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Supreme Court Rules That Non-Party to an International Arbitration Agreement May Compel Arbitration

Recently, the Supreme Court unanimously ruled in *GE Energy Power Conversion France SAS, Corp. v. Outokump Stainless USA, LLC*, 140 S. Ct. 1637 (2020) that that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories under domestic equitable estoppel doctrines. This ruling resolves a decades long split in the Circuits and overturns the rule previously followed in the Second, Third, Ninth, and Eleventh Circuits that only a signatory to an international arbitration agreement could enforce its terms.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("Convention") governs the enforcement of international arbitration awards among parties to the Convention. In the United States, the statute implementing the Convention is Chapter 2 of the Federal Arbitration Act (FAA) 9 U.S.C. § 201 *et seq.* ("Chapter 2"). A party seeking to compel arbitration under Chapter 2 must prove the existence and validity of "an agreement in writing within the meaning of the Convention." *E.g.*, *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 654-55 (9th Cir. 2009) (citation omitted). Article II, section 1 of the

(continued on page 2)

INSIDE

Trademark Partners Recommended by *Who's Who Legal* 2020 Guide
Page 3

EU Countries Sign Intra-EU BIT Termination Agreement, Ushering in Brave New World of Investor-State Dispute Settlement on the European Continent
Page 4

Practice Area Updates:

EU Litigation Update
Page 5

White Collar Litigation Update
Page 7

Class Action Litigation Update
Page 9

Quinn Emanuel Attorneys Named 2020 "Rising Stars" by *Law360*
Page 10

Talc Summary Judgment Victory and Other Victories
Page 10

Victoria Maroulis and Colleen Tracy James Recognized as Top 250 Women in IP

Managing IP has recognized QE partners and patent trial lawyers Victoria Maroulis and Colleen Tracy James in its annual *IPStars* list of Top 250 Women in IP for 2020/21. The award recognizes leading female IP practitioners who achieve outstanding results for clients in their respective practice areas and are thought leaders in the field of Intellectual Property. *IP Stars* is known as the leading guide for Managing Intellectual Property firms and practitioners. Q

Top Barrister and Solicitor Advocate Joins in London

The firm welcomes new partner Justin Michaelson to the London office. Michaelson represents high net worth individuals and companies in large cross-border disputes involving commercial litigation, international arbitration and associated interim relief. Over the past decade Michaelson has advised on a number of freezing injunction cases including *VTB v Nutritek*, which went to the Supreme Court and became the leading authority on piercing the corporate veil. More recently he was involved in *National Trust Bank v Yurov & Others,* representing the second and fifth defendants in a two month Commercial Court trial; *Sberbank v OJSC International Bank of Azerbaijan*, representing Sberbank in an action seeking to avoid the impact of a foreign insolvency process; and *Empreno & LIC Telecommunications Sarl v VTB Capital Plc & Others*, acting for the shareholders of BTC in a Commercial Court claim against VTB and others. Michaelson is also representing ENRC in *ENRC v Khazageldin and ENRC v Hollingsworth*. He is recommended for commercial litigation and international arbitration in numerous

(continued on page 10)

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Convention provides that each contracting state "shall recognize" an "agreement in writing" to arbitrate a given dispute. Article II, section 2 defines the term "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

The Split Among the Circuits

In 1988, the Fourth Circuit ruled in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-321 (1988) that when claims against a parent and its subsidiary are inherently inseparable, a court may refer claims against the parent to arbitration under the Convention even though the parent was not a party to the arbitration agreement. To reach this conclusion, the Fourth Circuit relied upon the statement of the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) that the federal policy in favor of arbitration "applies with special force in the field of international commerce," 863 F.2d at 319 rather than the language of the Convention.

In 1994, the Fifth Circuit ruled that a non-signatory to an international contract with an arbitral provision could enforce that provision under the Convention in *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994). The Fifth Circuit examined the language of Article II, section 2 of the Convention and concluded that the term "signed by the parties" modified the term "arbitration agreement" but not the term "an arbitral clause in a contract" . Accordingly, the Fifth Circuit affirmed a district court ruling that a party could enforce the arbitral provision in an unsigned insurance policy stating: "[b]ecause what is at issue here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply. A signature is therefore not required." *Id.*

The Second Circuit disagreed with the Fifth Circuit's interpretation of Article II, section 2 in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 215-18 (2d Cir. 1999). In *Kahn Lucas*, the Second Circuit analyzed Article II section 2's text and drafting history and held that the definition of "agreement in writing" in the Convention requires that any agreement, whether it be an arbitration agreement or an arbitral clause in a contract, be signed by the parties or contained in a series of letters or telegrams. Accordingly, the Second Circuit reversed a district court order compelling arbitration because the contract at issue was not signed by one of the litigants.

The Second Circuit's reasoning in *Kahn Lucas* was later adopted by the Third Circuit in *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) and the Eleventh Circuit in *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290-91 (11th Cir. 2004). The Ninth Circuit adopted the *Kahn Lucas* Court's reasoning in *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000-1001 (9th Cir. 2017) referring to the *Kahn Lucas* Court's "faithful adherence to the principles of treaty interpretation," "detailed analysis of Article II(2)'s legislative history and negotiations," and "cogent analysis" and dismissing *Sphere Drake* as a "decision [that] cited no authority and provided no analysis . . . and has therefore been rejected by our sister circuits." *Id.* at 1001.

The Supreme Court granted certiorari in *GE Energy Power Conversion France SAS, Corp. v. Outokump Stainless USA, LLC*, to resolve this split in the Circuits. 140 S. Ct. at 1643.

The *GE Energy* Case

The *GE Energy* case arose out a dispute over allegedly defective motors. In 2007, ThyssenKrupp Stainless USA, LLC ("ThyssenKrupp"), entered into three contracts with F.L. Industries, Inc., to construct cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each contract contained an arbitration clause providing that "all disputes arising between both parties in connection with or in the performances of the Contract … shall be submitted to arbitration for settlement." F.L. Industries, Inc. then entered into a subcontract with GE Energy Power Conversion France SAS, Corp. ("GE Energy") to provide motors for the mills. Later, Outokumpu Stainless USA, LLC ("Outokumpu"), acquired the plant from ThyssenKrupp. GE Energy's motors allegedly failed in the summer of 2015, resulting in substantial damages.

In 2016, Outokumpu and its insurers sued GE Energy in Alabama state court. GE Energy removed the case to federal court under section 205 of Chapter 2, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement … falling under the Convention." GE Energy then moved to dismiss and compel arbitration, relying on the arbitration clauses in the contracts between F.L. Industries, Inc. and ThyssenKrupp. *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 401951 (SD Ala., Jan. 30, 2017). The district court held that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors. *Id.*, at *4. Because the court concluded that both Outokumpu and GE Energy were parties to the agreements, it declined to address GE Energy's argument that the agreement was also enforceable under the doctrine of equitable estoppel. *Id.*, at *1, n. 1.

The Eleventh Circuit reversed the District Court's

order compelling arbitration. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (2018). The Eleventh Circuit first rejected the district court's conclusion that GE Energy fell within the definitions of "Seller" or "Parties" and went on to explain that GE Energy could not compel arbitration because the Convention required "that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration," and "GE Energy is undeniably not a signatory to the Contracts." *Id.* at 1326. The Eleventh Circuit also held that GE Energy could not rely on equitable estoppel because the doctrine conflicts with the Convention's signature requirement. *Id.* at 1326-1327 (*citing Czarina, LLC v. W.F. Poe Syndicate, supra)*.

The Supreme Court granted certiorari. The Court's analysis begins with Chapter 1 of the FAA which permits courts to apply state law doctrines related to the enforcement of arbitration agreements. The Court noted that in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631-632 (2009), "we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement." 140 S. Ct. at 1644.

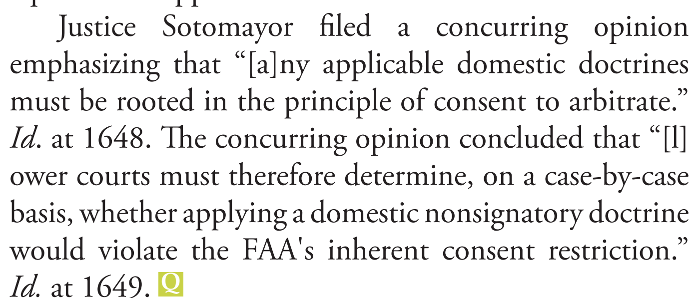
The Court then observed that the Convention "focuses almost entirely on arbitral awards. . . ." and "[o]nly one article of the Convention addresses arbitration agreements—Article II." *Id.* at 1644. The Court pointed out that Article II contains only three short sections: Article II sections 1 and 2 (which were quoted in pertinent part above) and Article II section 3 which provides "that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Id.*

The Court then explained that under 9 U.S.S. § 208 "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter [Chapter 2] or the Convention." *Id.* The Court then framed the issue to be determined as "whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA, conflict with" the Convention and concluded that they do not. *Id.* at 1644-1645 (citations omitted).

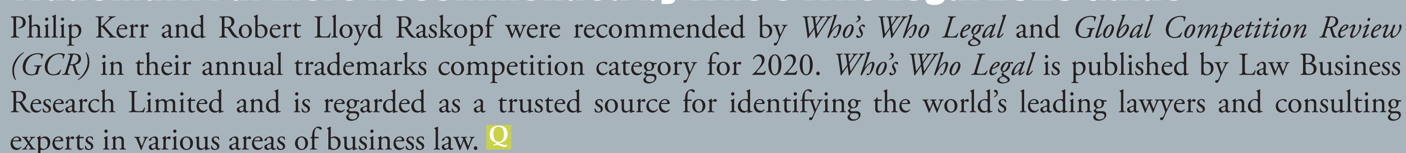
The Court observed that the text of the Convention did not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel and stated: "[t]his silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines." *Id.* at 1645. The Court also pointed out that the language of Article II section 3 stating that courts of a contracting state "shall ... refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests arbitration "provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements." *Id.*

Based upon this analysis, the Court concluded that "nothing in the text of the Convention 'conflict[s] with' the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA." *Id.* The Court then reviewed the negotiation and drafting history of the Convention as well as the post-ratification conduct of signatory nations and concluded that they too were consistent with the Court's interpretation of the Convention's text. *Id.* at 1646-1647.

The Supreme Court did not determine whether GE Energy could enforce the arbitration provisions under the doctrine of equitable estoppel or which body of law would govern that determination, indicating that those questions could be addressed on remand. The Court stated that it held only that the Convention does not conflict with the enforcement of international arbitration agreements by non-signatories under domestic-law equitable estoppel doctrines.



Justice Sotomayor filed a concurring opinion emphasizing that "[a]ny applicable domestic doctrines must be rooted in the principle of consent to arbitrate." *Id.* at 1648. The concurring opinion concluded that "[l]ower courts must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction." *Id.* at 1649.



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Philip Kerr and Robert Lloyd Raskopf were recommended by *Who's Who Legal* and *Global Competition Review (GCR)* in their annual trademarks competition category for 2020. *Who's Who Legal* is published by Law Business Research Limited and is regarded as a trusted source for identifying the world's leading lawyers and consulting experts in various areas of business law.

EU Countries Sign Intra-EU BIT Termination Agreement, Ushering in Brave New World of Investor-State Dispute Settlement on the European Continent

On 5 May 2020, all EU Member States (except Ireland, Sweden, Finland and Austria) concluded the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (the "Termination Agreement"). As its name suggests, this agreement purports to put an end to all bilateral investment treaties ("BITs") between its signatories.

The impact of this agreement cannot be understated. Most of the BITs affected by this agreement were signed between Eastern and Western European States before the former became members of the EU. The termination of intra-EU BITs will mean the end of an era for investor-State dispute settlement ("ISDS") and could foreclose a significant number of future claims against sovereigns. Yet, there is much more than meets the eye.

The Culmination of a Political Process

The Termination Agreement flows from the 6 March 2018 decision of the Court of Justice of the European Union (the "CJEU") in *Slovak Republic v. Achmea B.V.* (The "*Achmea* Decision"). In that decision, the CJEU concluded that the dispute resolution provision of the Netherlands-Slovakia BIT was contrary to EU law. This, according to the CJEU, was because such a provision would grant an arbitral tribunal the authority to make decisions on the interpretation or application of EU law without the ability to refer such questions to the CJEU.

There has been some debate about whether the *Achmea* Decision is a *sui generis* decision or has general scope. Some have argued that the *Achmea* Decision only applies to the dispute resolution provision of the Netherlands-Slovakia BIT (or, at most, those like it that provide for the direct or indirect application of EU law to the merits of a dispute). Others maintain that the *Achmea* Decision means that all intra-EU BITs (regardless of whether they call for application of EU law) are contrary to EU law.

The latter is the position taken by EU Member States. On 15 January 2019, EU Member States signed a series of "declarations" in which they informed investors and investor-State tribunals that, based on their understanding of the *Achmea* Decision and its implications, "*all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable*." In that same document, they resolved to terminate all intra-EU BITs by the end of 2019. The Termination Agreement – although a little late – flows from those declarations.

However, the movement to terminate intra-EU BITs began at least a decade before the *Achmea* Decision. Its origins can be traced to the 2007 Lisbon Treaty, which gave the EU absolute authority over both the external and internal trade policies of the Member States. Since then, the Commission (the EU's executive branch) has lobbied for the termination of intra-BITs – mostly, against the will of the majority of EU Members States, who refused to terminate their intra-EU BITs.

The Termination Agreement nonetheless strikes a conciliatory position in comparison to the Commission's longstanding approach and the 15 January 2019 declarations. It provides differing solutions for three classes of arbitration proceedings (as defined in the Termination Agreement).

Concluded Arbitration Proceedings: A Full Exemption from Termination

According to the Article 6 of the Termination Agreement, awards rendered in Concluded Arbitration Proceedings – i.e. arbitration proceedings commenced on the basis of an intra-EU BIT in which a final award was rendered prior to 6 March 2018 (the date of the *Achmea* Decision) and where the award was duly executed with no pending challenge – are unaffected by the Termination Agreement.

While this will only touch a small number of cases, it is a striking retreat from the position put forward in the 15 January 2019 declarations, which called for Member States to take an active role in preventing intra-EU BIT awards from being rendered or enforced.

Pending Arbitration Proceeding: The Europeanization of Intra-EU Bit Disputes

Pending Arbitration Proceedings – i.e. those initiated prior to 6 March 2018, but not concluded before that date – are subject to a special dispute resolution process anchored in EU law and institutions. The special settlement procedure provided in the Termination Agreement's Article 9 may only be opened where the measure alleged to be a violation of the BIT also violates EU law. The process is led by a "facilitator" who is chosen by a former Member of the CJEU (not the parties) and must have "in-depth knowledge of Union law" (not international law).

In effect, this settlement procedure takes the dispute out of the international sphere and puts it squarely in an EU law context (of course, with, at most, the prospect of a non-binding proposal by the facilitator).

New Arbitration Proceedings: The End of Intra-EU Bit Investor-State Arbitration?

Article 5 of the Termination Agreement purports to sound the death knell for arbitration proceedings under intra-

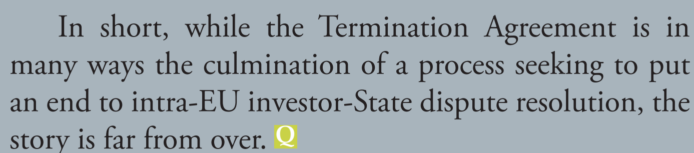
EU BITS. It provides that arbitration clauses in intra-EU BITs "*shall not serve as legal basis for New Arbitration Proceedings*" (which are defined as arbitration proceedings initiated on or after 6 March 2018). However, despite this categorical language, intra-EU ISDS is not dead.

First, the hold-outs to the Termination Agreement ensure that there will be some life for intra-EU BITs post-*Achmea*. While Ireland's absence was to be expected (as it had already terminated all of its intra-EU BITs), the fact that the other hold-outs did not sign the Termination Agreement came as a surprise – and clearly did not please the Commission, which has brought infringement proceedings against Finland and the UK. In particular, the UK, which although not technically a member of the EU, remains a party to the relevant treaties for the time being. If its intra-EU BITs survive its divorce from the EU, the UK could be a safe harbour for intra-EU BITs.

Second, the Termination Agreement appears to make a notable exception for proceedings commenced under the Energy Charter Treaty (the "ECT"). At the time of the declarations, Hungary split from other Member States, arguing that proceedings commenced under the ECT were not subject to the *Achmea* Decision. It now appears that its position has won the day as the ECT is not included in the Termination Agreement. Therefore, EU investors would still be able to bring claims against EU Member States provided that they may invoke this treaty instrument.

Third, investors may ultimately seek to challenge whether, as a matter of international law, the Termination Agreement may have retroactive effect on ongoing arbitrations and even on future arbitrations brought under so-alled sunset clauses (i.e., clauses of BITs that extends that treaty's protections post-termination) – which the Termination Agreement also purports to terminate.

In short, while the Termination Agreement is in many ways the culmination of a process seeking to put an end to intra-EU investor-State dispute resolution, the story is far from over. Q



PRACTICE AREA NOTES

EU Litigation Update

"Pay-for-Delay" Settlements Contrary to EU Competition Law

In the pharmaceutical industry, the term "pay-for-delay" has attracted attention from the business and legal communities for years. However, the legality of the position in Europe remained uncertain for quite some time due to the lack of a precedent-setting verdict from the Court of Justice of the European Union (CJEU). On January 30, 2020, the CJEU finally held in *Generics (UK) Ltd., GlaxoSmithKline plc, Xellia Pharmaceuticals ApS, Alpharma LLC, formerly Zoetis Products LLC, Actavis UK Ltd, Merck KGaA v. Competition and Markets Authority*, Case C-307/18, that "pay-for-delay" agreements can violate European antitrust and competition laws. As several further related proceedings are pending before the European courts, including the CJEU itself, the decision is highly relevant and has already been cited by the Advocate General in *Lundbeck v. Commission*, Case C-591/16 P, and *Groupe Canal + v. Commission*, Case C-132/19 P, the latter involving pay TV channels, indicating the wide-ranging applicability of the CJEU's decision in *Generics*.

"Pay for delay," also known as "reverse payment settlement," refers to litigation settlement agreements between original and generic pharmaceutical manufactures that exceed the scope of common patent settlement licenses. For example, the patentee may agree to pay the accused infringer to abandon its infringing activities, *i.e.* to delay the market access of a generic product until expiration of the asserted patent, and to drop any challenges to the validity of the respective patent, while in return, the patentee ends the infringement litigation. Thus, the patentee enjoys market exclusivity due to the delayed launch of a competing generic drug.

These settlements were and are subject to several competition and antitrust law complaints all over the world. They fall within the particular field of tension between exclusive IP rights and antitrust/competition law. The crucial question is when the exercise of exclusive IP rights exceeds the bounds of patent law and becomes anti-competitive behavior. The CJEU's decision provides welcome clarity on this issue. Most critically, it makes clear that generic manufacturers that have taken preparatory steps for market access are likely to be competitors of the originator. If those two parties go on to conclude an agreement in which the generic manufacturer receives a significant payment from the original manufacturer that has no other explanation than a commercial interest to delay market entry, the agreement will be considered a *restriction of competition*. The CJEU's decision also holds that substitutable generics and the original pharmaceutical can share a market pursuant to Art. 102 TFEU.

Legal Background

Statutory Law

In general, license and other agreements regarding IP rights are subject to distinctive treatment under EU competition law, meaning that because of the fundamental importance of IP rights and their pro-competitive effects, the parties have a lot of freedom with regard to the terms of such agreements. As long as an IP right is valid, agreements regarding the market access to corresponding products are privileged under antitrust and competition law and such agreements can generally not be considered a violation of Art. 101 and 102 TFEU.

However, certain clauses are deemed to restrict competition under particular circumstances. Among these clauses are, for example, "non-challenge" clauses, i.e. when a party is obliged not to challenge the licensed IP right's validity. While such "non-challenge" clauses are seen as intended restrictions of competition, they may be exempted, *e.g.* if included *in license or settlement agreements*, under Art. 101 (3) TFEU pursuant to Art. 2 *et seq*. of the *EU Technology Transfer Block Exemption Regulation* (TT-BER; EU 316/2014).

The respective guidelines to EU 316/2014 specify that such clauses in the context of settlement agreements are generally considered to fall *outside* the scope of Art. 101 (1) TFEU. The reason for this is that in order to settle their litigation, parties generally agree to discontinue any challenges to the IP rights which were the center of their earlier dispute (*cf.* Guidelines to EU 316/2014, no. 242). "No-challenge" clauses can, however, still restrict the freedom of competition, as illustrated by the following examples (*cf.* Guidelines to EU 316/2014, no. 243):

- A "non-challenge" clause may violate competition law if the respective patent was granted "*following the provision of incorrect or misleading information during Examination*" (*cf.* CJEU, 6 December 2012, file no. C-457/10 – *AstraZeneca AB and AstraZeneca plc v. European Commission*);
- Special monetary rewards for withdrawing or not challenging IP.

The latter example requires particular scrutiny, as it relates to "pay-for-delay" agreements (which typically include such clauses), in return for a delay of the market entry of a generic drug. While the Guidelines address this issue, there had been neither a definition nor a binding ruling by a higher instance court regarding how to deal with such "pay-for-delay" agreements in Europe.

Previous Decisions

The first notable case the Commission addressed on "pay for delay" involved the agreement of Lundbeck A/S with several generic producers over the anti-depressant *Citalopram.* Although some (rather weak) method patents were still legally active, Lundbeck paid the generic producers millions for not challenging the patents. The Commission imposed fines amounting to several million euros on Lundbeck and the generic manufacturers. Lundbeck filed and lost an appeal.

In the case of the French pharmaceutical company, Servier, the Commission fined Servier and other generic producers 427 million Euro collectively for several settlement agreements found to be anti-competitive. In that case, the Commission found that Servier engaged in a practice of paying off any generic producer that challenged the validity of Servier's patent in exchange of the generic manufacturer abandoning any lawsuit and/or delaying entry into the market. The Commission determined that the agreements at issue violated Art. 101 (1) TFEU, and due to the dominance of Servier in the market for hypertension medication, also violated Art. 102 TFEU. The Court of First Instance annulled the decision of the Commission regarding the abuse of a dominant position (Art. 102 TFEU) on the basis that the definition of the market by the Commission was defective, but otherwise sustained the finding of a violation of Art. 101(1) TFEU.

In practice, the trend was, therefore, clearly towards the invalidity of "pay-for-delay" agreements in settlements. Still, reliable criteria for determining the competitive relationship between the original drug manufacturers and the generic manufacturers, even if the respective patents are legally valid, and for assessing the effects of such agreements on the relationship, was still missing before the CJEU decision in *Generics*.

The Decision of the CJEU in *Generics*

Facts

In 1987, the pharmaceutical group GlaxoSmithKline developed the anti-depressant *paroxetine,* for which it held the molecular patent and several secondary patents protecting the manufacturing process. When the main patent expired in 1999, generic manufacturers pushed for market access in the UK. Disputes over infringement and validity (of the secondary patents) arose, which were finally settled with a "pay-for-delay" agreement. The UK Competition and Markets Authority considered these agreements an infringement of competition law and imposed fines on the parties. Subsequently, the decision of the authorities was challenged and brought before the Competition Appeal Tribunal (UK), which was seeking guidance by way of a request for a preliminary ruling from to the Court of Justice (file no. C-307/18).

Ruling of the CJEU

The CJEU followed the argument of Advocate General J. Kokott closely and ruled that the underlying agreement

between GlaxoSmithKline and generic producers violates Art. 101 and 102 TFEU. The Court held that "pay-for -delay" clauses could constitute a *restriction of competition* and an *abuse of a dominant position*. First, the CJEU stated that neither the validity of the patent nor the question of infringement ruled out the existence of competition between original manufacturer and generic manufacturer. The disputes over infringement or validity were rather a preparatory step for market access, which demonstrated the potential competition. Crucial, therefore, was whether the launch of the generic product was actually possible, i.e. there must not be insurmountable barriers to enter the market. A patent is, according to the ruling (para. 46-51), not such an insurmountable barrier. Furthermore, the conclusion of a respective agreement was a strong indication of competition. This means that at least potential competition between the parties will likely have to be assumed in most "pay-for-delay" cases.

Regarding *the restriction of competition* pursuant to Art. 101 (1) TFEU, the CJEU stated that respective agreements may not be regarded "as agreements bringing to an end entirely fictitious disputes, or as designed with the sole aim of disguising a market-sharing agreement or a market-exclusion agreement*"* (para. 76). Even the transfer of value through those agreements did not automatically constitute a restriction of competition since the transfer may be justified, *e.g.* to compensate litigation costs. However, clauses in which a generic manufacturer agrees not to challenge the validity of the patentee's IP rights even temporarily may restrict competition if: a significant transfer of value is made; there is no consideration other than refraining from market access; and no plausible explanation for the consideration other than the commercial interest of both originator and generic manufacturer (para. 87 – *restriction of competition by object*).

Still, if there are significant pro-competitive effects, those may be taken into account for the characterization as a *restriction of competition by object* "… in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition…" (para. 103). The pro-competitive effects must, however, be sufficiently significant to justify reasonable doubts that competition is harmed at all (para. 107).

In case that was not sufficient, the subsidiary *restriction of competition by effect* still has to be thoroughly analyzed. However, the Court did not deem such an analysis necessary in order to establish the existence of appreciable potential or real effects on competition of a settlement agreement where (1) the generics manufacturer would probably have been successful in the patent proceedings, or (2) the parties to that agreement would probably have concluded a less restrictive settlement agreement (para. 121). Other factors can be sufficient.

Furthermore, the restriction or even elimination of competition pursuant to Art. 101 TFEU could, as well, be *an abuse of a dominant position* according to Art. 102 TFEU. One prefatory problem with raising a claim under this section is that the generics manufacturer's product is often not yet on the market because it is blocked by the patent in question. Under these circumstances, the question of how to define the market arises and whether potential, future competition between the original product and the generic suffices. The Court held that potential competition can be shown if the generics manufacturer can enter the market within a short period (after expiry of the patent) with sufficient strength to constitute a serious counterbalance to the manufacturer of the original medicine already on the market. Such evidence is sufficient to define the market and the branded-manufacturer's dominant position in that market (para. 132-134). This may be particularly true if the generics manufacturer has historically been able to enter the market effectively, has taken the steps necessary to achieve market entry, and/or has executed supply contracts with third-party distributors. In the present case, it was particularly important that the active ingredient of the medicine was in the public domain, but the process of manufacturing the medicine was patented. These factors tended to show that the barrier to entry was the anticompetitive restraint on trade rather than some, other, lawful restriction.

White Collar Litigation Update

Department of Justice Emphasizes Importance of Modern, Effective Compliance Programs in Revised Guidance to Companies

On June 1, 2020, the Criminal Division of the U.S. Department of Justice ("DOJ") released revised guidelines for prosecutors to evaluate corporate compliance programs in charging and plea decisions (the "Revised Guidelines"). *See* U.S. Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020), *available at* https://www.justice.gov/criminal-fraud/page/file/937501/download. The Revised Guidelines assume even more importance in light of DOJ Acting Criminal Division Chief Brian Rabbitt's recent remarks that DOJ intends to move forward with key FCPA prosecutions and resolutions in 2020 despite the pandemic. Though it may be challenging, companies should ensure their compliance programs remain effective and responsive to the unique challenges of the current business environment.

The general purpose of the guidelines has not changed since they were first introduced in 2017—

to assist prosecutors in evaluating a target company's compliance program. Prosecutors use this information in their determination of: (1) the form of any resolution or prosecution for the company; (2) a monetary penalty, if any; and (3) any ongoing compliance obligations the company will be subject to after the resolution (*e.g.*, a monitorship or ongoing reporting obligations).

The heart of the Revised Guidelines and the prosecutors' analysis remains answering three core questions:

1. Is the company's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the company's compliance program work in practice?

However, the Revised Guidelines demonstrate DOJ's attempt to provide clarity to companies and the defense bar as to what it looks for in a corporate compliance program. Outgoing Head of the Criminal Division Brian Benczkowski previewed the thinking behind the revisions in his December 19 remarks at the American Conference Institute's conference on the Foreign Corrupt Practices Act.

There, Mr. Benczkowski reassured companies who might be concerned that investing in effective compliance programs would create more problems than they solved by revealing misconduct that previously would have remained hidden. While quickly dispelling the notion that it would be beneficial for companies to specifically refrain from taking steps to identify misconduct in their midst, Mr. Benczkowski emphasized that DOJ had an interest in companies making "efficient" and "effective" investments in their compliance programs, and that DOJ should be incentivizing them to do so.

Mr. Benczkowski stated that the benchmark for an effective compliance program should be the design of the program, not how much money the company spent. Additionally, Mr. Benczkowski remarked that DOJ would conduct additional trainings for prosecutors to provide a "more sophisticated understanding of compliance program design" and "the challenges to effective implementation." The latter point implicitly acknowledged the difficulty that companies can face in designing, implementing, monitoring, and revising a compliance program on the fly.

In short, Mr. Benczkowski addressed an issue that companies and the defense bar had raised for years—the perception that DOJ both (1) unreasonably discounted the significant work companies did in creating modern compliance programs by focusing solely on instances where the compliance program broke down, and (2) underestimated the difficulty of creating an effective compliance program and ignored the impossibility of preventing all misconduct. These concerns led many companies to conclude that further investment in compliance programs wasn't warranted, as DOJ was not willing to take the company's investment into account during charging and plea discussions.

In this way, the Revised Guidelines benefit companies, because they provide more guidance as to what DOJ will be looking for when it determines whether a company's compliance program is adequate. The new guidelines place greater emphasis on whether the company's compliance program is adequately resourced, and whether compliance professionals are given enough authority and resources within the company to perform their jobs effectively. This moves the discussion away from a whether the compliance program is 100% effective (which no compliance program can be), and towards whether the company takes compliance seriously. A company has significantly more flexibility to demonstrate the latter. By hiring good people and giving them the tools and authority to identify misconduct, the company can show it takes compliance seriously.

This shift in emphasis is apparent from changes in the Revised Guidelines. For instance, the title of Section II of the guidelines was previously, "Is the Corporation's Compliance Program Being Implemented Effectively?" The new title is, "Is the Corporation's Compliance Program Adequately Resourced and Empowered to Function Effectively?" If DOJ has more than a hunch that a company has done something wrong, it can argue that the company's compliance program has already failed and is not being "implemented effectively." By changing the conversation to whether the compliance program is "adequately resourced and empowered to function effectively," DOJ is allowing the company to demonstrate that it has built a robust compliance program in spite of minor lapses.

Additionally, the Revised Guidelines direct prosecutors to consider softer indicia of a compliance program's effectiveness. When considering whether the compliance program is adequately resourced, prosecutors should now ask, "Do compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions?" Such questions show that DOJ is willing to dig into the details of a company's compliance program to truly understand how it works, and to credit companies that have taken the additional steps to build a functional and targeted compliance program.

A key feature of the Revised Guidelines is an emphasis on a compliance program that evolves over

time, and learns from past mistakes. For example, when prosecutors consider the effectiveness of the company's internal mechanisms for evaluating its own compliance programs (such self-evaluations are a critical part of any compliance program), they should now ask, "Is the [company's] periodic review limited to a 'snapshot' in time or based upon continuous access to operational data and information across functions? Has the periodic review led to updates in policies, procedures, and controls?" Additionally, when evaluating whether the company's compliance department is set up for success, prosecutors should now ask, "Does the company review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks?"

The Revised Guidelines also emphasize modernity, efficiency, and accessibility in a compliance program. In fact, they specifically note that some companies "have invested in shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions." Such specific references to "shorter" and "targeted" trainings indicate DOJ's willingness to consider leaner compliance programs as effective. Other new directives instruct prosecutors to consider such things as whether the company is tracking which of its policies employees are actually looking at (*see* Revised Guidelines at 4), something that would not have been possible in the early days of compliance programs.

Finally, although somewhat unrelated to the other changes, the Revised Guidelines shift some emphasis from pre-deal due diligence to post-deal due diligence in the Mergers and Acquisitions ("M&A") context. There are two possible explanations for this. First, there may have been criticism from practitioners that DOJ's expectations for pre-deal due diligence were unrealistic. Second, DOJ may have been concerned that too many companies focused exclusively on pre-deal due diligence, while ignoring potential compliance risks after the deal was finalized. The new changes, such as directing prosecutors to consider the due diligence conducted during the "integration period" of an M&A deal, may address both concerns by incentivizing companies to shift some of the due diligence from the more intense pre-deal period to the less intense post-deal period.

Many of changes in the Revised Guidelines were also included in the second edition of the Resource Guide to the Foreign Corrupt Practices Act ("FCPA Resource Guide"), which DOJ and SEC issued on July 3, 2020. By including the changes in the FCPA Resource Guide, DOJ and SEC appear to be strengthening their commitment to the policies espoused in the Revised Guidelines and their application over the long term. (For more on the FCPA Resource Guide, see Quinn Emanuel's client alert on its contents and implications for companies.)

In closing, the changes in the Revised Guidelines appear positive for companies and should reassure them that DOJ has been listening to feedback from industry and the defense bar. Specifically, DOJ appears to be open to companies demonstrating that a wide variety of compliance programs can be effective, and that leaner, more targeted compliance programs can replace larger, outdated ones. The changes show that DOJ understands that no compliance program will ever be 100% effective or fixed in time and the point DOJ is evaluating them, and that what DOJ is really looking to determine is whether the company is truly committed to building an effective compliance program, or just hiding behind one that looks good on paper.

Class Action Litigation Update

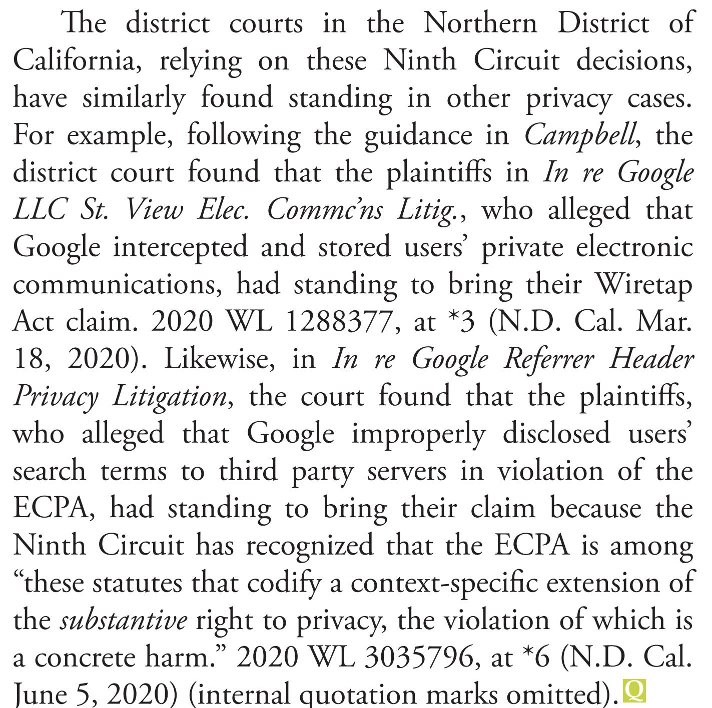
Recent Privacy Cases Regarding Article III Standing from the 9th Circuit and Northern District of California

Article III standing – or lack thereof – continues to confound litigants especially in privacy cases. In *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), the U.S. Supreme Court firmly established that a plaintiff cannot satisfy the injury-in-fact requirement of Article III by alleging "a bare procedural violation, divorced from any concrete harm." *Id.* at 1549. A series of 2020 decisions in data privacy cases in the Ninth Circuit, however, have signaled a willingness to interpret broadly the "concrete and particularized" injury requirement and to allow plaintiffs to assert privacy claims even on what would appear to be bare procedural violations. We summarize those decisions in turn below.

In *Campbell v. Facebook, Inc.*, the Ninth Circuit found that the plaintiffs, who alleged that Facebook scanned their private messages for URL and used that information without consent in violation of the Electronic Communications Privacy Act (ECPA) and the California Invasion of Privacy Act (CIPA), had established Article III standing. 951 F.3d 1106, 1118 (9th Cir. 2020). Parsing the principles established in *Spokeo*, the Ninth Circuit held that while a plaintiff cannot satisfy the "concreteness" requirement by merely pointing to a "bare *procedural*" violation of a statute, a plaintiff bringing a claim under a statutory provision that identifies "a *substantive* right that is infringed any time it is violated . . . need not allege any further harm to have standing." *Id.* at 1117 (internal quotation marks omitted). The Ninth Circuit explained that because the harm at issue was an intangible harm linked to a statutory violation, both the history and judgment of the legislature played an important role in determining

whether the alleged injury was "concrete." *Id.* at 1116-17. Specifically, the court found that (1) the ECPA and CIPA provisions at issue—which target "substantive intrusion" of private communications "rather than merely setting out a procedure for handling data"—protect against harms that bear a "close relationship" to ones that have "traditionally been regarded as providing a basis for a lawsuit" (in this case, actionable common law right to privacy); and (2) the legislature had intended that these provisions "reflect statutory modernizations of the privacy protections available at common law." *Id.* at 1117-18. As such, the court concluded that these provisions, which "codif[y] a context-specific extension of the *substantive* right to privacy," "protect concrete interests" and the plaintiffs need not allege any additional harm to have standing. *Id.* at 1117.

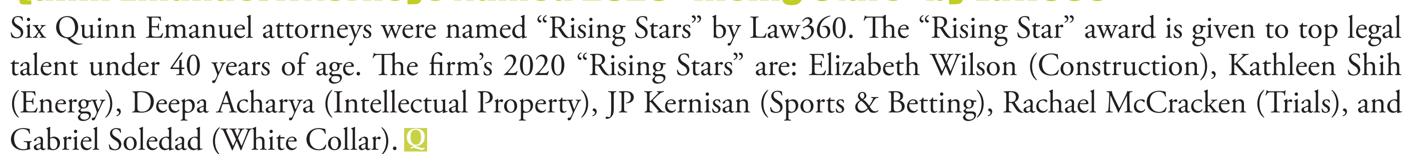
Not long after *Campbell*, the Ninth Circuit likewise found that the plaintiffs in *In re Facebook, Inc. Internet Tracking Litigation* had standing to pursue their privacy claims under the Wiretap Act, the Stored Communications Act (SCA), and CIPA because they had "sufficiently alleged a clear invasion of the historically recognized right to privacy." 956 F.3d 589, 599 (9th Cir. 2020). The plaintiffs specifically alleged that Facebook improperly tracked logged-out users' browsing histories and compiled that information to create personal profiles that were sold to advertisers. *Id.* at 596. Following an analysis similar to the one in *Campbell*, the Ninth Circuit found that (1) violations of the right to privacy, which



"encompass[es] the individual's control of information concerning his or her person," have long been actionable at common law; and (2) the legislature had "intended to protect these historical privacy rights" when it enacted the Wiretap Act, SCA, and CIPA. *Id.* at 598. Thus, the court concluded that "these statutory provisions codify a substantive right to privacy, the violation of which gives rise to a concrete injury sufficient to confer standing." *Id.*

The district courts in the Northern District of California, relying on these Ninth Circuit decisions, have similarly found standing in other privacy cases. For example, following the guidance in *Campbell*, the district court found that the plaintiffs in *In re Google LLC St. View Elec. Commc'ns Litig.*, who alleged that Google intercepted and stored users' private electronic communications, had standing to bring their Wiretap Act claim. 2020 WL 1288377, at *3 (N.D. Cal. Mar. 18, 2020). Likewise, in *In re Google Referrer Header Privacy Litigation*, the court found that the plaintiffs, who alleged that Google improperly disclosed users' search terms to third party servers in violation of the ECPA, had standing to bring their claim because the Ninth Circuit has recognized that the ECPA is among "these statutes that codify a context-specific extension of the *substantive* right to privacy, the violation of which is a concrete harm." 2020 WL 3035796, at *6 (N.D. Cal. June 5, 2020) (internal quotation marks omitted).

Quinn Emanuel Attorneys Named 2020 "Rising Stars" by *Law360*



Six Quinn Emanuel attorneys were named "Rising Stars" by Law360. The "Rising Star" award is given to top legal talent under 40 years of age. The firm's 2020 "Rising Stars" are: Elizabeth Wilson (Construction), Kathleen Shih (Energy), Deepa Acharya (Intellectual Property), JP Kernisan (Sports & Betting), Rachael McCracken (Trials), and Gabriel Soledad (White Collar).

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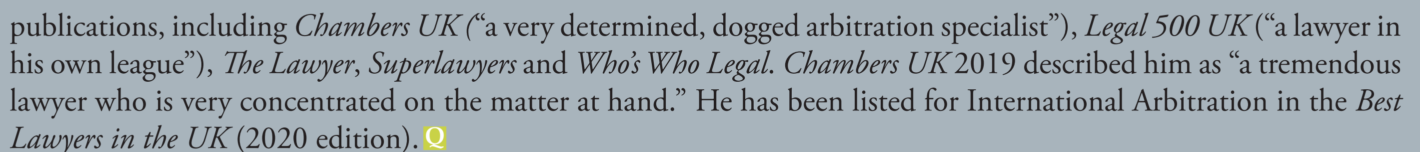

publications, including *Chambers UK* ("a very determined, dogged arbitration specialist"), *Legal 500 UK* ("a lawyer in his own league"), *The Lawyer*, *Superlawyers* and *Who's Who Legal*. *Chambers UK* 2019 described him as "a tremendous lawyer who is very concentrated on the matter at hand." He has been listed for International Arbitration in the *Best Lawyers in the UK* (2020 edition).

VICTORIES

Talc Summary Judgment Victory

In February, the Pennsylvania Superior Court affirmed Quinn Emanuel's landmark summary judgment victory in the first cosmetic talc case to approach trial in Philadelphia.

Our firm represents Colgate-Palmolive Company in multiple lawsuits filed around the country alleging that cosmetic talcum powder products manufactured by Colgate contained asbestos. The defense strategy we developed and implemented in these cases has resulted in a number of significant victories for Colgate, including three appellate decisions in the past year affirming summary judgment in Colgate's favor.

In the most recent of these decisions, *Brandt v. The Bon-Ton Stores Inc.*, we first attacked the scientific underpinnings of the claims alleged in the trial court

with a series of *Frye* motions. The plaintiff's liability case hinged on the testimony proffered from two experts who claimed to have tested talc drawn from "vintage" containers of Colgate's Cashmere Bouquet product and found asbestos. During a week-long *Frye* hearing in the Pennsylvania Court of Common Pleas, we demonstrated that those experts employed flawed techniques that permitted them to count non-asbestos particles—including certain talc particles—as asbestos. The court excluded those experts' opinions, holding that their methodologies were not generally accepted in the relevant scientific communities.

The plaintiff then sought to rely on testimony from an industrial hygienist who claimed the plaintiff was exposed to asbestos from Colgate's products at a level sufficient to cause her disease. The expert offered this opinion by parroting test results of a non-testifying litigation expert, who had employed techniques similar to those the court had excluded—and who would never appear before the jury at this trial. In a transparent effort to avoid *Frye* scrutiny, the non-testifying expert's test results had been "published" in a now-defunct journal shortly after they were excluded as unreliable in a separate case in New York. Through a series of motions *in limine*, we successfully moved to exclude both the "published" test results and the industrial hygienist's exposure opinion. With no evidence left to support the plaintiff's causation claims, we renewed our motion for summary judgment during jury selection, and the motion was granted.

On appeal, the plaintiff contested the exclusion of the non-testifying experts' opinions and also offered an assortment of supposedly disputed facts, attempting to create a triable issue on the highly complex and technical causation issues. The Superior Court affirmed, holding, first, that the trial court had properly applied Pennsylvania law in precluding Plaintiff from using testifying experts as conduits for opinions of non-testifying litigation experts, and, second, that the court had properly granted summary judgment to Colgate in the absence of competent expert testimony establishing that asbestos exposure from Cashmere Bouquet was a substantial factor in causing the plaintiff's disease. The Superior Court's decision renders the summary judgment victory permanent, as the affirmance has not been appealed.

Ninth Circuit Victory for Safeguard Properties

Quinn Emanuel obtained an important appellate victory in the United States Court of Appeals for the Ninth Circuit for Safeguard Properties, in a class action alleging violations of consumer protection laws and seeking over $1 billion in damages.

Our client, Safeguard Properties, is the largest property preservation company in the country. When a home goes into foreclosure and is abandoned by the homeowner, Safeguard is hired by 150 different banks and federal government agencies to maintain the property until the foreclosure process is complete, which can sometimes take two years or more. As part of those preservation activities, Safeguard changes a lock on the back door of the house so that they can perform monthly inspections and complete necessary repairs. The bank permits Safeguard to conduct such lock changes pursuant to a clause in standard-form mortgage contracts allowing the bank to make entry in the event of default and abandonment.

In 2016, in an unrelated case called *Jordan v. Nationstar Mortgage LLC*, the Washington state Supreme Court held in a 6-3 decision—contrary to federal guidance and the laws of 49 other states—that mortgage clauses permitting entry prior to the completion of foreclosure were invalid. The Washington legislature implemented a legislative fix, but class actions quickly followed for pre-2016 conduct. Several major banks and mortgage servicers quickly settled claims for tens of millions of dollars. But because Safeguard worked for all of the banks, they had many times the number of potential class members as any single bank. Before we were retained to take over the case from prior counsel, Safeguard was facing a 19,000-plaintiff certified class and a $1 billion demand.

Within six months, the class against Safeguard was decertified and the case was dismissed. The district court's ruling had two prongs: (1) Safeguard acted in good faith under existing law prior to the Washington Supreme Court decision, defeating plaintiffs' claims under the Washington Consumer Protection Act; and (2) the original named plaintiff in the case committed a massive fraud on the court and never actually owned the property he sued about, depriving him of standing. The court ruled that even though there were later-named plaintiffs added to the operative complaint, the absence of standing by the original plaintiff made the case a nullity and required even the later-added plaintiffs to be dismissed without prejudice. These were difficult legal issues, and it didn't help when the Washington Attorney General filed an amicus brief siding with the plaintiffs and asking the Ninth Circuit to reinstate the consumer protection claim.

On July 14, 2020, the Ninth Circuit declined Plaintiffs-Appellants' certification request and affirmed the dismissal of the consumer protection claim, confirming that Safeguard acted in good faith under existing law and therefore could not be liable. As a result of this decision, this former 19,000-plaintiff class action will now proceed as single plaintiff, non-class, individual trespass claim. Q

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business litigation report

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- As of August 2020, we have tried over 2,300 cases, winning 88% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $70 billion in judgments and settlements.
- We have won five 9-figure jury verdicts and one 10-figure jury verdict.
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