LAW FIRM "MOST FEARED" GLOBALLY BY LARGE BUSINESSES
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Greenwashing Claims on the Rise: Avoiding Dirty Laundry

"Green marketing"—where businesses advertise products and services as eco-friendly—has been on the rise. Examples are everywhere: H&M, one of the world's largest fashion retailers, vaunts its "Conscious" clothing line, which uses "sustainable materials" such as organic cotton and recycled polyester. Cosmetics industry giants Estée Lauder and L'Oréalis are pushing "clean beauty" products. And according to Morningstar Inc., capital flows into funds that claim to focus on environmental, social, and governance ("ESG") issues jumped in 2020, driving assets under management up 29% in the fourth quarter to nearly $1.7 trillion. A recent Bank of America survey found that 40% of investable assets are now touted to be ESG friendly or compliant. That has led governments, competitors, and consumers to become increasingly savvy at detecting and suing for "greenwashing."

What Is Greenwashing?

"Greenwashing" occurs when a business creates the impression that its products and practices are environmentally friendly when they are not, or not to the extent claimed or implied. It can be intentional or result from imprecise wording. Thus, a company may claim its product is "made of recycled material." But is the *entire* product made of recycled material, or only a part? Section 260.13 of the FTC's Green Guidelines—"designed to help marketers avoid making environmental claims that mislead consumers"—warns against unqualified claims of recycled content unless the ***entire*** product, excluding minor incidental components, is made from recycled components.

Greenwashing Claims on the Rise

In 2020, the National Advertising Division (NAD)

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Partner Charles Verhoeven Named a 'Lawyer of the Decade' by the *Daily Journal*

Charles Verhoeven was named a 'Lawyer of the Decade' by the *Daily Journal* because of his outstanding achievements in trials and patent cases. A co-chair of the firm's National IP Litigation Practice and head of our Silicon Valley and San Francisco offices, Charlie has been "at the center of some of the most impactful intellectual property disputes in the technology sector over the last decade."

Government Investigation and Litigation Expert Dr. Haiyan Tang Joins Shanghai Office

The firm welcomes Dr. Haiyan Tang as a partner in the firm's Shanghai office. Haiyan is well known for her experience in helping multinational and China-based companies navigate sensitive Chinese and U.S. government enforcement, investigation, and compliance matters, and complex cross-border litigation and arbitrations. Dr. Tang also has served as Managing Director and Chief Legal & Compliance Officer of a leading private equity fund in Asia and Acting Regional Compliance Director in China for one of the world's largest pharmaceutical companies. She was recognized as one of the 100 top female practitioners in the field worldwide by Global Investigations Review, and a "recommended attorney" by the Chambers Asia-Pacific. Dr. Tang attended Nanjing University and earned a Ph.D. in neuroscience at Yale. She received her J.D. from the George Washington University Law School and is admitted to practice in California and the United States Patent & Trademark Office.

of the BBB National Programs—the advertising industry's self-regulatory forum—saw a substantial increase in the number of greenwashing claims, including claims of biodegradibility, to questionable third-party certifications, to purportedly non-toxic products. The SEC also joined the issue with its March 4, 2021 announcement of the creation of a Climate and ESG Task Force in the Division of Enforcement. The Task Force "will develop initiatives to proactively identify ESG-related misconduct," including analyzing disclosures "relating to investment advisers' and funds' ESG strategies." And on March 16, 2021, three environmental groups filed the first complaint with the FTC against an energy company for alleged greenwashing. Given the rise in green marketing, the capital flowing into "green" funds, and the increasing focus on detecting greenwashing, we are likely to see more enforcement efforts and civil suits.

Federal and State Consumer Protection: Perhaps the most infamous greenwashing case is the Volkswagen diesel emissions scandal. Volkswagen sold consumers on the low-emission features of its cars despite its cheating on emissions tests with "defeat devices." It ultimately agreed to pay $***14.7 billion*** to settle with the Department of Justice, the State of California, and the FTC. Elsewhere, the FTC has investigated and found more than 90 cases of businesses misleading consumers with greenwashing and has imposed civil penalties.

These efforts are likely to only increase during the Biden Administration, as will civil lawsuits. On March 16, 2021, Earthworks, Global Witness, and Greenpeace filed an FTC complaint against Chevron for deceptive advertising that "overstates investment in renewable energy and its commitment to reducing fossil fuel pollution." They claim Chevron has violated the Green Guides "by consistently misrepresenting its image to appear climate-friendly, while its business operations overwhelming rely on climate-polluting fossil fuels."

Regulators on other continents are also increasing their scrutiny of green marketing claims. In January 2021, the European Commission released the results of a study that for the first time screened green online claims from sectors such as garments, cosmetics, and household equipment. The study found that "in 42% of cases the claims were exaggerated, false or deceptive and could potentially qualify as unfair commercial practices under E.U. rules." And with the EU Sustainable Finance Disclosure Regulation having gone into effect on March 10, 2021, European regulators will devote more attention to the accuracy of green marketing. And the European Commission's Sustainable Finance Action Plan imposes obligations on fund managers, financial advisors, and others to disclose information on ESG considerations to potential investors and on their websites.

Private Consumer Actions: In recent years, a flurry of such suits has been filed against traditional energy companies. In May 2020, a non-profit sued ExxonMobil, claiming it is "greatly overstating the level in which it engages in cleaner forms of energy … thereby deceiving consumers," in violation of the District of Columbia's Consumer Protection Procedures Act. *Beyond Pesticides v. Exxon Mobil Corporation*, D.C. No. 2020-CA-002532. The complaint alleges that only a small part of Exxon's business is devoted to clean energy, as it simultaneously invests heavily in fossil fuels.

In a suit that lasted *eight years*, consumers of Wesson cooking oil brought a putative class action alleging the manufacturer had "deceptively and misleadingly marketed its cooking oils" as "100% Natural" when they were made from GMOs. The suit settled, with the manufacturer agreeing not to label, advertise, or market Wesson Oils as "natural" and paying damages to the class. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). In July 2019, consumer nonprofits sued Tyson Foods for misleading consumers by proclaiming its commitment to sustainable practices, even though it is allegedly the "second largest polluter" in the U.S. that routinely allows the "horrific abuse" of its livestock. *Food & Water Watch Inc. v. Tyson Foods Inc.*, D.C. Case No. 2019-CA-004547.

Securities Law Enforcement: On March 3, 2021, the SEC's Division of Examinations announced that one of its annual examination priorities will be to review ESG funds' "advertising for false and misleading statements, and review [their] proxy voting policies and procedures and votes to assess whether they align with their strategies." The next day, the SEC announced the creation of a Climate and ESG Task Force that, among other things, will analyze issuer ESG disclosures.

State governments have also targeted investor disclosures for greenwashing. In 2018, the New York Attorney General sued ExxonMobil for misrepresenting to its investors the cost of future climate change regulations by applying a lower proxy cost for carbon internally than it had publicly disclosed. *New York v. ExxonMobil Corp.*, 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019). After a two-week bench trial, the court found for Exxon, concluding that Exxon's disclosures could not reasonably have misled investors. The Massachusetts AG has its own case against Exxon, alleging that it deceived investors by failing to disclose climate change risks and misrepresenting its business. *Massachusetts v. ExxonMobil Corp.*, 462 F. Supp. 3d 31, 38 (D. Mass. 2020). Exxon's motion to dismiss is pending.

Private Securities Suits: Under Section 10(b) and

Rule 10b5 of the '34 1934, if a company includes an affirmative statement in its disclosures, it has a duty to ensure that the statement is accurate and complete. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. And because the anti-fraud rules apply even to less formal statements such as press releases, investor calls, and websites, a company may face litigation for "greenwashing" even if it avoids including such representations in its official disclosures.

In 2019, 3M shareholders filed a securities class action against the company for allegedly "issuing false and misleading statements to conceal the truth about the Company's exposure to legal liability" for manufacturing products containing per- and polyfluoroalkyl substances. *In Re: 3M Co. Sec. Litig.*, CV 19-15982 (D.N.J. Aug. 31, 2020). The plaintiffs claim that 3M concealed and misrepresented evidence that the chemicals are toxic, and its "omissions and misrepresentations" caused 3M's stock price to trade at "artificially inflated prices." The suit is ongoing. With more money pouring into "socially conscious" funds, there will be an increase in litigation over whether the funds actually are adhering to their stated ESG-related principles. One such case has arisen in Australia.

Traps to Avoid

1. Making Unqualified Environmental Claims. Many countries have laws and guidelines about greenwashing, which center on statements businesses can make about their products and services. The FTC's Green Guide warns, for example, that it is deceptive to make broad, unqualified general environmental benefit claims, such as calling a product "ecofriendly" without saying why it is ecofriendly. Although the Guides are not binding on courts or state authorities, adherence to them will provide powerful arguments that genuine attempts were made not to mislead. Likewise, Australia, the E.U., the U.K., Norway, and Canada have similar regulations and guidelines.

2. Suggesting or Implying Independent Certification or Endorsement Without Adequate Basis. Although it is wise for businesses to obtain unbiased, reliable third-party assessments, labels, or certificates to show how their products or services are ecologically sound, they must be careful. Companies have found themselves in trouble for suggesting a label or certificate was independently awarded when it was not. The FTC charged the Moonlight Slumber mattress company for claiming that its products had been certified with the "Green Safety Shield," while omitting that the awarded seal was its own creation.

3. Focusing Solely on the End-Product or Service. A fashion company may be quick to launch its "sustainable" line of clothing using recycled fabrics, but neglect to acknowledge they are manufactured in factories powered by coal-generated electricity. Or a company may espouse environmental concerns in one area, while ignoring or downplaying its less-than-sustainable practices in another. Ben and Jerry's came under fire for this in 2018 when the Organic Consumers Association ("OCA") accused it of conducting a misleading marketing campaign called "Caring Dairy." *Organic Consumers Ass'n v. Ben & Jerry's Homemade Inc.*, 2018 CA 004850 B (D.C. Super. Ct. July 9, 2018). The campaign touted the business's commitment to animal welfare standards, but the OCA claimed this was misleading because the company sourced ingredients from operations that contributed to water pollution, thereby creating a false image of its environmental standards. The District of Columbia Superior Court denied the motion to dismiss, finding a reasonable consumer "could plausibly interpret Ben & Jerry's labeling and marketing as affirmatively (and inaccurately) communicating that the company's ice cream products are sourced exclusively from Caring Dairies and/or other humane sources." The parties mediated for two years before the case was dismissed.

Conclusion

Although these cases may strike some as extreme or even frivolous, the fact that judges are letting them get beyond the pleading stage tells us that the threat has to be taken seriously—at least until appellate courts provide guidance on how far afield an inquiry may go into a company's environmental record. For now, statements and commitments must be backed up by specific, clear, factual evidence, not just puffery about "green" efforts.

Financial Disputes and Investigations Leader Paul Baker Joins London Office

Paul Baker has joined the London office as a partner. He focuses on complex financial disputes and investigations, particularly contentious asset management work. He also provides specialist reputation management advice to global organizations regarding their online and print media strategies, particularly in crisis situations. These include advising on matters involving defamation, malicious falsehood and harassment arising from social media publications.

A Sea Change to Peremptory Challenges: The Effects of California's AB-3070

Five minutes before the end of the 2020 legislative session, California legislators passed a law that could drastically alter jury selection in state court trials. Designed to address implicit bias in jury selection, the law changes the framework for deciding whether the exercise of a peremptory challenge is discriminatory. Proponents note that historical bias has resulted in less diverse juries than the pool presents and say change was overdue. Others say the law will do more harm than good.

Starting on January 1, 2022 for criminal trials and January 1, 2026 for civil trials, judicial oversight of jury selection will be designed to end implicit bias. The court will no longer assess whether the peremptory was exercised as a result of purposeful discrimination, as held in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 22 Cal. 3d 258 (1978). Instead, the court must consider whether there is a substantial likelihood an objectively reasonable person—defined as one who is aware of unconscious bias and its impact on the justice system—would view the challenge as related to the juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. Thus, rather than assessing actual, subjective motivations, this objective test considers how a reasonable person, sensitive to the issues of unconscious bias, would view the juror challenge.

Perhaps most significant, California's new law considers ***presumptively invalid*** a laundry list of reasons for striking a prospective juror, including many that have been used by prosecutors for years to justify a juror's dismissal: expressing distrust of the criminal justice system, having a negative experience with the justice system, and having a close relationship with someone charged with or convicted of a crime. Other reasons, such as a prospective juror speaking English as a second language, providing unintelligent or confused answers, or acting inattentively, are presumptively invalid. That presumption may be rebutted only by ***clear and convincing*** evidence and, in the case of confused or inattentive prospects, where the judge observed the conduct. Because other states will consider this framework, it is important to understand the reasons for the law and its consequences.

Reasons for the New Law

California's Legislature was transparent about its intent in passing this new law, stating "many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination." The bill's sponsor, California Attorneys for Criminal Justice (CACJ), an association of defense attorneys, noted that the selection process excludes Black and Latinx jurors. Between 2006 and 2018, California courts of appeal considered 683 cases in which trial courts denied defense attorney motions over the removal of Black and Latinx jurors. Even if prosecutors' "race-neutral" reasons for striking jurors largely correlated with racial and/or ethnic stereotypes, courts were unlikely to find a constitutional violation, according to a 2020 report by the Berkeley Law Death Penalty Clinic. Prosecutors used their strikes to remove Black jurors in nearly 75% of cases, and Latinx jurors in roughly 28% of cases; yet, the appellate courts found constitutional error in only 2.6% of those decisions.

Principal Changes in C.C.P. § 231.7

The law identifies improper reasons for striking a prospective juror. For example, having a child outside of marriage, receiving state benefits, or living in a particular neighborhood are presumed to be invalid reasons for dismissal unless the attorney can show by clear and convincing evidence that an objectively reasonable person would view the reason as unrelated to the prospective juror's perceived membership in a cognizable group. California lists six additional presumptively invalid reasons for striking a juror, including a prospective juror's dress, attire, or personal appearance, lack of employment or underemployment, and friendliness with a prospective juror of the same group.

The law also bars grounds that have "historically been associated with improper discrimination in jury selection," such as that the prospective juror was staring or failing to make eye contact, or exhibited a problematic attitude, body language, or demeanor. If a party seeks to dismiss such a juror, the trial court must confirm that the behavior occurred, based on the court's own observations or counsel's observations and counsel must explain why such behavior "matters to the case to be tried."

Washington State Led the Way, with Illustrative Appellate Results

California's new law follows closely behind a change imposed three years ago by the Supreme Court of Washington. Under General Rule 37, which took effect in April 2018, if a Washington trial court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. Since then, Washington's appellate courts have held that reasoning that would have been sufficient under *Batson* now requires a trial court to deny the peremptory challenge.

For example, in *State v. Pierce*, 195 Wash. 2d 230, 243-44 (2020), the state Supreme Court reversed and remanded a first-degree murder conviction, finding the trial court improperly allowed the prosecution to strike the only Black juror on the venire after she said she had a brother who was convicted of attempted murder and that the process "left a bad taste in her mouth." The prosecutor explained the reason for the challenge was that the juror had strong opinions the system did not treat her brother fairly, a reason presumptively invalid under the law. Similarly, in *State v. Listoe*, 475 P. 3d 534, 539 (2020), the court held the State was improperly permitted to peremptorily strike the only Black juror on the venire after he proclaimed he would question, and have problems following, the law if he disagreed with it. In *State v. Omar*, 12 Wash. App. 2d 747, 748 (2020), the court affirmed the trial court's denial of a peremptory challenge on the basis that the juror, of Asian descent, would be seated in a first-degree robbery case after stating that she had worked at a bank while it was robbed.

Criticisms of the New Law

Prosecutors have been vocal opponents of the new law. The California District Attorneys Association raised concern on a number of bases, including that the bill was one-sided, will punish innocuous conduct, and infers ill intent without any basis. Prosecutors criticize the presumptively invalid reasons for dismissing a juror as reading like a laundry list created by criminal defense attorneys to ensure only jurors predisposed to acquit can serve. For example, jurors who express distrust of the criminal justice system or who've had negative experiences with law enforcement are more likely to disregard or discount evidence produced by the prosecution, including an officer's testimony. Prosecutors have also called the new law impractical because some of the most common and logical reasons to excuse a potential juror would now be evidence of an attorney's bias. Thus, a juror who slept through jury selection or who understands so little English that they are unable to follow the proceedings could not be dismissed as part of a peremptory challenge.

Judges have also been critical of this reform. The Association of African American California Judicial Officers requested the bill's withdrawal, arguing it was premature and should be subject to more review. And the Alliance of California Judges called AB 3070 problematic, fearing it would make the jury selection process longer and more difficult. The president of the Alliance advocated, instead, for eliminating peremptory challenges altogether, which has been echoed by some prosecutors who say that will at least restore parity between them and defense attorneys.

The impact on civil cases will be significant. In complex cases, lawyers on both sides of the v. usually want jurors who are interested in the case and willing to sift through a lot of conflicting evidence. It may be difficult to eliminate potential jurors who display behaviors in *voir dire* that run counter to those goals. Even on the more mundane side, there will be consequences. A presumptively invalid reason for dismissal is a prospective juror's neighborhood. However, in certain civil cases, such as toxic torts, defense attorneys would want to cite that the juror lives where the chemical spill, gas explosion, or wildfire occurred as a neutral justification for dismissal. That may not be possible.

Other Consequences of Amended C.C.P § 237.1

Attorneys need to be prepared to try cases with less sympathetic, more hostile, or cynical jurors. Trials will also take longer. Attorney bar cards are on the line in the face of accusations of bias. Judges' decisions will be reviewed de novo on appeal. This may lead to more use of jury questionnaires or additional *voir dire* to ensure development of a sufficient record as to why race is not a factor in the challenge. There will be more objections to peremptory challenges and time-intensive record-making. And the consequences of a successful objection will also slow down the case. The law requires the judge to start jury selection anew if requested by the objecting party, and declare a mistrial and select a new jury if requested by the defendant after the jury has been impaneled.

Other States May Follow

Three other state Supreme Courts have called into question their existing approach to peremptory challenges, which require a showing of intentional discrimination. We should assume that *Batson* is on the verge of a wave of reformulations in state courts across the country.

International Disputes Expert Dominic Roughton Joins London Office

Dominic Roughton has joined the firm as a partner in the London office. Dominic practices international arbitration, litigation, and public disputes. He specializes in the energy and mining sectors, particularly in Asia, where he practiced for 12 years, Africa, the CIS, and the Middle East. He also has expertise in the state-to-state arena, especially maritime boundary disputes. He sits as an arbitrator and has acted as counsel in the ICC, LCIA, SCC, SIAC, JCAA, and CIETAC Arbitrations.

Life Sciences Litigation Update

Protecting Sensitive Information in the COVID-19 Era

Cybersecurity has become an enormous concern. In the last year, 80 percent of organizations have experienced a breach caused by a third-party vendor. The level of threat activity in the first half of 2020 surpassed all of the activity in 2019. Hackers create 300,000 pieces of malware every ***day***. Employee decisions are often the weak link in efforts to protect information from hackers. For example, in 2018 a NASA employee brought a personal computer to work without permission and connected it to NASA's Jet Propulsion Laboratory network, which a hacker later targeted to gain access to adjoining systems. And according to Microsoft, 44 million of its customers are still using passwords that have been compromised by known, large-scale breaches.

The COVID-19 pandemic has dramatically changed how and where people work. This has increased the importance of individual decision-making in protecting companies from cybersecurity risks to their most sensitive information, including trade secrets. Almost overnight, a majority of the global workforce was using technology to work remotely from home—technology that was not designed to replicate all of the data security measures that exist in corporate facilities.

This abrupt shift has been especially challenging for life sciences companies. This is the result of myriad factors, including the increasing transition from written health care records to electronic forms, the confidentiality requirements unique to their business, and their need to protect commercially sensitive intellectual property. Employees of life sciences companies regularly deal with highly confidential information concerning patients, drug manufacturing, trade secrets, and pricing and promotions. Even before COVID-19, these companies were a regular target for cyber-attacks: "Between 2012 and 2014, cybercriminals started to ramp up attacks on the healthcare industry, which remarkably suffered more than the business, military, and government sectors." Connor McLarren, *Once More Unto the Breach: How the Growing Threat of Ransomware Affects Hipaa Compliance for Covered Entities*, 15 Ind. Health L. Rev. 305, 308 (2018). But this has been heightened by the pandemic.

Where traditional solutions, such as virtual private networks (VPN), are not seen as sufficient to protect highly sensitive information, such as key information related to a company's drug development pipeline or financials, companies may opt for the remote use of company-owned devices and data protocols in lieu of personal devices, or limit the types of information that can be accessed remotely (even though personnel will find that to be a frustrating approach).

In addition, companies providing clinical testing may need to adapt in analyzing and preparing patient results, and employees working in general R&D must adopt more robust confidentiality measures for preparing patent applications, analyzing copyrighted data, and documenting trade secret methods, formulations, and manufacturing processes. Companies can conduct cybersecurity training or otherwise educate employees about the various tactics used by cybercriminals to acquire sensitive information and ways they can protect their personal home wireless networks and the devices attached to them. *See* Amy Candido, et al., "Reasonable Measures" To Protect Trade Secrets At Risk With Employees Working-From-Home Amid Covid-19 Crisis, Quinn Emanuel (Apr. 2, 2020), https://www.quinnemanuel.com/media/pebmpg0u/client-alert-reasonable-measures-to-protect-trade-secrets-at-risk-from-employees-working-from-home-amid-covid-19-crisis-5.pdf.

Federal agencies have weighed in. The FDA has recognized that companies conducting clinical trials might need to change their data management procedures and handling of patient information. U.S. Food & Drug Administration, Conduct of Clinical Trials of Medical Products During the COVID-19 Public Health Emergency (Jan. 27, 2021). The Department of Justice suggests that companies use The National Institute of Standards and Technology's ("NIST") voluntary cybersecurity framework as part of their efforts. *NSIT voluntary cybersecurity framework*, 1 Health L. Prac. Guide § 5B:14 (2020). The NSIT is drafting a guide to cybersecurity risk. The current draft is at https://nvlpubs.nist.gov/nistpubs/ir/2020/NIST.IR.8286A-draft.pdf, with a final report due later this year. The Department of Health and Human Services has published a list of Top 10 Tips for Cybersecurity in Health Care: (1) establish a security culture; (2) protect mobile devices; (3) maintain good computer habits; (4) use a firewall; (5) maintain anti-virus software; (6) plan for the unexpected; (7) control access to protected health information; (8) use strong passwords and change them regularly; (9) limit network access; and (10) control physical access. https://www.healthit.gov/sites/default/files/Top_10_Tips_for_Cybersecurity.pdf. HHS has published its own practices for the health industry. www.phe.gov/Preparedness/planning/405d/Documents/HICP-Main-508.pdf

Product Liability Litigation Update

Considerations for Admitting 30(b)(6) Testimony in Mass Tort and Product Liability Cases

In many mass tort and product liability cases involving alleged injuries with a long latency period, corporate defendants must often defend decisions and actions occurring many years in the past. Companies often no

longer employ the people who made the key decisions at issue. To avoid wasting time deposing the wrong person, plaintiffs typically obtain testimony from a corporate designee under Rule 30(b)(6) or its state law counterparts, which often refer to this type of witness as a "person most knowledgeable" ("PMK"). Such a witness is responsible for giving knowledgeable and binding answers on behalf of the corporation, which includes matters not only within the Rule 30(b)(6) or PMK witness's personal knowledge, but also to matters known or reasonably available to the organization. Mass tort plaintiffs are now calling these witnesses to testify during the plaintiffs' case-in-chief. This offers advantages to the plaintiffs and challenges to the corporate defendant.

On the plaintiffs' side, they can get certain necessary testimony into evidence through a corporate representative as an admission by the company, and thus as an exception to the hearsay rule. Plaintiffs also can potentially get damaging documents into evidence through the corporate representative, even when the corporate representative was not involved in the events contained within the document. Calling such a witness can provide a "one stop shop" approach to present a unified narrative to a jury, rather than having to present the story through a series of piecemeal company witnesses. And significantly, plaintiffs can seek to use the rules of evidence to undermine a defendant's attempt to rehabilitate such witnesses or offer rebuttal testimony through them.

That is because, at trial, a witness is generally limited to testifying about information within that witness' personal knowledge and not as to facts based on hearsay. *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 F. App'x 899, 907-08 (5th Cir. 2010). Primarily relying on Rule 32(a)(3)'s authorization for an *adverse* party to use a 30(b)(6) or PMK witness's deposition testimony at trial, courts generally authorize an opposing party to cross-examine 30(b)(6) or PMK witness about historical facts concerning the business, even if those facts are outside of the witness's personal knowledge. *Brazos River*, 469 F.3d at 434 ("[I]f the corporation makes the [PMK] available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge.").

Many courts do not allow the business entity to offer its own corporate representative's testimony for historical facts if it is based on hearsay. *See, e.g.*, *Union Carbide*, 404 F. App'x at 907-08; *Sovereign Military Hospitaller v. Fla. Priory*, 702 F.3d 1279, 1295 (11th Cir. 2012); *but cf. Whitehouse Hotel Ltd. P'ship v. Comm'r*, 615 F.3d 321, 342 (5th Cir. 2010) (permitting a partnership's Rule 30(b)(6) or PMK witness to testify to matters within the "partnership's knowledge," rather than the Rule 30(b)(6) or PMK witness's personal knowledge). It is common for a Rule 30(b)(6) witness's testimony of historical facts and company admissions to be admissible when it is being used *against* a business entity at trial, but it is excluded when offered to *support* the company, where such evidence is based on hearsay.

Corporate defendants are not without strategic options to combat this challenging dynamic at trial. First, in federal court and states with procedures modeled after the federal rules, if any portion of the 30(b)(6) or PMK witness's deposition testimony is introduced into evidence, then the company may also offer any other part of the deposition. Fed. R. Civ. P. 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."); *see also Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 n.4 (10th Cir. 2009). However, this rule allows for only *deposition testimony* to be played at trial—not a live redirect examination, so its utility is limited where plaintiffs call the corporate representative as a live witness.

Second, a 30(b)(6) or PMK witness can develop personal knowledge of historical facts by relying on exceptions to the hearsay rule, such as records prepared in the ordinary course of business or perceptions based on industry experience. *See Burlington N. R.R. Co. v. Neb.*, 802 F.2d 994, 1004-05 (8th Cir. 1986). Thus, if a corporate representative's testimony can be founded upon exceptions to the hearsay rule, there is a higher likelihood that the testimony will be admitted.

Third, courts may permit "witnesses to give lay opinion testimony about a business's policies, practices, or procedures, based on an after-the-fact review or analysis of documents or facts, if the witness's testimony derived from personal knowledge gained through participation in the business's day-to-day affairs." *United States v. Kerley*, 784 F.3d 327, 337 (6th Cir. 2015); *see also United States v. Valencia*, 600 F.3d 389, 416 (5th Cir. 2010). It can be effective to convey the company's position on key issues, even where it is limited by the lack of a percipient fact witness to certain historical facts.

Artificial Intelligence Update

The Promises and Perils of 6G Technology

6G technology will usher in a revolution in innovation, unleashing artificial intelligence, revolutionizing the health care and data-transmission sectors, and creating novel privacy issues. 6G offers transmission speeds potentially 100 times faster than 5G, near-zero latency, and connection density up to 10 million devices per square kilometer. These advances will create a network where

almost every device can be simultaneously connected, enabling technologies not possible today.

6G is only in its infancy. Governments and private entities are just beginning to invest in the technology, and projections suggest commercial availability around 2030. But given 6G's anticipated ubiquity and potential to change the landscape, we would be wise to begin learning about it now.

Artificial Intelligence

Artificial intelligence ("AI") represents a new frontier in the global economy: Some estimates say it could contribute up to $15.7 trillion worldwide by 2030. 6G promises at least two major developments that will affect our current law: The creation of vast interconnected AI networks, and the growing importance of AI inventors. Increases in computing power and innovations in computer science have fueled AI innovation. From 2002 to 2018, AI patent applications rose by over 100%. This pace shows no sign of slowing: Countries are pouring money into AI research, and major telecommunications firms like Nokia and Huawei have begun investing in 6G-enabled AI technologies.

Regulatory Vacuum

These AI innovations will affect our lives in ways that current regulatory frameworks are not prepared to address. For example, 6G-enabled AI technology will permit the creation of a "smart application layer" of interconnected devices, from autonomous vehicles to medical implants to geolocation sensors, all of which will communicate with one another in real time. This network will be undergirded by an "intelligent sensing layer," a web of technologies that will collect and analyze data from these devices. Every piece of life could be connected. Every accompanying bit of data could be collected.

Public reaction will vary. Some will welcome the conveniences and synergies. Others will fear the establishment of a technological Panopticon. Consider the debate over universal facial recognition. San Francisco has banned the use of facial recognition technology by the police and other agencies, fearing intrusion into citizens' private lives. Elsewhere, from London to Beijing, facial recognition is common and authorities hail its ability to fight crime. These debates will only grow.

United States regulators have not kept pace with AI's advances. AI regulation is "in its infancy." Little has happened at the federal level: In 2019, the White House issued an Executive Order creating the "American AI Initiative," and the National Institute of Standards and Technology identified nine "areas of focus" for AI standards, but no binding policies have issued. The United States Congress has introduced many bills to regulate artificial intelligence, but none have passed.

This void has not been filled at the state level, at least not in a consistent manner. Just look at the difficulties in regulating autonomous vehicles: States like Arizona have billed themselves as red-tape-free laboratories for autonomous vehicle innovation. Yet a fatal accident in Arizona unveiled safety issues with prototypes that were then on the road, as a post-accident report revealed that Uber, the car's manufacturer, had disabled the car's autonomous emergency brakes and standard collision-avoidance system before the accident. Autonomous vehicle manufacturers have openly sought consistent regulatory guidance. This lack of state regulatory cohesion is repeated on an international scale, as countries have not coalesced under any sort of international standard. Firms involved with AI technology should monitor the shifting regulatory sands, even potentially delaying large-scale investments until it becomes clear that they will receive the state's blessing.

And, while AI could potentially decrease overall energy consumption by increasing network efficiencies, AI technologies require large amounts of energy for computation and communication, which could frustrate plans for energy-efficient implementation. AI innovators must understand both the physical and governmental barriers that could slow the 6G revolution.

AI & IP

Even as AI patents have skyrocketed, a recent decision from the U.S. Patent and Trademark Office threatens to curb a new source of AI intellectual property: Patents on products invented by AI. In April 2020, the PTO considered a case involving an AI called DABUS, a system of neural networks trained to independently recognize the novelty and salience of inventions. https://www.uspto.gov/sites/default/files/documents/16524350_22apr2020.pdf. Without human intervention, DABUS had "invented" an improved beverage container, and a "neural flame" device for search-and-rescue missions. The PTO ruled that it could not list DABUS as the inventor, citing terms in the statute like "individual," "herself," and "person." *Id.* at 8.

AI inventorship will only grow. The PTO says that the term "inventor" must refer to "the individual who invented or discovered the subject matter of the invention." *Id.* at 6. Under this opinion, these devices will be unpatentable. It will have enormous ramifications. The owners of AI systems will still want to protect their intellectual property rights, and may end up relying on other forms such as trade secret protection. That would be a massive change to the status quo, where patents dominate the enforcement landscape. Trade secret enforcement comes with its own challenges, such as proving misappropriation and in some cases, showing how damages can be directly attributable to the misappropriation. Increased reliance on trade secrets will force companies to shift their IP policies and practices. A trade secret exists only as long as it is kept secret. Even an accidental disclosure breaks trade secret protection. A

shift from patent to trade secret IP protection may force AI-based companies to update their employment agreements, as they would need to ensure that their employees never disclose the secrets underlying their firms' innovations, even after they leave the firm.

Spectrum

6G technologies will require a massive expansion of the regulatory structure around spectrum, the data-bearing frequencies that enable wireless communications. 6G requires frequencies in the 100 GHz to 1 THz range, which will allow for the extreme densification of systems, enabling hundreds and even thousands of simultaneous wireless connections with significantly higher capacity than 5G systems. This can support such innovations as zero-latency local networks, wireless "fiber-like" data rates between local devices, wireless data center networks (reducing infrastructure cost), on-chip wireless networks, nano-networks (which connect nano-devices), and intersatellite communications.

This spectrum revolution will require competent regulation. In the U.S., two federal agencies now regulate frequency: the FCC, which governs private use, and the National Telecommunications and Information Administration (NTIA), which manages the federal government's use. In March 2019, the FCC voted to open frequencies up to 3 THz, saying it had "launched the race to 6G." The FCC created "experimental licenses" to allow researchers to experiment in this range. The FCC and NTIA have jurisdiction over these spectra, which will require meaningful coordination between them.

The presence of two regulatory agencies can have downsides for industry, as agencies can fight over territory, credit, and decision-making authority. For instance, the DOJ's Antitrust Division and the Federal Trade Commission (FTC) have overlapping authority to enforce antitrust laws. This recently became an issue in a case where the FTC sought to impose antitrust liability on telecommunications manufacturer Qualcomm, while DOJ Antitrust argued that the same suit threatened national security because, by disadvantaging Qualcomm, it risked undermining US leadership in 5G technology and boosting Chinese manufacturer and alleged saboteur Huawei.

Health Care

6G may revolutionize health care through fully-automated surgery, rapid transfer of medical data, and fully implantable devices. But where there is medicine, there are malpractice suits. 6G-enabled technologies could create an unanticipated wave of liability. 6G's infrastructure requirements will also pose a problem for medical providers who hope to rely on its interconnected technology.

Medical malpractice liability from defective devices is not a new phenomenon. To take one example, Stryker has paid over $2 billion to settle lawsuits stemming from its hip-replacement therapy. Consider the implementation of a 6G-powered brain-computer interface (BCI). The BCI allows individuals to control machines with their brains, offering a host of innovations: Sophisticated prosthetic limbs, improved memory for patients suffering from Alzheimer's, and similar technologies. But the promise and potential profit of these innovations comes with enormous potential liability. Individual brain-damage medical malpractice suits can result in judgments of millions of dollars. A brain-damage class action would threaten manufacturers with crushing liability. In medical device litigation, the liability would not solely lie on manufacturers: Anyone in the distribution chain, from manufacturers, to hospitals, to doctors, needs to beware of this potential wave of liability.

Infrastructure

A global 6G network requires a tightly-nested web of transmitters and base stations. Because 6G base stations are anticipated to have a transmission distance under 200 meters, some estimate that full 6G implementation will require 100 billion base stations globally. The placement of 5G towers, which average one per block in many U.S. cities, has sparked fights about local autonomy and property rights, as many states have barred cities from setting the rates they charge companies to erect antennae. The increased number of 6G base stations poses a proportionately greater problem.

These infrastructure battles will not be confined to the planet's surface. Nations have already begun building 6G networks from above, launching satellites that could offer worldwide 6G connectivity. This proliferation creates a host of issues, from the creation of clouds of "space junk" that increase the risks of satellite collisions, to the stoking of tensions between world powers over interstellar dominance. These battles could be fought at a lower altitude, as researchers have proposed using drones to establish 6G networks. Even there, the regulatory environment is still developing, with the FAA announcing a set of rules in December 2020.

Privacy

Privacy may be the most important legal issue with 6G innovation: When technology promises global connectivity, an individual's entire life risks becoming one data breach away from compromise. The ultimate role of 6G in society may be determined by whether this promised safety can allay well-grounded fears of a potential breach of the interconnected network that will hold all of society's data.

Current FTC regulations require firms to take "reasonable security" measures. A web of regulators patrol privacy issues: The SEC has guidelines for cybersecurity in finance,

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Trial Team Secures Win for Revlon Lenders Who Citibank Repaid "By Mistake"

Quinn Emanuel secured a major trial victory against Citibank in federal court in New York. The case was also remarkable for the speed with which Quinn Emanuel handled it. On August 11, 2020, Citibank paid nearly $900 million to hundreds of Revlon lenders on a 2016 loan. Each received exactly what it was then owed in principal and interest. More than 20 hours later, Citibank said its payments were a mistake, that it had intended to pay only interest. Citibank demanded return of nearly all of the money.

Over the next few days, lenders holding more than $300 million of the Revlon loans agreed to return the principal repayments. But the lenders managed by ten investment managers represented by Quinn Emanuel—more than 100 lenders who held over $500 million of the loans—rejected Citibank's demand. As the Quinn Emanuel team read the law, the lenders were entitled to retain the funds because: (1) the payments were exactly what was owed; (2) the lenders had no reason to believe, at the time the payments were received, that they would have been made in error; and (3) the lenders did nothing to induce Citibank to make the payments.

One week later, Citibank sued Brigade, Symphony, HPS, and seven other investment managers. The cases were consolidated before Judge Jesse Furman. He issued temporary restraining orders preventing defendants from touching the funds before trial. He set an expedited schedule, requiring that all fact discovery, expert discovery, and pre-trial motions be done in three months. On December 9, he began a one-week, fully remote bench trial. Throughout the case, Citibank expressed complete confidence that defendants had to return the money. That ended in February, when Judge Furman issued a 101-page decision rejecting Citibank's claims, holding that the lenders can retain the payments.

The Quinn Emanuel team based its case on New York's "discharge for value" rule, which states that a lender is entitled to keep funds where it is paid what it is owed, without receiving any notice, at the time of the payment, of a mistake. Judge Furman agreed that the doctrine applies here. He found that Quinn Emanuel's witnesses had credibly established that they did not know—and had no reason to know—that Citibank had erred when it payed the lenders exactly the amounts they were owed. Indeed, "[g]iven a choice between assuming that Revlon had paid off the 2016 Term Loan early—as borrowers sometimes do—and assuming that Citibank or Revlon had mistakenly transferred over $900 million—something no bank may have ever done before (and may never do again)—it would have been borderline irrational to choose the latter."

Decisive Victory for Universities in COVID-19 Refund Tuition Class Actions

The firm achieved a significant victory last month for clients the University of Rhode Island, Roger Williams University, and Johnson & Wales University in COVID-19 tuition refund class actions that threatened their financial stability. *See Burt v. Bd. Trs. Univ. of Rhode Island*, No. 20-465-JJM-LDA (D.R.I. Mar. 4, 2021) (and consolidated cases). This decision has already been cited in other cases.

For universities, the COVID-19 pandemic has heralded an unprecedented number of class action lawsuits. Despite efforts to ensure their students could continue their studies on schedule through remote learning, universities were met with over *300* class action lawsuits against more than *200* schools. For many universities, these class actions pose an existential threat. The suits typically allege breach of contract, unjust enrichment, conversion, and violations of consumer protection laws. They demand refunds of tuition and fees amounting to thousands of dollars per student, with potential 7-figure or 8-figure exposure to the class.

Many universities moved to dismiss, but the tide so far has run in plaintiffs' direction overwhelmingly, with most motions denied in state and federal courts across the country. To win these cases, Quinn Emanuel convinced the District Court to insist, even at the pleading stage, that plaintiffs demonstrate that the alleged contracts contain a specific, enforceable promise to provide uninterrupted in-person education in all circumstances. Plaintiffs could not do so. Although they cited course catalogs, websites, and promotional materials, Quinn Emanuel convinced the judge to deem those as unactionable statements, negated by the universities' express reservation of rights in their catalogs to "change the program of study" and "assignment of instructors, locations, or meeting times" at any time. On the conversion and unjust enrichment claims, Quinn Emanuel convinced the court that there is nothing "unjust" in receiving tuition and fees in exchange for providing uninterrupted progress towards degrees—especially given the "obvious additional cost" schools "had to incur to continue operations during a pandemic."

Appellate Victory for Leading Enterprise AI Software Company C3.AI

Quinn Emanuel recently obtained a unanimous affirmance from the Third Circuit Court of Appeals of the firm's trial victory for client C3.ai in the District of Delaware. C3, which recently conducted a high-profile IPO, is a leading enterprise AI software provider. In 2014, former stockholders of E2.0, a company C3 acquired in a stock-

for-stock merger, sued C3, its founder Tom Siebel, and its former CEO David Schmaier for securities fraud under 10(b) of the '34 Act, common law fraud, and breach of contract related to certain alleged misrepresentations and breaches of contract in connection with C3's acquisition of E2.0. Plaintiffs sought $68 million in damages. After a bench trial, Quinn Emanuel obtained a complete defense victory and an award to C3 of attorneys' fees and expenses.

On appeal, the Plaintiffs sought review of a single claim: an alleged breach by C3 of a "holdback" provision in the merger agreement, whereby C3 would award C3 shares to the former E2.0 stockholders if C3 did not have a valid indemnification claim against E2.0 for certain breaches of the agreement. At trial, the court credited the testimony of Tom Siebel and David Schmaier and found that Plaintiffs had failed to prove any damages from the alleged breach. Based on a review of the documents and testimony, the court rejected the Plaintiffs' reliance on the $3.33 "Unit Divisor" contained within the agreement, ruling that it was not indicative of the shares' value, but rather simply a "plug-in" number for purposes of calculating the stock-for-stock exchange ratio under the merger.

On appeal, the Plaintiffs argued that the district court was wrong to ignore the $3.33 figure because the figure was an actual representation of the shares' value. Plaintiffs also argued that the lower court had overlooked two additional dollar figures in the record that could serve as the measure of damages. (Plaintiffs had raised neither figure in post-trial briefing.) Finally, Plaintiffs argued that they should have been awarded at least nominal damages, which they said would have rendered them the "prevailing party" for purposes of the contractual fee-shifting provision.

Quinn Emanuel defeated all of these arguments on appeal. In an opinion that adopted arguments from the firm's appellate briefing and oral argument, the Third Circuit affirmed the district court's findings regarding the $3.33 Unit Divisor, holding that "[t]he District Court thoroughly reviewed the documentary record, the plain language of the Merger Agreement, and its credibility determinations as to the testimony of C3's lead negotiators, E2.0's lead negotiator, and C3's counsel, all of which confirmed that $3.33 was never intended to reflect an actual valuation of C3's shares."

The Third Circuit also agreed that Plaintiffs had forfeited the two alternative purported damages values they relied on by failing to raise them before the district court. And it agreed with Quinn Emanuel that the district court did not abuse its discretion by not awarding nominal damages because Plaintiffs had failed to request them in pleadings or argument before the district court. Q

(Artificial Intelligence Update continued from page 9)

DHS investigates cybercriminals, and Commerce "is tasked with enhancing cybersecurity awareness and protections."

States have implemented their own regulations. For example, New York recently enacted the SHIELD Act, which, among other things, requires companies to carry out "reasonable" security measures, including implementing procedures to train employees and "adjust[ing] the security program in light of business changes or new circumstances." The Act also permits the attorney general to levy a fine of up to $5,000 for each failure to adhere to reasonable security standards under Section 350(d) of the New York General Business Law. S.5575B Reg. Sess. 2019-2020 (N.Y. May 7, 2019).

Both federal and state laws use reasonableness as a starting point, but it is impossible to predict what security protocols will be "reasonable" in 6G's new frontier. The difficulty of predicting and adapting to 6G's innovations will have real consequences due to the harsh penalties imposed by state-level privacy laws. The California Consumer Privacy Act, enacted in 2018, assesses fines at $750 per breach per consumer per incident, or actual damages. Additionally, plaintiffs in private litigation have struggled to show harm from data breaches, but that could become easier as 6G networks will increase our reliance on data. A single breach could lead to catastrophic damages for the victimized firm.

Despite the gloom, 6G actually could offer a privacy renaissance. Right now, encryption is accomplished via asymmetric cryptography, a process by which data are encoded with a public key, accessible to all, but can only be decoded with a private key. Modern keys are easy to generate but difficult to reverse-engineer with current technology. That will change with quantum. Quantum computing lets cryptographers create secure keys by leveraging the uncertainty principle, the idea central to quantum encryption that an attempt to measure a piece of information disturbs the system in a way that can be detected. The sending computer transmits the key to decode the encrypted data to the receiving computer, but both can sense a disturbance in the data, at which point the sending computer sends a different key until the transmission is finished without being disturbed.

This increase in encryption technology will magnify a separate issue: The (in)ability of law enforcement to access devices of the accused. In 2016, Apple refused to unlock the phone belonging to the perpetrator of a mass shooting. Once encryption becomes functionally unbreakable, the divergent interests of the government and the service and device providers will come to a head. Q

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