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Overview of the Class Action Regime in Australia

The Australian class action regime is among the most plaintiff-friendly in the world, and it has been reported that, outside of the U.S., Australia is the next most likely place in which a corporation will find itself defending a class action (Clark & Harris, *The Push To Reform Class Action Procedure In Australia: Evolution or Revolution?* (2005) Melbourne University Law Review 776(32)).

While the Australian national class action regime was introduced in 1992, it was not until the early 2000s that class actions became a mainstay of the legal landscape. The rapid growth in Australian class actions since then has coincided closely with the rise of third party litigation funding. Counsel for corporations doing business in Australia should be aware of the general parameters of class action litigation in that country.

Class action proceedings in Australia are termed "representative proceedings." For ease of use, we will refer to class actions throughout.

The class action regime in Australia differs at the state and federal level. Federally, the class action rules are contained within Part IVA (ss 33A–33ZJ) of the *Federal Court of Australia Act 1976* (Cth) ("Part IVA"). Part IVA comprehensively governs the conduct of class action proceedings in the Federal Court, including the make-up of the class of plaintiffs, the procedure required to ensure fairness to the defendants, and the way in which the proceeds of judgment should be distributed. Generally, at the state level, the rules are silent on these issues and are instead determined between the parties and the court on a case by case basis. However, the two largest jurisdictions in Australia, New South Wales and Victoria, have adopted, with only very limited changes,

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INSIDE

Kathleen Sullivan Featured in December 2013 *The American Lawyer* Cover Story

In an age of blogs and e-mail publications, the cover of *The American Lawyer* magazine remains one of the most prominent places a lawyer can be featured. *The American Lawyer*'s December 2013 cover story features Quinn Emanuel name partner Kathleen Sullivan in a profile entitled "The Golden Touch" and in the online version, "Quinn Emanuel's Successful Bet on Kathleen Sullivan." The article describes Sullivan's unusual transition from Harvard and Stanford law professor and Dean of Stanford Law School to chair of Quinn Emanuel's appellate practice as "a singular success story."

Opening with photographs of Sullivan in the lobby of the New York Life Building, the home to the firm's New York office, the article highlights Sullivan's recent appellate wins. These include her Supreme Court victory for Shell in *Kiobel v. Royal Dutch Petroleum*, which rolled back the Alien Tort Statute, and her bench trial and Second Circuit win for Entergy in *Entergy Nuclear Vermont Yankee v. Shumlin*, which invalidated Vermont's efforts to close a nuclear power plant. The story also describes Quinn Emanuel's unmatched growth in recent years into a firm that now has 700 lawyers in 15 offices including nine outside the U.S.—and the only female name partner at any Am Law 100 firm. Q

Quinn Emanuel Named to BTI's 2014 "Client Service A-Team" Honor Roll

The firm was recently named to BTI Consulting Group's 2014 "Client Service A-Team" Honor Roll. BTI's ranking methodology is based on direct feedback from 300 corporate counsel and ranks law firms serving the world's largest clients. This recognition comes on the heels of Quinn Emanuel's recent selection as one of the "Fearsome Foursome"—the four firms in-house counsel fear the most in litigation based on a BTI poll of general counsel. Q the rules in Part IVA. For the purposes of this review we will confine our discussion to those rules.

Key Features of the Australian Class Action Regime. In order for a representative plaintiff to institute class action proceedings in Australia, the following criteria must be met:

1. there must be seven or more people who have a claim;
2. the claims must be in respect of, or arise out of, the same, similar or related circumstances; and
3. the claims must give rise to a substantial common issue of law or fact.

Under Part IVA, a representative plaintiff does not need the consent of the class members in order to commence proceedings, nor do they need to know the details of the other plaintiffs. Instead, a class can be defined by a list of names or by other set criteria, but it is not necessary to specify the number of people in the class or the value of their claims. As such, Part IVA operates on the basis of an opt-out regime, whereby every potential claimant who falls within the definition is a member of the class unless they opt-out of the proceedings (though we note that a class can be defined in such a way that members are effectively required to opt in—referred to as a "closed class"). There is also no certification requirement in Part IVA, meaning that a judge is not required to certify the proceedings as appropriate to be brought by way of a class action.

A final important aspect of the Australian class action regime is the need for settlement approval. Once proceedings have been commenced under Part IVA, any settlement of those proceedings must be approved by the court. A settlement approval requires the court to reach an independent conclusion that the proposed settlement is fair and reasonable, and is in the interest of class members.

Litigation Funding. In addition to the procedural aspects of class actions in Part IVA, another important driver of the Australian class action regime is the presence of litigation funders. Litigation funders are third parties (generally companies) who fund litigation on behalf of the plaintiffs in exchange for a share of the proceeds of any settlement or judgment. Litigation funding in Australia is not a regulated industry and funders are particularly prevalent in Australia, at least in part, because there is a prohibition on lawyers acting for clients on a contingency fee basis. There are a number of publicly listed litigation funders in Australia, the most prominent of which, Bentham IMF Ltd ("IMF"), has recorded a return of over 300% on its investments. IMF's public report to 30 June 2013, records that it has generated \$1.278B in revenue, \$849M of which was returned to clients and \$429M of which was retained by IMF. In total, IMF has expended only \$3.2M in lost cases and adverse costs orders (and a further \$3.7M on withdrawal costs from cases). By any measure, the profit margins are significant.

Differences Between Australian and American Class Action Systems

Significant differences between the Australian and American class action systems are set out in the table below.

Recent Australian Cases

Australian courts are yet to provide guidance on a number of key areas, as the majority of class actions in Australia settle before judgment. Ambiguity exists in how damages should be quantified in securities class actions, how best to establish liability and link causation to the damages claimed, as well as discovery procedures. While recent case law has not provided answers to those legal questions, the following cases demonstrate the ability of Australian class actions to have an international impact.

Issue	Australia	America
Certification	No requirement for certification by the court of the proceedings.	Plaintiff required to satisfy the court that formal requirements for commencement of proceedings by class action have been met.
Common vs individual issues	Must be at least one substantial common issue of law or fact linking plaintiffs in the class.	Common issues are required to predominate over individual issues.
Contingency fees	Contingency fees not allowed for lawyers. Litigation funders entitled to operate on a contingency fee basis.	Contingency fees allowed for lawyers.
Costs	Generally the unsuccessful party must pay the costs of the successful party to the action.	Each party bears its own costs irrespective of success.

In September 2012, the Federal Court of Australia handed down judgment on the representative claim brought by a number of local councils against Lehman Brothers. *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028. Lehman Brothers was found to have engaged in misleading and deceptive conduct, was found to have been negligent in its promotion of synthetic collateralized debt obligations (SCDOs), and was found to have breached its fiduciary duties as a financial advisor to the councils. This decision is being appealed by Lehman Brothers in the High Court of Australia. Settlement negotiations are also continuing.

Further, in November 2012, the Federal Court ruled in a separate case brought by a number of local councils, that global rating agency Standard & Poor's (S&P) had applied misleading AAA ratings to certain investments. *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200. As a result of their reliance on those ratings, the councils lost more than $16 million during the global financial crisis. The case held that, in certain circumstances, a ratings agency can owe a duty of care to investors. S&P, ABN Amro, and financial house Local Government Financial Services were ordered to repay the councils' losses. They have appealed the decision.

The above two cases are significant for several reasons, but primarily because they were among the first global decisions to make findings regarding complex debt obligation products that were sold in the lead up to the 2008 financial crisis. These cases have sparked a litany of similar litigation around the world, with actions contemplated against S&P and other ratings agencies in the Netherlands, United States, and United Kingdom.

The Lehman Brothers case is also significant because it betrays a trend in the Australian class action industry, namely the rise of institutional investors participating in class actions (rather than so called "mum and dad investors").

Prospective Changes to the Australian Regime

The rise in class actions in Australia has some commentators questioning whether such litigation is putting too much pressure on Australian businesses. In the past year, shareholder class actions alone accounted for $480 million in settlement payouts by Australian companies. Class action advocates argue that such actions are a business risk, and can be managed by improved corporate behavior, rather than attacking the mechanism through which Australians can enforce their legal rights.

There is a healthy debate within Australia about the best way to manage class actions into the future. With the change in the federal government following the election of 7 September 2013, it will be interesting to see what approach the new government takes in relation to some of the policy challenges associated with the regulation of litigation funding and the potential introduction of contingency fees. A discussion of these potential policy challenges is provided below.

Litigation Funding. George Brandis, the new Attorney General, has publicly commented that there should be a greater level of regulatory scrutiny of the class action industry. This may mean that litigation funders in the near future may be required to hold licenses similar to those held by promoters of managed investment schemes. The aim of such licensing is to ensure that litigation funders are adequately funded, so that plaintiffs and successful defendants are not left out of pocket. This approach has gained momentum and support from Australia's largest litigation funder, IMF, and the U.S. Chamber Institute of Legal Reform.

Policy makers must also consider whether sufficient regulation exists to ensure claimants' rights are balanced effectively against the interests of funders and lawyers. This question has recently come into sharp relief as a number of partners from plaintiffs' law firm Maurice Blackburn have established a litigation funder, Claims Funding Australia ("CFA"), and sit on its board. CFA is proposing to co-fund several class actions in the Federal Court, with Maurice Blackburn engaged to act in those matters. The Federal Court is yet to approve this initiative. The Court is currently considering whether the fiduciary duties Maurice Blackburn owes its clients can co-exist with its business interests in funding the claim. The Court's ruling in that regard, and the new government's reaction to it, will prove interesting. If the courts allow this type of funding arrangement, it will create new opportunities for law firms to diversify the range of services they offer clients.

Contingency Fees. Australian lawyers are presently prevented by legislation from entering into contingency fee arrangements. However, this may change. The New South Wales Law Society has indicated some willingness to discuss reform in this area. A Law Society spokesman said that "The Council of the Law Society has considered an internal policy paper on the question of contingency fees and pursuant to resolutions passed at its August meeting it is to consider further issues." There is also growing demand from the legal industry and its clients to introduce contingency fee arrangements. Advocates argue that those arrangements would lead to improved access to justice, particularly given the underfunding of free legal assistance services. Those opposed to the introduction of contingency fees point to the fear that lawyers may be driven to settle or maintain claims for their own interests rather than their client's or the Court. Q

Expansion of California's Unfair Competition Law

In yet another expansion of California's unfair competition law, the California Supreme Court recently ruled that state law claimants may base a cause of action on a "borrowed" federal statute even though the U.S. Congress had repealed that federal statute's private enforcement provision. In *Rose v. Bank of America N.A.*, 57 Cal. 4th 390 (2013), the Court reversed the lower courts on the legal sufficiency of plaintiff's claim, holding that Congress' failure to remove a savings clause from the underlying federal law, the Truth in Savings Act ("TISA," 12 U.S.C. § 4301 *et seq*. at § 4312), left open the ability for plaintiffs to bring a state law claim based on a violation of TISA.

Plaintiffs in *Rose* brought a class action suit against Bank of America, asserting that certain violations of TISA's disclosure requirements relating to fee increases on personal bank accounts constituted unlawful and unfair business practices under California's unfair competition law ("UCL" Calif. Bus. & Prof. Code, § 17200 *et seq*.). Under settled California law, violation of federal statues may constitute an "unlawful" act for purposes of the UCL, even where the underlying federal statute does not itself contain a private enforcement mechanism. *See, e.g.*, *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1095-96 (2008) (permitting UCL claim based on violations of California statutes that mirror requirements from the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq*.)).

To date, the major limitation on the UCL's "borrowing" of federal statutes is where the federal statute purports to provide an exclusive remedy or where Congress intended the federal statute to preempt any related state laws. *See Safeco Ins. Co. v. Superior Court*, 265 Cal. Rptr. 585 (Cal. Ct. App. 1990). When enacted, TISA included a provision authorizing private civil actions. 12 U.S.C. § 4310. However, Congress repealed that provision in 1996 by adding a "sunset clause" to the private action provision, effective 2001. (Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 2604(a) (Sept. 30, 1996), 110 Stat. 3009-470).

The question posed by the *Rose* case was whether Congress' repeal of TISA's private right of action would impact the UCL's ability to "borrow" TISA violations. In the trial court, defendant successfully demurred to the *Rose* plaintiffs' complaint, arguing that Congress' action demonstrated a desire to eliminate *any* private right of action under TISA, and that TISA therefore constituted an exclusive federal scheme. 57 Cal. 4th at 394. The Court of Appeal, Second District, affirmed the demurrer, reasoning that Congress' repeal of TISA's private right of action was an express rejection of any private right to enforce TISA. *Rose v. Bank of America, N.A.*, 133 Cal. Rptr. 3d 615, 624 (Cal. Ct App. 2011).

The California Supreme Court granted petition for review, and reversed. In discussing its reasoning, the Court noted that the post-repeal TISA retains a separate savings clause which states that TISA does "not supersede any provision of the law of any state relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency." 12 U.S.C. § 4312. Neither lower court had addressed the significance of the savings clause, but the Supreme Court suggested that the UCL was exactly the kind of statute contemplated by the savings clause, and that the continued existence of the savings clause, despite Congress' repeal of the private action provision, indicates that UCL claims may still be based on violations of TISA.

The Court's holding can also be understood in the context of longstanding California jurisprudence treating the UCL as providing a strong, independent cause of action. Notably, the Court relied upon its own prior analysis in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998), in which the Court held that a corporation had standing under the UCL to enforce a violation of the California Penal Code related to the prohibition of cigarette sales to minors. *Id.* at 567. Following this prior guidance, in *Rose*, the Court repeatedly emphasized the UCL's force as an independent cause of action and that the pursuit of a claim under the UCL is not the same as "enforcement" of the underlying federal statute. *See, e.g.*, 57 Cal. 4th at 397 ("[B]y borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism. It provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is 'unlawful.'"); *id.* at 396 ("[A] UCL action does not 'enforce' the law on which a claim of unlawful business practice is based. By proscribing 'any unlawful' business practice [the UCL] 'borrows' violations of other laws and treats them as unlawful practices that the [UCL] makes *independently* actionable.") (emphasis in original) (internal citations omitted).

While the Court notes early on that its holding is limited to the unique circumstances of the case (57 Cal. 4th at 395 ("the issue before us is a narrow one")), the logic of the decision and its discussion of the independence of the UCL suggest that the outcome might have been the same even without the existence of the savings clause, such that the Court may permit UCL "borrowing" from federal statutes whenever there is any ambiguity about Congress' desire to create exclusive and preemptive federal schemes. Alternatively, the scope of *Rose* may truly be quite narrow, permitting UCL claims based on borrowed federal law that precludes private enforcement only where the underlying statute *also* contains a clause expressly protecting consistent state laws.

PRACTICE AREA NOTES

Bankruptcy & Restructuring Update

Second Circuit Holds that Section 109 Eligibility Requirements Apply to Foreign Entities in Chapter 15 Bankruptcy Cases. Recently, the United States Court of Appeals for the Second Circuit held that the eligibility requirements set forth in section 109 of the United States Bankruptcy Code (the "Bankruptcy Code") apply to foreign debtors in chapter 15 bankruptcy cases, and may preclude the availability of chapter 15 relief even if all the requirements for recognition of a foreign proceeding are satisfied. *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013). The issue was one of first impression within the Second Circuit.

Background. On April 3, 2012, foreign representatives (the "Foreign Representatives") of Octaviar Administration Pty Ltd ("OA")—a foreign debtor undergoing liquidation proceedings in Australia—filed a petition for relief under chapter 15 of the Bankruptcy Code. Specifically, the Foreign Representatives sought recognition of the Australian proceeding as a foreign main proceeding pursuant to 11 U.S.C. § 1515. On August 30, 2012, Drawbridge Special Opportunities Fund LP ("Drawbridge") filed an objection to the petition arguing that OA did not qualify for relief as a debtor under chapter 15 because "only a person that resides or has a domicile, a place of business, or property in the United States … may be a debtor under [the Bankruptcy Code]." *See* 11 U.S.C. § 109(a).

On September 6, 2012, the United States Bankruptcy Court for the Southern District of New York (Chapman, J.) (the "Bankruptcy Court") entered an order granting recognition of the Australian proceeding as a foreign main proceeding over Drawbridge's objection. Noting that chapter 15 contains its own definition of a "debtor," *see* 11 U.S.C. § 1502(1) (a "debtor" is "any entity that is the subject of a foreign proceeding"), the Bankruptcy Court held that for purposes of chapter 15, the debtor need only be a debtor in a foreign proceeding; the eligibility requirements set forth in section 109(a) did not apply. A direct appeal to the Second Circuit ensued.

The Second Circuit Decision. Reversing the Bankruptcy Court, the Second Circuit found that a foreign debtor in a chapter 15 case must satisfy the section 109(a) eligibility requirements before a bankruptcy court may grant recognition of a foreign proceeding. In so holding, the Second Circuit observed that pursuant to section 103(a), chapter 1 "of this title … appl[ies] in a case under Chapter 15." Section 109 is within chapter 1, thus, "by the plain terms of the statute," section 109 applies to cases under chapter 15. Because the Foreign Representatives made no attempt to establish that OA had assets in the United States in accordance with section 109(a), the Foreign Representatives' request for recognition of the Australian proceeding should have been denied.

Conclusion. Section 109(a) does not require that a specific quantum of property be located in the United States in order for a debtor to qualify for bankruptcy relief. Indeed, courts have liberally construed the term property in section 109 to encompass, for example, United States bank accounts or funds on retainer with United States law firms. While some courts have held—in the context of chapter 11—that placing property in the United States for the sole purpose of creating bankruptcy jurisdiction presents an issue of bad faith, other courts have found that bad faith is not a basis for denying chapter 15 relief. Thus, even if a debtor were to place property in the United States just prior to filing a chapter 15 petition in order to satisfy the section 109 eligibility requirements, as long as the assets are in the United States *as of the petition date*, it is unlikely that section 109(a) will act as a significant bar to chapter 15 relief.

London Litigation Update

Parallel Judicial Proceedings in Europe: "The Alexandros T" [2013] UKSC 70. In a landmark decision, the U.K. Supreme Court has provided parties with a meaningful way to discourage opponents from commencing proceedings in the courts of another EU Member State in breach of an exclusive jurisdiction agreement in favor of the English courts. The Supreme Court held that, in certain circumstances, the wronged party is entitled to seek damages for breach of that jurisdiction agreement and related declarations if its opponent commences proceedings in another Member State. The decision is significant because while the parallel proceedings in the foreign Member State cannot actually be prevented (as EU law prohibits the use of anti-suit injunctions), they can now be rendered commercially pointless as any recovery obtained will automatically be recoverable by way of damages in the English courts.

The background to the dispute is that, following the sinking of the ship 'Alexandros T', its owners brought claims against their insurers in the English High Court in 2006. The claims were settled and the proceedings were stayed on the terms of the settlement agreements, which contained exclusive jurisdiction clauses in favor of the English courts (the insurance policies themselves also contained English jurisdiction clauses). In 2011, however, the owners commenced fresh proceedings against the insurers in Greece. The insurers applied to the English courts, seeking (amongst other things) declarations that the Greek claims were in breach of the release provisions in the settlement agreements and the English jurisdiction clauses in both the settlement agreements and the insurance policies. The insurers also sought damages for those breaches, and indemnities in respect of the Greek claims. In response, the owners argued that these claims fell within Articles 27 and/or 28 of Council Regulation (EC) No. 44/2001 (the "Brussels Regulation") and that the English proceedings had to be stayed pending the decision of the Greek court on its own jurisdiction. Article 27 of the Brussels Regulation is mandatory and requires that where proceedings involving the same cause of action between the same parties are brought in different Member States, any court which is not first seized of the matter must stay its proceedings until the jurisdiction of the court first seized is determined. Article 28 is discretionary and concerns proceedings which are related (rather than identical); it provides that any court which is not first seized of the matter may stay its proceedings.

At first instance, the High Court refused to stay the English proceedings and held that the owners were bound to indemnify the insurers against any costs incurred and any sums that may be awarded against them in the Greek proceedings. The Court of Appeal, however, reversed that decision and held that under Article 27 it was bound to stay the English proceedings in favor of the Greek court (it made no final determination of the position under Article 28).

Reversing the decision of the Court of Appeal, the Supreme Court ruled that Article 27 did not apply as the two proceedings did not concern the same causes of action. The Greek claims were claims in tort, whereas the insurers' claims were contractual and based on the terms of the settlement agreements and insurance policies; they were therefore not "mirror images" of each other. An analysis under Article 27 only requires consideration of the claims themselves; it does not take into account possible defenses or a broader overall picture of the proceedings in question. The Court of Appeal was therefore wrong to focus on the nature of the settlement agreements as a defense to the Greek claims in tort. As regards to Article 28, the Supreme Court held that the English court was first seized as the original 2006 English proceedings remained "live" to allow for enforcement of the terms of the settlement agreements; an application for enforcement therefore did not constitute a new action. Even if the English court were second seized, however, the Supreme Court held that it would exercise its discretion to refuse a stay on the basis that the English court was the natural court to consider the English law contractual issues raised by the insurers' claims and that a judgment from the English court on these issues would assist the Greek court. Accordingly, if the owners continue their appeal from the first instance judgment, it will now fall to the Court of Appeal to determine the substantive issues (given that there is no longer any need to wait for the Greek court to rule on its own jurisdiction).

This judgment provides a welcome degree of certainty and finality to parties who have entered into settlement agreements which are subject to English law and jurisdiction. More generally, it means that parties will be less likely to commence proceedings in another EU Member State in breach of an English jurisdiction agreement knowing that the English court will permit the wronged party to bring parallel proceedings to recover by way of damages any recovery that might be obtained in the foreign court.

Defaulting on Procedural Requirements and Deadlines: The New Approach Following <u>Mitchell v News Group Newspapers Ltd</u> [2013] EWCA Civ 1537. In an appeal relating to the libel claim brought by Andrew Mitchell MP against *The Sun* regarding the "Plebgate" affair, the Court of Appeal set out guidance as to the new approach to applications for relief from sanctions for breaches of procedural requirements. The Court held that the approach was to be more robust and relief granted more sparingly following the amendments to the wording of CPR 3.9 pursuant to the Jackson reforms.

Mitchell's solicitors failed to exchange and lodge their costs budget at least seven days before the CMC as was required by CPR PD51D and Master McCloud ruled that they should therefore be treated as having filed a budget comprising only the applicable court fees (and as such in the event that Mitchell won at trial, he would be limited to recovery from the defendant only of such applicable court fees, rather than the usual award that the unsuccessful party pay the successful party's reasonable legal costs). Mitchell applied under CPR 3.9 for relief from that sanction but Master McCloud dismissed the application on the basis that the Jackson reforms required stricter compliance with rules and orders. On appeal, the Court of Appeal refused to overturn the Master's ruling on the basis that the new wording of CPR 3.9 was a deliberate shift in emphasis for the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and court orders. The Court of Appeal provided the following guidance as to how the new approach should be applied: (i) it would usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or order; (ii) if that could properly be regarded as "trivial," the court would usually grant relief provided that an application was made promptly; (iii) if not "trivial," then the burden was on the defaulting party to persuade the court to grant relief.

Lord Dyson MR held that administrative errors, pressures of work, and "*well intentioned incompetence*" will rarely be good reasons unless the breach is truly trivial. The judgment also cited the example of the solicitors suffering from a debilitating illness or being involved in an accident as what "may" constitute a good reason and went on to state that if departures from rules, practice directions, and court orders were tolerated then the relaxed approach to civil litigation which the reforms were intended to change would continue. Lord Dyson MR acknowledged that the new more robust approach would mean that from now on relief from sanctions should be granted more sparingly than previously and that it was the Court's hope that its judgment should ensure that the "*culture of delay and non-compliance*" will not continue for long.

The ruling is a clear message from the Court of Appeal to legal representatives that non-compliance with rules and orders will no longer be tolerated and there should be a major change of culture in this regard. It also emphasised the importance of submitting the required costs budgets in time at risk of serious consequences for the client in terms of costs recovery.

Trademark Litigation Update

Trademark Laches: An Effective Exit in the Right Circumstances. Delay-based defenses in trademark cases are rarely an effective way for a defendant to exit a case before discovery. Statute of limitations defenses almost never dispose of so-called continuing tort cases, where every new act of alleged infringement is often held to start its own limitations clock running. Instead, the statutory period in these cases usually works only to limit the time frame for the plaintiff's recovery for damages, even if the plaintiff waited decades to bring suit.

In cases based on a single instance of infringement, the defense of laches can result in a complete dismissal in trademark cases, barring all past damages and prospective relief, such as injunctions. *See, e.g.*, *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 840 (9th Cir. 2002); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 190, 192-93 (2d Cir. 1996); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 & n.3 (7th Cir. 1999). It is generally more difficult to establish laches in a continuing tort case than a statute of limitations defense in a case premised on a single occurrence, such as a personal injury, where the defendant needs only to prove that the date of the occurrence, or the date it was discovered or should have been reasonably discovered, is outside of the limitations period. This is because laches applies only where the defendant can prove that the plaintiff unreasonably delayed in bringing suit and that prejudice would result.

In most jurisdictions, laches is presumed to apply if the delay is longer than the statute of limitations period. *See, e.g.*, *Conopco*, 95 F.3d at 191; *Santana Prods. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 139-41 (3d Cir. 2005); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001); *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002); *Hot Wax, Inc.*, 191 F.3d at 821; *Jarrow Formulas*, 304 F.3d at 837; *Kason Indus., Inc. v. Component Hardware Group, Inc.*, 120 F.3d 1199, 1203 (11th Cir. 1997). Even in a jurisdiction that does not apply the presumption, or where the plaintiff has offered some evidence to rebut it, a long delay can decrease the level of prejudice the defendant needs to prove. *See, e.g.*, *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 807 (8th Cir. 1979); *accord Hot Wax, Inc.,* 191 F.3d at 824; *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 1000 (9th Cir. 2006).

In trademark cases, the Ninth Circuit supplements the two basic criteria of unreasonableness and prejudice with four additional factors: the strength and value of the mark asserted, harm to the plaintiff if relief is denied, whether the parties are competitors, and whether the defendant's use of the mark was in good faith. *E–Systems Inc. v. Monitek, Inc.*, 720 F.2d 604, 607 (9th Cir. 1983). These fact-intensive inquiries, called the *E-Systems* factors, and three of which overlap with the likelihood of confusion factors evaluated on the merits of the claim, can make it challenging to succeed in asserting a laches defense at the pleading stage and even at summary judgment.

Nevertheless, pretrial victories on laches grounds occur. In *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004), for example, a four-year delay from the point of actual knowledge to filing suit was sufficient to apply laches to bar a dispute between competing grocery store chains both using the term "Gigante." The plaintiff learned of the defendant's use of the mark in 1995, waited until 1998 to confront the defendant when it planned to open a store in the same area, and then waited another year before filing suit. The trial court ruled on summary judgment that laches barred the action and the Ninth Circuit agreed because the plaintiff had failed to excuse its delay, the defendant had built a valuable business using the mark during that period, the mark was found to be relatively weak, and the defendant acted in good faith—even though the parties were competitors and some evidence of actual confusion existed.

Laches victories at the pleading stage are much more rare, but not impossible. Recently the court applied laches at the pleading stage in *Parts.com v. Google Inc*. 3:13-cv-01074-JLS-WMC (S.D. Cal. Dec. 4, 2013). In its complaint, the plaintiff, an online auto parts retailer, alleged that Google had been continuously infringing the PARTS.COM trademark since at least November 2007 by allowing third party advertisers to use the term "parts.com" in Google's AdWords advertising program. Parts.com alleged that it sent Google a cease and desist letter in November 2007—almost six years before it filed suit—and that it was suffering $2 million dollars in lost sales each year as a result of the allegedly continuous infringement. The court ruled that Parts.com's delay was presumed unreasonable, the complaint offered no excuse for it, and Google would suffer expectation-based prejudice because each year of delay created millions of dollars in potential liability. Although the presumption applied, the court also analyzed the remaining *E-Systems* factors, finding a weak mark, no bad faith, and no competition between the parties.

Notwithstanding the relative rarity with which it applies, laches remains a viable defense in the right circumstances.

Life Sciences Litigation Update

Can the FDA Be Held Liable in a Private Lawsuit for Failure to Prevent Recent Drug Shortages? In *Carik et al. v. United States Dep't of Health & Human Servs. et al.*, CV 12-272, __ F. Supp. 2d __, 2013 WL 6189313 (D.D.C. Nov. 27, 2013), the U.S. District Court of the District of Columbia granted a motion to dismiss for lack of subject matter jurisdiction, which was filed by the U.S. Department of Health and Human Services, the U.S. Food and Drug Administration, and the U.S. National Institutes of Health ("the Defendants"), in a case in which the Plaintiffs had sought declaratory, injunctive and monetary relief for failure to ensure an adequate supply of prescription drugs.

All but one of the Plaintiffs suffered from a rare and potentially life threatening condition known as Fabry disease and were being prescribed the drug "Fabrazyme," the only drug approved in the United States to treat Fabry disease. In 2009, there was a shortage of Fabrazyme after it was discovered that the manufacturer, Genzyme, had placed virus adulterated product into interstate commerce. This shortage resulted in a Consent Decree between the U.S. Department of Justice and Genzyme, which gave the government limited oversight over Genzyme's manufacturing facility. As a result of the shortage, Genzyme convened a panel to recommend how to manage the remaining supply of Fabrazyme. The panel advised physicians to provide doses at levels reduced as much as thirty percent of normal to avoid depletion of the supply of Fabrazyme. In 2010, Mr. Carik, one of the plaintiffs suffering from Fabry disease, petitioned the U.S. National Institutes of Health to use its "march-in rights" under the Bayh-Dole Act on the '804 patent for Fabrazyme which would enable the federal government to force the patent holder to "grant a nonexclusive, partially exclusive, or exclusive license" where a "Federal agency determines that such . . . action is necessary to alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees." The government has never exercised its "march-in" authority. *Carik et al. v. United States Dep't of Health & Human Servs. et al.*, CV 12-272, 2013 WL 6189313 at *3 (D.D.C. Nov. 27, 2013)(citing Defs. Mem. at 11).

The last Plaintiff suffered from vitamin A deficiency disease and was being prescribed a drug known as "Aquasol A" to treat the condition. Aquasol A is the only drug approved in the United States to treat the type of vitamin A deficiency afflicting the Plaintiff. A worldwide shortage occurred in 2010 when the manufacturer, Hospira, transferred manufacturing of the drug to a different facility.

The Plaintiffs sued in February 2012 alleging five claims: (1) violations of the Doctrine of Separation of Powers; (2) violation of the 10th Amendment of the United States Constitution; (3) violation of the Patent Clause of the U.S. Constitution; (4) violation of the 5th Amendment; and (5) violation of the Food, Drug and Cosmetics Act. In response, the Defendants moved to dismiss all claims for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The court agreed that the Plaintiffs failed to meet the standing requirement and did not discuss other defenses.

Relying on the Supreme Court's three-prong test for standing under Article III of the U.S. Constitution, the court first determined the Fabry Plaintiffs failed to indicate they had indeed suffered an "injury in fact" based on both their asserted physical injuries and depravation of Constitutionally protected rights. Although not completely barred in the D.C. Circuit, the court also determined the Fabry Plaintiffs failed to show standing based on "probabilistic injuries" caused by diluted dosages of Fabrazyme. However, the vitamin A deficient Plaintiff met this prong of the test by pleading that the disease had caused a worsening of eyesight and without treatment the loss of eyesight would be irreversible.

Second, the court found no causal link between the injuries and the Defendants' conduct, rather all of the alleged injuries were caused by independent third-party actions—*i.e.*, the pharmaceutical companies' manufacturing activities, or lack thereof. In response to the Plaintiffs' first causation argument, the court held that Defendants have no duty, statutorily or otherwise, to alleviate drug shortages by halting Hospira's transfer of manufacturing to a different facility without an adequate stockpile of product. Additionally, the Plaintiffs attempted to show causation through the defendants' indirect approval of the Fabrazyme rationing plan based on their Consent Decree oversight of Genzyme, awareness of the plan and lack of action to stop the plan. Ultimately, the court rejected this argument, holding it would be unfair to attribute the actions of third-party pharmaceutical companies based on the Defendants' limited oversight because "[e]ven extensive regulation by the government does not transform the actions of the regulated entity into those of the government," and "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the [government] responsible for those initiatives" (quoting *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Thus, the Plaintiffs failed to show causation by arguing a duty to act or by limited agency oversight and did not have standing under Article III.

Finally, despite having already determined the Plaintiffs' lack of standing under Article III, the Court determined that because the Plaintiffs suffered no injury attributable to the Defendants, any Court action could not remedy their suffered injuries. Q

Quinn Emanuel Highly Ranked by *Chambers Europe*

Quinn Emanuel's European offices (London, Mannheim, Moscow, Hamburg, and Paris) earned top rankings in *Chambers Europe* 2013. The publication praised the firm's London office for its "impressive client wins" on behalf of ITV Group, York Capital, and Irish businessman Derek Quinlan. Sources agree that the firm's London office is "really going places." Quinn Emanuel's German offices were recognized for their "contentious" intellectual property work in the telecommunications sector on behalf of Motorola, Samsung, and Sony, among others. Partners at the firm's Moscow office and newly opened Paris office were equally praised, with special attention given to their influential work in both arbitration and litigation. Q

Victory for Paulson & Co.

On October 1, 2013, Quinn Emanuel obtained for its clients—senior executives of Paulson & Co. Inc.—a complete and decisive dismissal of a civil complaint brought by Five Mile Capital SPE B LLC ("Five Mile") which sought more than $158 million in damages. The executives were directors of a portfolio entity, MSR Hotels & Resorts, Inc. (the "REIT"), also a defendant in the action. The total victory exonerated the executives and cleared the way for the REIT to successfully emerge from bankruptcy in 2013.

Before Five Mile commenced its action, certain of the REIT's subsidiaries owned five iconic, luxury resorts across the United States. In 2011, those entities (the "Affiliated Debtors") filed for bankruptcy relief in the United States Bankruptcy Court for the Southern District of New York. During those cases, the Affiliated Debtors and Five Mile entered into a stipulation consenting to a senior lender "credit bidding" its loans in exchange for the resorts in the absence of any higher and better offers. The resorts were sold to the lender under the Affiliated Debtors' court-approved plan of reorganization. Five Mile, as the most junior lender to the Affiliated Debtors, was left with no recovery on account of its $50 million loan. Five Mile vociferously objected to the consummation of the sale, but its objections were found to be without merit and they were ultimately overruled.

The REIT had issued a "bad boy" guarantee on account of Five Mile's loan—triggered if the borrower committed certain bad acts. The REIT also owned some of the trademarks used at the resorts. In an attempt to recover some value on account of its lost investment, Five Mile sued both the REIT and the directors, asserting direct and derivative claims on account of the defendants' alleged actions and omissions in connection with the Affiliated Debtors' sale of the resorts and administration of the trademarks. Five Mile specifically alleged that (i) the guarantee was an unconditional guarantee, (ii) the resorts were sold without its consent in violation of the loan agreement, (iii) there were "bad boy" acts on the basis of intentional misrepresentation, and (iv) the directors breached their fiduciary duties.

Quinn Emanuel filed a motion to dismiss the litigation in its entirety and on the merits. After two-and-a-half days of oral argument presented in late July 2013, the Bankruptcy Court issued a bench ruling on October 1, 2013 (reported at 2013 WL 5716897), granting the defendants' motion and adopting Quinn Emanuel's legal arguments. The Bankruptcy Court agreed that the plain language of the guarantee established that it was a limited, "bad boy" guarantee. Further, it held that there were no "bad boy" acts that could have triggered the limited guarantee. The Bankruptcy Court specifically determined that Five Mile's consent to credit bidding by the lender during the course of the Affiliated Debtors' bankruptcy cases was deemed consent under New York law to the sale of the resorts to that purchaser, even though every ancillary detail of the eventual transaction could not be foreseen at the time the consent was given. The Bankruptcy Court further observed that because the sale of the resorts was for reasonable value, *i.e.*, the highest possible value that could be obtained in the marketplace, Five Mile failed to allege how it had suffered damages that the guarantee required in order to trigger liability. The Bankruptcy Court further rejected the claims that the borrower had made any misrepresentation or otherwise committed a "bad boy" act and found "exceedingly convincing" the arguments that the directors served their fiduciary duties appropriately and in complete good faith.

Quinn Emanuel Overturns $70 Million Fraud Verdict

On November 20, 2013, Judge Richard G. Andrews of the U.S. District Court for the District of Delaware granted judgment as a matter of law to the firm's client Cisco, erasing almost the entirety of a federal jury's award of $70 million to plaintiff XpertUniverse, Inc.—without the expense of a new trial.

XpertUniverse, which developed technology to connect customers with experts in various fields, joined Cisco's Technology Development Program in 2005. It later sought entry into the next tier of Cisco's partnership programs (SolutionsPlus) but was not admitted. XpertUniverse thereafter sued Cisco, alleging that Cisco had denied the SolutionsPlus application and then fraudulently concealed the denial—even though XpertUniverse knew all along that its application had not been accepted. It sought $70 million in damages, which was its expert's speculative estimate of the company's total value before the purported concealment. XpertUniverse also alleged that Cisco had infringed its patents. The case went to trial, and the jury found for XpertUniverse—awarding the demanded $70 million on the fraud claim and $34,000 on the patent infringement claim.

After the trial loss, Cisco brought in Quinn Emanuel. Retaining Kathleen M. Sullivan and Quinn Emanuel's appellate group to lead the post-trial briefing, Cisco moved for judgment as a matter of law on the fraud claim, which Judge Andrews granted. He held that the purported misrepresentation was not material because XpertUniverse knew that its application had not been accepted, and a reasonable person would not have acted differently knowing that the application was "denied" as opposed to "not accepted." Without a material misrepresentation, the court concluded, Cisco could not be held liable for fraud. The court held that Cisco was also entitled to judgment on the alternative ground of lack of causation, concluding that there was insufficient proof that XpertUniverse would have had $70 million in lost value if only the "denial" had been revealed at an earlier date.

On the patent infringement claim, the court affirmed the jury's award of $34,000 in patent damages but denied XpertUniverse's request for injunctive relief or an ongoing royalty. The net result was to reduce a $70 million fraud verdict to a $34,000 patent judgment. XpertUniverse is expected to appeal, and Quinn Emanuel will serve as lead appellate counsel to defend Cisco's post-trial victory.

Class Decertification Victory for State Farm

In an extremely important victory for client State Farm Mutual Automobile Insurance Company, Quinn Emanuel convinced the Ohio Supreme Court to reverse certification of a class of approximately 100,000 Ohio State Farm policyholders seeking to recover more than $100 million in compensatory damages, as well as punitive damages.

In that case, the named plaintiff, Michael Cullen, brought suit on behalf of himself and other State Farm policyholders whose windshield repairs had been paid for by State Farm over a twenty-year period. The plaintiff claimed that under their State Farm policies he and the class members were entitled to cash payments in the amount of the cost of a windshield replacement. The plaintiff asserted claims for breach of contract, bad faith, and breach of fiduciary duty. The trial court granted class certification under Ohio Rules 23(B)(3) and 23(B)(2). The Ohio Court of Appeals affirmed class certification.

In its 22-page opinion issued on November 5, 2013, the Ohio Supreme Court held that "this action does not satisfy the requirements for class certification pursuant to Civ. R. 23(B)(2), because the declaratory relief sought is at best only incidental to an award of monetary damages." The Court also found that "the trial court abused its discretion in granting class certification pursuant to Civ. R. 23(B)(3), because a rigorous analysis of the evidence presented by parties demonstrates that individual questions present predominate over issues common to the class." Quinn Emanuel subsequently convinced the Court to deny the plaintiff's motion for reconsideration on December 24, 2013.

The Ohio Supreme Court's decision constitutes a significant win for State Farm. The Court's ruling not only decertifies the class in that specific case, but also will be generally helpful to the company in opposing other class actions in Ohio and elsewhere.

Summary Judgment Victory in Los Angeles Superior Court

Quinn Emanuel recently obtained a victory for one of its clients in Los Angeles Superior Court: defeating a $25 million claim on summary judgment, winning affirmative summary judgment of liability on the client's trademark infringement cross-complaint, and at the subsequent damages trial in November 2013, winning an award of all damages sought, plus costs and attorneys' fees on the client's behalf.

The plaintiff, a disgruntled former high-level sales representative for the client's various lines of luxury skincare and cosmetic products, had asserted causes of action for breach of contract, fraud, defamation, intentional infliction of emotional distress, breach of fiduciary duty, and tortious interference arising from the client's termination of her member sales agreement in 2009. She sought over $25 million in damages, injunctive relief, an accounting of profits, and a restraining order. By the time Quinn Emanuel took over from prior counsel in late 2012, the plaintiff's claims had already been pending in federal and state courts in California for over two years and attempts to dismiss the case had failed. Quinn Emanuel's team secured key admissions from the plaintiff regarding actions that constituted violations of the terms and conditions of the contract she alleged had been breached by the firm's client, in addition to numerous instances of her own trademark infringement.

In July 2013, with the necessary facts and evidence in hand, the firm moved for summary judgment on the client's behalf. Quinn Emanuel argued that the plaintiff's admitted violations of her agreement as a result of her own trademark infringement barred her recovery on the contract she alleged had been breached, and rendered her affirmatively liable for trademark infringement and false designation of origin under the Lanham Act. In October 2013, the Court issued a decision granting the summary judgment motion in full, dismissing plaintiff's claims and granting summary judgment on liability on the cross-complaint.

The issue of damages on the client's cross-complaint was tried to the Court in November 2013. On January 7, 2014, the Los Angeles Superior Court issued its tentative judgment, siding with Quinn Emanuel's client on every issue and awarding 100% of the damages sought. Based on a finding of willful infringement, the Court also awarded attorneys' fees and costs. Q

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