribution in Southern California, which depends heavily on imported water supplies, partners Kathleen Sullivan and Valerie Roddy obtained a unanimous appellate victory for the Metropolitan Water District of Southern California ("Metropolitan"). The San Diego County Water Authority ("San Diego") sued Metropolitan in a dispute over a water exchange agreement that used lawful water-conveyance rates as the price term. A California trial court invalidated Metropolitan's conveyance rates and then awarded San Diego over $235 million in damages for contract breach. Ms. Sullivan and Ms. Roddy convinced California's First District Court of Appeal to vacate that judgment. Rejecting the numerous statutory, common law, and constitutional rate challenges raised by San Diego, the appellate court adopted Quinn Emanuel's argument that Metropolitan's allocation of its State Water Project transportation costs to its conveyance rates was reasonable and lawful. The decision should eliminate approximately 85% of the monetary judgment below and allow Metropolitan to collect billions of dollars from San Diego in lawful rates in the coming decades.

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business litigation report

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