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Proliferation of Mass Arbitration: Ballooning Costs and Emerging Tactics

Introduction

For many years, companies have included arbitration clauses in their contracts with employees and consumers. The clauses typically require that any dispute be resolved in arbitration rather than in court. Although companies traditionally prefer to compel arbitration, plaintiffs' attorneys have recently developed a strategy to use mandatory arbitration to their advantage by banding together similarly situated plaintiffs to bring "mass arbitration" claims. Mass arbitration occurs when hundreds or thousands of individuals file separate arbitration demands against a single entity based on a common legal theory. Typically, companies must cover significant upfront arbitration fees to defend against these claims, which can be overwhelming and may increase pressure on a company to resolve the disputes. This new weapon for plaintiffs in large-scale employment and consumer disputes is the natural outgrowth of three strands of precedent: (1) cases that upheld mandatory arbitration in consumer and employment cases; (2) cases that approved of class action waivers in the same contexts; and (3) cases that required companies to pay the costs of such individual arbitrations. The proliferation of mass arbitration claims presents numerous risks and opportunities for consumers, employees, and companies alike.

The Supreme Court Sets the Stage

The Supreme Court created conditions favorable to the proliferation of mass arbitration through a series of decisions starting twenty years ago.

In 2001, the Supreme Court settled conflicting opinions among the lower courts, holding that employers could require in employment contracts that employees submit all disputes with a company to arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

In 2011, the Supreme Court strengthened the ability of companies to impose arbitration on consumers and limited consumers' rights to bring class-wide arbitration. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, plaintiffs alleged that

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Quinn Emanuel Once Again Named to the "Fearsome Foursome"

Law360 has once again named Quinn Emanuel as one of the four firms that general counsel view as the firms they least want to see in court because of their fearsome competition. The 2022 "Fearsome Foursome" were selected based on a BTI Consulting Group survey, consisting of over 350 phone interviews with General Counsel, Chief Legal Officers, and other legal decisionmakers at companies with at least $1 billion in U.S. revenue. The publication recognizes firms that are admired by both clients and peers, yet "strike the utmost fear into the hearts" of adversaries. Quinn Emanuel has appeared on this list every year for the last decade. Q

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2022

Patent Trial Lawyer Nina Tallon Joins Washington, D.C. Office

Nina Tallon has joined the Washington, D.C. office as a partner. She has represented clients in jury and bench trials in state and federal courts throughout the U.S. and is undefeated in cases before the U.S. International Trade Commission (ITC). Q

AT&T falsely advertised phones as "free" when consumers had to pay approximately $30 in sales tax. *Id.* at 1744. The sales agreement required that consumer claims be arbitrated, and it also prohibited consumers from bringing claims as "a plaintiff or class member in any purported class or representative proceeding." *Id.* Previously, the California Supreme Court prohibited the use of collective action waivers as unconscionable under California law. *Id.* at 1746. In a 5-4 decision, however, the U.S. Supreme Court upheld the agreement's arbitration requirement and its prohibition on class arbitrations. *Id.* at 1753. Writing for the majority, Justice Scalia noted that invalidating the arbitration requirement or class arbitration waivers would frustrate the goal of the Federal Arbitration Act (the "FAA") to enforce private agreements and to encourage efficient dispute resolution. *Id.* at 1749.

In 2019, the Supreme Court further limited the availability of class arbitrations in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). After a hacker stole tax information from 1,300 Lamps Plus employees, the hacker filed a fraudulent income tax return in the name of Frank Varela, who then filed a class action lawsuit on behalf of the affected employees. *Id.* at 1412-13. Based on a clause in its employment contract that required "any and all" claims to be decided through arbitration, Lamps Plus moved to dismiss the suit in favor of individual arbitration. *Id.* at 1413. Initially, the District Court compelled arbitration but allowed the employees to proceed as a class, and the Ninth Circuit affirmed on the basis that the clause was ambiguous as to whether class arbitrations were available. *Id.* at 1414. The Supreme Court reversed. The Court held that silence and ambiguity are insufficient to infer consent to participate in class arbitration. *Id.* at 1415. The Court noted that class arbitration was contrary to the purposes of the FAA, as it "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1411 (quoting *Concepcion*, 131 S. Ct. at 1751). Thus, unless an agreement specifically allows for class treatment, an arbitration must proceed on an individual basis. *Id.*

"Unconscionable" Fee Arrangements

Another factor leading to the proliferation of mass arbitrations arose from courts requiring companies to pay the bulk of fees in mandatory arbitration. In 1997, the D.C. Circuit held that "where arbitration has been imposed by the employer and occurs only at the option of the employer," the employer must pay all of the arbitration fees. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997). The court noted that it would be "unacceptable'" to require plaintiffs to pay substantially higher fees to initiate an arbitration than they would have to pay in court. *Id.* at 1483. The court also placed other restrictions on arbitration clauses, such as mandating neutral arbitrators, providing for sufficient discovery, and allowing for all types of relief that would be available in court. *Id.* at 1482.

Other courts have found that clauses requiring plaintiffs to bear significant costs are unconscionable in both employment and consumer contracts. In 2011, a California district court invalidated a fee provision in an employment contract providing for a 50/50 split of arbitration fees "absent 'settled' authority coming only from the Supreme Court." *Chavarria v. Ralphs Grocer Co.*, 812 F. Supp. 2d 1079, 1083 (C.D. Cal. 2011). The court called this provision a "substantial economic barrier to justice" which nullified arbitration's goal of reducing cost. *Id.* at 1088. Courts have similarly held in the consumer sphere that consumers cannot be forced to bear substantial costs in a mandatory arbitration. *See, e.g.*, *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862, 874 (D. Or. 2002); *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015).

In accordance with these decisions, arbitration forums such as JAMS and the American Arbitration Association (the "AAA") changed their consumer and employment arbitration rules to require companies to pay for the vast majority of arbitration costs. *See, e.g.*, JAMS Employment Arbitration Rules, JAMS Policy on Consumer Arbitrations.

Ballooning Costs

While arbitration can provide financial advantages compared to litigation, the trend of mass arbitration has altered the calculus for litigants. For example, the AAA charges $300 to individuals and $2,650 to companies to cover the initial filing and case management fees for each individual arbitration demand. *See, e.g.*, AAA Employment Arbitration Rules. In California, a new state law provides that arbitration fees must be paid within 30 days of the due date set by the arbitration provider. Cal. Civ. Proc. Code § 1281.97.

Recently, more than 6,000 couriers filed arbitration demands against DoorDash, a food delivery service provider. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020). DoorDash's employment agreement contained a "Mutual Arbitration Provision" that required employees to resolve "any and all disputes" through arbitration with the AAA. *Id.* The court compelled DoorDash to proceed with the individual arbitrations. *Id.* Pursuant the AAA's rules, the plaintiffs were required to pay $1.2 million to initiate arbitration, while DoorDash was saddled with a $12 million upfront bill. *Id.*

Similarly, Uber faced 12,501 individual arbitration demands from its drivers over a three-month period in 2018. Pet. for Order Compelling Arbitration, *Abadilla v. Uber Technologies, Inc.*, Case No. 3:18-cv-7343 (N.D. Cal. Dec. 5, 2018). The drivers contended that they were

improperly classified as independent contractors rather than employees. *Id.* Eventually, Uber settled the cases for between $146 million and $170 million rather than undertake an impending mass arbitration battle.

In response to these inflating costs, some companies have declined to pay the initial filing fees while arguing that a mass arbitration is inappropriate. For example, in 2019, Postmates refused to pay approximately $10 million in filing fees when 5,274 couriers filed individual arbitration demands. *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1250 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020). The company argued that the "individual arbitration demands were insufficient . . . to initiate arbitration proceedings." *Id.* The court compelled arbitration and required Postmates to pay the arbitration fees to determine whether the plaintiffs' claims were valid in the first instance. *Id.* at 1255. In a related case involving Postmates, a court further upheld the California law requiring payment within 30 days, holding that the state law was not preempted by the FAA, as the law "encourages arbitration" by "preventing parties . . . from holding hostage employees' or consumers' validly arbitrable claims." *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG, 2021 WL 540155, at *7 (C.D. Cal. Jan. 19, 2021).

Development of Mass Arbitration Strategies

Mass arbitration efforts inherently involve recruiting enough plaintiffs to create significant exposure for the company. For plaintiffs' attorneys, this is often a significant obstacle. Locating hundreds or thousands of employees or consumers who are willing to engage in arbitration is a daunting task that requires "expensive ad campaigns and time-consuming administrative coordination." Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, Bloomberg Law (Feb. 11, 2019).

Though mass arbitrations seek individual dispute resolution on a surface level, they can have an impact similar to class action claims. For example, the software firm Intuit recently faced a mass arbitration threat when 125,000 plaintiffs alleged that the company misled them into paying for its Turbo Tax service. Alison Frankel, *Intuit Defends $40 Million Class Settlement, Attacks Mass Arbitration Firm*, Reuters (Dec. 9, 2020). Facing an overwhelming number of individual claims, Intuit and the plaintiffs' lawyers agreed to a $40 million settlement of all claims in the broader "class" of Turbo Tax purchasers (which was ultimately rejected by the court as being too low).

Efforts to Curb Cost

The threat of mass arbitration can cause companies to willingly waive or alter existing arbitration clauses. When tens of thousands of plaintiffs filed individual arbitration demands against Amazon, the company modified its terms of service in certain contexts. Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, Wall Street Journal (Jun. 1, 2021). While the terms originally contained a lengthy arbitration clause, they were changed to allow claims to be brought in state or federal court. *Id.* Several other companies, including Google and Microsoft, have followed suit and eliminated mandatory arbitration clauses in some of their employment contracts. Erin Mulvaney, *JPMorgan, Facebook Fight Mass Arbitration Legal Strategy*, Bloomberg, (Jul. 3, 2019).

Aside from abandoning arbitration clauses altogether, companies have tried taking other steps to curb the impact of mass arbitrations. For example, some companies have attempted to negotiate aggregated "bellwether" arbitrations, where a certain number of claims go through the arbitration process, and the results are extrapolated to cover the remaining claims.

Arbitration providers have also tried to adapt to the mass arbitration phenomenon. The International Institute of Conflict Prevention and Resolution ("CPR") created a process for mass employment arbitration, which provides that when 30 or more employees file similar claims against an employer, ten are randomly selected as bellwethers. After the initial arbitrations are complete, a CPR mediator uses the results to attempt to strike a class-wide deal agreeable to both sides. If the process does not result in a settlement, the parties can proceed in arbitration or in court. *See* CPR Mass Claims Protocol and Procedure.

Additionally, the AAA recently adopted a specific fee structure for "multiple consumer case filings." The AAA's approach involves a sliding scale for fees in cases involving 25 or more similarly situated consumer plaintiffs. Under these rules, businesses must pay filings fees of $300 per case for the first 500 cases, $225 per case for cases 501-1,500, $150 per case for cases 1,501-3,000, and $75 per case for any additional cases. *See* AAA Revised Consumer Arbitration Rules. While such updated fee structures may still require companies to pay hundreds of thousands of dollars in initial arbitration costs, they could lessen the financial burden and encourage companies to continue to rely on arbitration for dispute resolution in lieu of traditional litigation.

Conclusion

The proliferation of mass arbitration has greatly impacted the approach companies, consumers, and employees take to dispute resolution. Although arbitration was once seen as a concrete way for companies to avoid the significant costs of litigation, the new mass arbitration trend has forced all parties to reconsider their litigation strategies.

The Federal Circuit Blurs a Once Bright-Line Rule Regarding Personal Jurisdiction

Patent owners seeking to assert their rights in forums outside their home states may now need to think twice about whether to hit send on a cease-and-desist or demand letter. For the past two decades, since the Federal Circuit's decision in *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998), patent owners have been able to send cease-and-desist letters to alleged infringers in other states without subjecting themselves to personal jurisdiction in that other forum. *Red Wing* appeared to establish a bright-line rule that precluded personal jurisdiction where a patent owner did nothing more than assert its patent rights in correspondence. Now, the Federal Circuit says that may not always be the case. In *Trimble Inc. v. PerDiemCo LLC*, the Federal Circuit held that the that a patent owner was subject to jurisdiction in another state based on its 22 communications with an alleged infringer, which the court found were "extensive" and more akin to an "arms-length negotiation" than to a cease-and-desist or demand letter. *Trimble*, 997 F.3d 1147, 1156-57 (Fed. Cir. 2021).

Background

The lawyer for PerDiemCo, a Texas limited liability company, sent a letter to Innovative Software Engineering, LLC ("ISE"), which is an Iowa limited liability company. The letter accused ISE of infringing nine patents related to geofencing and electronic logging technology and included as an attachment an unfiled complaint for the Northern District of Iowa.

How was a letter from a Texas company to an Iowa company threatening suit in Iowa sufficient for the Northern District of California to have specific personal jurisdiction over the Texas company?

At the district court level, things went PerDiemCo.'s way – arguably, this was the expected result based on precedent. In what was a seemingly simple application of *Red Wing*, the district court held that "exercising specific personal jurisdiction over PerDiemCo would be constitutionally unreasonable." *Id.* at 1152. After all, *Red Wing* stood for the proposition that "[a] patentee should not subject itself to personal jurisdiction in a forum solely by informing a party who happens to be located there of suspected infringement." *Id.* at 1154 (quoting *Red Wing*, 148 F.3d at 1361). If applied as a bright-line rule, PerDiemCo, the patentee, would not have been subject to specific personal jurisdiction in the Northern District of California solely for informing Trimble, a California resident, of suspected infringement.

On appeal, the Federal Circuit reversed, identifying identified several reasons why "the minimum contacts or purposeful availment requirement is easily satisfied in this case." *Id.* at 1157.

First, ISE forwarded the letter to Trimble, a Delaware limited liability company, which has its headquarters in Sunnyvale, California and it is the parent of ISE. Once Trimble identified itself as the point of contact for resolution, PerDiemCo began corresponding with it.

Second, PerDiemCo subsequently raised new allegations against Trimble – not just ISE – implicating eleven patents total. PerDiemCo threatened suit in the Eastern District of Texas, where it is based, and informed Trimble that it had retained counsel for that purpose.

Third, Trimble and ISE corresponded about entering into binding mediation and negotiating a resolution. Their Chief IP Counsel specifically stated that "Trimble was willing to negotiate as long as the talks continued to be productive." *Id.* at 1151.

Fourth, the court pointed to the sheer volume of communications: the parties communicated by letter, email, or telephone at least twenty-two times in a three-month period before Trimble and ISE sought a declaratory judgment in the Northern District of California.

What Remains of *Red Wing* After *Trimble*?

The underlying rules remain the same. To determine whether an out-of-state defendant is subject to personal jurisdiction outside of its home state, the court looks to see if it has "purposely avail[ed] itself of the privilege of conducting activities within the forum State" and whether the plaintiff's claims "arise out of or relate to" those contacts. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024-25 (2021) (internal quotations omitted). When courts analyze if they have specific personal jurisdiction, they also must consider if this exercise comports with "fair play and substantial justice." *See id.* at 1024 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. at 310, 316-17 (1945)).

In *Red Wing*, a New Mexico-based patentee sent three letters alleging infringement and offering to negotiate a nonexclusive license. The Minnesota-based accused infringer responded with requests for extensions and denials of infringement before eventually seeking a declaratory judgment in Minnesota. The Federal Circuit determined that the "[p]rinciples of fair play and substantial justice afford a patentee sufficient latitude to inform others of its patent rights without subjecting itself to jurisdiction in a foreign forum." *Red Wing*, 148 F.3d at 1360-62. In other words, the Minnesota court

could not exercise personal jurisdiction over the New Mexico-based patentee simply because the patentee sent a cease-and-desist letter.

Trimble went the other way: the Federal Circuit found that the California district court *could* exercise personal jurisdiction over a Texas-based patentee based on similar conduct. *Trimble* cuts at the clarity that patent owners had come to rely on based on *Red Wing*. Although the Federal Circuit maintained that *Red Wing* was not being overruled, the court explained that *Red Wing* could not preclude California having jurisdiction over PerDiemCo, because "there is no general rule that demand letter can never create personal jurisdiction." *Trimble*, 997 F.3d at 1156. Instead, the "central question under *Red Wing* is now whether a defendant's connection to a forum is sufficient to satisfy the minimum contacts or purposeful availment test and … conforms to the due process and fairness." *Id.*

Ramifications

Post-*Trimble*, both sides of a patent dispute will need to think carefully before corresponding regarding alleged infringement. For patent owners, 22 communications is clearly too much to avoid personal jurisdiction. But the bright line has now blurred.

Future litigation will determine exactly where that line is. In *Trimble*, the Federal Circuit gave some hints, explaining that it had interpreted the Supreme Court as providing "instruction to treat 'isolated or sporadic [contacts] different from continuous ones.'" *Id.* (quoting *Ford*, 141 S. Ct. at 1028 n.4). This appears consistent with the earlier *Red Wing* distinction that a cease-and-desist letter that included an offer for a license was "more closely akin to an offer for settlement of a disputed claim rather than an arms-length negotiation in anticipation of a long-term continuing business relationship." *Red Wing*, 148 F.3d at 1361. For the foreseeable future, this may require courts to undergo a case-by-case analysis of these issues.

Without a bright-line rule, and with little ability to predict in advance the number of communications that may be necessary to license an alleged infringer, patent owners will be faced with significant uncertainty. For patent owners that do not want to litigate outside of their home states or chosen forums, there will likely be a greater inclination to file first and attempt to negotiate later. The thought of being trapped in an undesirable forum for a number of years may be greater than the desire to try to avoid litigation costs. For accused infringers, who may be eager to seize a jurisdictional advantage by filing declaratory judgments first in their respective forum states, there is an incentive to engage with the patent owner and increase the volume of pre-suit communications. These dynamics will continue to play out as courts interpret and apply the Federal Circuit's decision in *Trimble*.

Trial-Tested SEC Lawyer Sarah Heaton Concannon Joins Washington, D.C. and New York Offices

Sarah Heaton Concannon has joined the firm as a partner based in the Washington, D.C. and New York offices. Sarah joins the firm from the U.S. Securities and Exchange Commission where she served as Senior Trial Counsel. She appeared on behalf of the agency in federal court and administrative proceedings nationwide, serving as lead trial counsel in enforcement actions and investigations targeting everything from issuer, investment adviser, and broker-dealer fraud, to auditor and gatekeeper improper professional conduct, to cryptocurrency offerings, to violations of the Foreign Corrupt Practices Act (FCPA). Sarah also has a robust securities and commercial litigation and government enforcement practice and has litigated civil and criminal cases in a diverse range of sectors, including banking and financial services, pharmaceuticals, and energy. *Not admitted to the District of Columbia Bar.

Partner Will Thompson Joins Dallas Office

Will Thompson has joined the firm's Dallas office as partner. Will has represented plaintiffs and defendants in state and federal courts in trademark and trade secret cases, class-action lawsuits, antitrust litigation, sports litigation, and investigations. He has extensive experience in the oil and gas industry, including in cases involving oil-field operations, fraud and kickbacks.

White Collar Litigation Update

Second Circuit Arms Foreign National Defendants with a Powerful Tool for Challenging Extraterritorial Prosecutions by the United States

Over the past several years, U.S. prosecutors have become increasingly aggressive in charging foreign nationals for conduct occurring outside of the United States. When such cases are brought, prosecutors have repeatedly argued that foreign defendants who fail to voluntarily surrender to the United States and remain abroad are "fugitives"—regardless of whether they ever previously set foot in the U.S., and even if their home country decided, pursuant to local law, to decline extradition. Courts have then applied the "fugitive disentitlement doctrine" to preclude such defendants from later challenging the charges against them. Foreign national defendants have thus faced a Hobson's choice: either forego their own legal system's protections, leave their lives, families, and jobs to risk pre-trial detention in the U.S., and fight the charges here, or else remain at home and have the stigma of criminal indictment and "fugitive" status hanging over them indefinitely.

The Second Circuit Court of Appeals' recent decision in *U.S. v. Bescond*, 2021 WL 3412115 (2d Cir. 2021), however, appears to level the playing field, holding that a foreign national who (a) remains in his or her home country where the alleged criminal conduct occurred, and (b) does so "without concealment or evasion" does not meet the definition of "fugitive" and cannot be disentitled under the doctrine. This is a significant decision that will enable foreign nationals facing criminal prosecution in the United States to challenge the charges under certain circumstances without putting their liberty at risk, and it may serve as an important check on the expanding extraterritorial reach of U.S. criminal law.

The Case Against Bescond

Muriel Bescond is a French citizen living in France, who worked at the French bank Société Générale as head of the treasury desk. In 2017, U.S. prosecutors in the Eastern District of New York indicted Bescond and charged her with four counts of transmitting false, misleading, and knowingly inaccurate commodities reports in violation of the Commodity Exchange Act (the "CEA"), and one count of conspiracy to do the same. Specifically, the indictment alleged that between May 2010 and October 2011, Bescond participated in a scheme to manipulate the U.S. Dollar London Interbank Offered Rate, more commonly known as LIBOR.

Bescond was in France at all times during the alleged criminal scheme, and she remained in Paris, where she lived and worked, following the indictment. France does not extradite its citizens, and Ms. Bescond did not otherwise submit to the Court's jurisdiction. Through counsel, she moved to dismiss the charges against her on several grounds, including that the indictment violated Fifth Amendment due process because it failed to allege a sufficient nexus with the United States and that it charged an impermissible extraterritorial application of the CEA.

Because Bescond did not voluntarily travel to the United States to face the charges, the district court deemed her a fugitive and exercised its discretion to apply the fugitive disentitlement doctrine, declining to reach the merits of her motions. Bescond appealed.

The Second Circuit's Decision Regarding Fugitive Disentitlement

On appeal, the Second Circuit split from the Sixth and Eleventh Circuits and ruled that a fugitive disentitlement order is immediately appealable under the collateral order doctrine. Turning to the substance of the fugitive disentitlement analysis, the Court first noted that the "ordinary meaning of the term 'fugitive' does not describe Bescond," because fugitivity implies an effort to distance oneself from the United States or to frustrate arrest, and Bescond had taken no such action. It then concluded that Bescond was not a fugitive under either of the categories that existed at common law: (1) she was not a traditional fugitive (i.e., one who flees from the jurisdiction of the court where the crime was committed or departs from her usual place of abode and conceals herself), as Bescond had neither fled nor concealed herself; and (2) nor was she a constructive-flight fugitive (i.e., a person who commits a crime while in the United States, but is outside of the country when she learns of the charges and refuses to return in order to avoid prosecution), as she did not commit the alleged crime in the United States and was not staying away to avoid prosecution. Rather, "she merely remains at home, as her home country permits her to do."

After determining that Bescond was not a fugitive, the Second Circuit went a step further and held that even if she was, the district court abused its discretion in applying the disentitlement doctrine "given her innocent residence as a foreign citizen abroad, given the nature of the charged offense and her remoteness from the alleged harm that it caused, given her line of work, and given her nonfrivolous challenge to the extraterritoriality of the criminal statute." The Court reversed and remanded to the district court to consider the merits of Bescond's motions to dismiss.

Key Takeaways

The full impact of the Second Circuit's decision remains to be seen, as a number of questions regarding the scope of the Court's ruling remain unanswered—for example, whether the Court's reasoning is limited to individual defendants or could also extend to foreign companies and organizations, and how the fugitivity test will play out in different factual circumstances (e.g., a foreign national defendant who owns property in the United States; a defendant charged with a more serious or violent offense; etc.). It is also unclear whether other Circuits will adopt the Second Circuit's reasoning and issue similar rulings. What is clear, however, is that the *Bescond* decision is a victory for foreign nationals facing prosecution in the United States for conduct abroad, as it limits the scope of the fugitive disentitlement doctrine and opens the door to more forceful challenges to the extraterritorial application of U.S. criminal law.

Appellate Practice Update

Review of Selected Business Cases from Supreme Court's 2020 Term

The Supreme Court recently finished its October 2020 Term. We summarize below four cases of interest to the business community.

Google LLC v. Oracle America, Inc., *No. 18-956, Decided April 5, 2021*

In creating the Android operating system, Google wrote code that relied in part on Oracle's Java application programming interface ("API"). Oracle sued Google for copyright infringement. The question before the Supreme Court was whether a software interface is eligible for copyright protection, and if so, whether a fair use defense nevertheless applied.

The Court assumed without deciding that the interface is copyrightable, and decided the case based on the second issue by holding that the fair-use doctrine applied. The Court looked at four factors: First, Google's purpose in copying the code was to create a new platform, Android . Second, the nature of the copyrighted use was narrow—Google only used the Java API so that its engineers could code in a familiar language. Third, Google copied very little of the Java API. Finally, Google's product (Android) was not a competitor with Java's API.

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System, *No. 20-222, Decided June 21, 2021*

This case clarified procedural hurdles in securities class action lawsuits. Under the Federal Rules of Civil Procedure, plaintiffs can bring a class action if they can show that a common question of law or fact "*predominates*" over issues specific to individual members. Fed. R. Civ. P. 23(b)(3). For securities class actions arising out of a so-called "fraud on the market," existing Supreme Court precedent presumes that, because of market efficiency, the market price of a security reflects all material public information, including any fraudulent statements. 15 U.S.C. § 78j(b). This idea, known as the *Basic* presumption, posits that all plaintiffs in Section 10(b) suits who traded a security before a fraud was revealed relied on that information—establishing a common, "predominant" fact.

The instant case arose out of Goldman Sachs' alleged misrepresentation of its compliance with conflict-of-interest regulations. The first issue the Court addressed is whether Goldman could argue at the class certification stage that the alleged misrepresentation was too general to implicate the *Basic* presumption. The Second Circuit held that generality could only be adjudicated in the merit phase but the Supreme Court reversed, finding that generality is an important factor both as to whether a class should be certified and as to the materiality of the misrepresentation itself (in the merits stage).

Second, the Court addressed evidentiary burdens for rebutting *Basic.* Goldman was sued under the theory that it misrepresented its conflict-of-interest compliance and that this fraudulently inflated the stock price, which crashed when the SEC announced an investigation. To rebut the *Basic* presumption at the class certification stage, Goldman produced expert testimony demonstrating thirty-six prior instances when its stock price did not significantly change on unfavorable conflict news. The district court ruled against Goldman, explaining that the court was not persuaded that Goldman had rebutted the *Basic* presumption, and the Second Circuit affirmed. Goldman contended that upon producing the expert testimony, the burden shifted to plaintiffs to persuade the Court they relied on the misrepresentation. However, relying on prior precedent, the Supreme Court disagreed with Goldman and made clear that a defendant bears the full burden of persuasion in rebutting *Basic.*

Ford Motor Company v. Montana Eighth Judicial District Court, *Nos. 19-368 and 19-369, Decided March 25, 2021*

The Supreme Court addressed to what extent a business's activities in a state create personal jurisdiction over the company such that the company may be sued in that state. Ford was sued in two state courts—Montana and Minnesota—for product liability torts, but contended that, because the cars were manufactured and sold in other states or Canada, Montana and Minnesota courts

did not have personal jurisdiction over Ford.

The Supreme Court disagreed. The Court reasoned that Ford's specific conduct of selling or manufacturing the cars at issue need not have occurred in Montana or Minnesota so long as Ford engaged in other conduct in those states, such as advertising the cars, selling them, and servicing them. Ford's contacts in Minnesota and Montana, which were "designed to make driving a Ford convenient there," made it reasonably foreseeable that a resident would buy a car across state borders and bring it back home. *Montana Eighth* makes independent business activity more determinative of personal jurisdiction, observing that by "conducting so much business [in a state]" Ford "creates reciprocal obligations" like defending against claims by forum residents.

***AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508, Decided April 22, 2021**

The Supreme Court limited the Federal Trade Commission's ability to pursue monetary equitable remedies like restitution or disgorgement in court. The case involved an individual whose companies allegedly used intentionally confusing and long contracts to make high-interest loans to customers. The FTC brought criminal and civil actions against the individual and his companies, and—citing its right to seek "permanent injuncti[ve]" relief—the FTC sought civil restitution from AMG. 15 U.S.C. § 53(b). This request was consistent with prior caselaw in the Ninth Circuit (where the case against AMG was brought), which affirmed the FTC's ability to seek monetary equitable remedies.

The Supreme Court reversed. As a matter of statutory interpretation, the Court ruled that the FTC's ability to pursue a "permanent injunction" in Section 13(b) of the Federal Trade Act, 15 U.S.C. § 53(b), did not include monetary equitable remedies like "restitution." Additionally, the Court reasoned that allowing the FTC to pursue restitution using Section 13(b) would be out of step with other parts of the Federal Trade Act (like Sections 5 and 19), which explicitly allow the FTC to pursue monetary equitable relief but include procedural safeguards for the defendant that are absent from Section 13(b).

Class Action Litigation Update

COVID-19 Class Action Fallout in Australia

The COVID-19 pandemic has caused a veritable outbreak of class action litigation across the globe, spawning lawsuits in areas as diverse as product liability, employment, securities and constitutional law. In Australia, this wave of COVID-19 litigation has taken on a unique twist, with Quinn Emanuel filing mass tort proceedings against the State Government of Victoria, claiming hundreds of millions in damages in a nation-first contingency fee class action.

Background

In late March 2020, in the early days of the pandemic, Australian Prime Minister Scott Morrison announced that Australia would be closing its borders to the world and that all returned travelers would be required to undertake a mandatory 14-day isolation at designated quarantine facilities. In response to the Federal Government's edict, the State Government of Victoria announced that it would be rolling out a "Hotel Quarantine" program, pursuant to which all returned travelers arriving in the State would be detained in one of several designated hotels for the duration of the mandatory 14-day isolation period.

At a time when the serious health and economic consequences of widespread community transmission of the virus were becoming manifest around the world, the decision to implement Hotel Quarantine was taken in pursuit of a single, critical objective: prevent COVID-19 escaping into the Victorian community, and thereby protect Victorians and their businesses from the devastating impacts were the virus to take hold.

In April 2020, however, frontline health workers involved in the care of patients with COVID-19 in Hotel Quarantine began to raise serious concerns about how the program was being implemented and run. Raising particular alarm was a decision made by the Government to deploy private security guards to oversee quarantine detainees, even though the guards had no prior experience in infection prevention and control, received little-to-no training from the Government in relation to appropriate measures and protocols, and where other States and Territories were using police officers and military personnel to carry out that function.

Sure enough, by late May 2020 several security guards across multiple hotel sites had become symptomatic, later testing positive for COVID-19. By the time the resulting community transmission was discovered, and the State Government had begun scrambling to control the outbreak, but it was already too late. With the security guards as its vector, the virus had irreversibly seeded itself in the Victorian community; and it had been spreading—silently and undetected—for weeks, triggering the State's COVID-19 "second wave."

From the explosion in case numbers that followed, lockdown measures were a foregone conclusion. In June 2020, "Stage 3" restrictions were introduced,

prohibiting people from leaving their homes other than for essential reasons, and restricting the operation of hospitality, dining, entertainment and other retail businesses. But even these harsh measures came too little, too late. By August 2020, the Premier of Victoria had declared a state of disaster across the whole of the State and imposed a "Stage 4" lockdown, tightening restrictions on people leaving their homes, imposing stringent curfews, and dramatically curtailing—and in many cases, preventing—the ability of Victorian businesses to provide their goods and services to the public. Victoria had become a veritable ghost town, and with it, the livelihoods of millions of retail proprietors and their employees were plunged into darkness.

The COVID-19 Class Action

By proceedings filed in the Supreme Court of Victoria in August 2020, Quinn Emanuel sued the State Government Victoria (and certain servants and agents of the State) on behalf of lead plaintiff Anthony Ferrara and his restaurant business "5 Boroughs NY," one of the many thousands of Victorian retail businesses forced to shut their doors to customers as a result of the "second wave" lockdown measures. On behalf of this class of retail business proprietors, Quinn Emanuel seeks to recover millions of dollars in business losses that it alleges were caused by the defendants' negligence in implementing Hotel Quarantine program.

In what is shaping up to be one of the most complex and novel mass tort cases in Australian class actions history, Quinn Emanuel argues that the defendants assumed a duty of care to prevent foreseeable economic loss to class members when they took the decision to implement Hotel Quarantine with the sole aim of preventing a COVID-19 "second wave" from wreaking havoc on the Victorian community. The lawsuit argues that class members were uniquely vulnerable to the defendants' control in implementing the program in circumstances where they knew (or ought to have known) that strict COVID-19 restrictions—including widespread business lockdowns and stay-at-home orders—would become necessary in the event that it failed and the virus escaped, dramatically curtailing the ability of class members to carry on their businesses.

For that reason, the lawsuit asserts that the defendants owed class members a duty to take reasonable care in the design and implementation of the Hotel Quarantine program. In particular, lawsuit alleges that the defendants' duty required them take all reasonable steps to ensure that personnel were adequately trained in infection prevention and control; that they were provided with effective PPE; and that they were capable of overseeing Hotel Quarantine in a manner that would adequately protect against the risk of the virus escaping into the community. In this respect, the class action takes central aim at the Government's decision to deploy untrained private security guards to staff the critical program—a failure that has since been excoriated by an independent judicial inquiry tasked with unearthing the preventable failures that led to Victoria's devastating "second wave."

The case will undoubtedly involve complex questions of fact and law across each of the elements of duty, breach, causation and loss, requiring, among other things, expert evidence in epidemiology, virology and public health. The case is also unique as the first ever Australian class action to be run on a contingency fee basis. Unlike in the US, until recent reforms, contingency fee arrangements were long been prohibited under Australian law. The COVID-19 class action therefore stands certain to create new precedents and to pave the way for the sweeping changes to how class actions are funded and run in Australia.

Bankruptcy & Restructuring Litigation Update

Third Circuit Affirms Dismissal in Reliance on Technical Exception to General Rule That State Sovereign Immunity Does Not Apply in Bankruptcy Cases

In a recent non-precedential decision that relied on the technical distinction between a "property interest" and a "revocable privilege," the United States Court of Appeals for the Third Circuit upheld the dismissal of claims against the Commonwealth of Pennsylvania arising from its revocation of a slot machine license after the Commonwealth raised state sovereign immunity as a defense. *See Philadelphia Ent. & Dev. Partners LP v. Dep't*

(continued on page 10)

Law360 Selects Eight Partners as "2021 MVPs"

Eight firm partners have been selected as "2021 MVPs" by *Law360*. The chosen attorneys have distinguished themselves by "securing hard-earned successes in high-stakes litigation, complex global matters, and record-breaking deals." The award winning partners are: Derek L. Shaffer (Appellate), Robert Loigman (Banking), Erika Morabito (Bankruptcy), Crystal Nix-Hines (Class Action), Isaac Nesser (Securities), Stephen Neuwirth (Sports & Betting), Victoria Maroulis (Technology), and Juan Morillo (White Collar).

of Revenue, 2021 WL 2666690 (3d Cir. June 29, 2021). Although fraudulent transfers are not typically subject to state sovereign immunity defenses, the Pennsylvania gaming statue at issue explicitly classified the license as "a revocable, non-transferable privilege." Therefore, the Court found that the license the Commonwealth revoked was not "property" over which the bankruptcy court had *in rem* jurisdiction.

Although the Third Circuit upheld the Bankruptcy Court's decision to decline to exercise jurisdiction, its decision does not disturb the more general proposition that prevents sovereign immunity from interfering with critical bankruptcy functions, including avoidance actions generally and more particularly estate claims to avoid and recover a government license, provided the debtor retains an interest in the transferred property.

The Supreme Court's* Katz *Decision

The doctrine of sovereign immunity prohibits federal courts from exercising jurisdiction over state government defendants. In bankruptcy, however, the doctrine has limited reach. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Supreme Court held that by ratifying the Constitution's Bankruptcy Clause, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies," the states waived immunity protection over matters "ancillary to and in furtherance of the court's *in rem* jurisdiction." *Id.* at 372. That waiver is codified in section 106(a) of the Bankruptcy Code.

Despite this broad waiver, however, *Katz* did not categorically foreclose the defense of sovereign immunity for all bankruptcy matters. *See id.* at 378 n.15 ("We do not mean to suggest that every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity."). In determining whether sovereign immunity applies in the bankruptcy context, courts generally ask whether the proceeding furthers: (i) the exercise of jurisdiction over estate property (*e.g.*, avoidance actions); (ii) the equitable distribution of that property to stakeholders (*e.g.*, stay violations); and (iii) the fundamental purpose of bankruptcy (*e.g.*, a debtor's right to discharge). *See id.* at 363-64. To the extent a claim implicates one of these three critical functions, states do not enjoy immunity from suits. *Id.* 364-35.

Philadelphia Entertainment and Development Partners, L.P.

In 2006, Philadelphia Entertainment and Development Partners, LP ("PEDP") made plans to build and operate a casino, paying $50 million to the Commonwealth of Pennsylvania Department of Revenue (the "Commonwealth") to obtain a slot machine license. Pennsylvania's Gaming Control Board revoked the license in 2010 after PEDP failed to satisfy certain deadlines required under the license.

In 2014, after failing to recover the license in state court, PEDP filed a chapter 11 case and initiated an adversary proceeding against the Commonwealth. The adversary proceeding sought to recover the value of the license the Commonwealth had revoked as a fraudulent transfer under sections 544 and 548 of the Bankruptcy Code and applicable state law—here, Pennsylvania.

The bankruptcy court dismissed the adversary proceeding, reasoning that (among other things) the license did not constitute property or an asset of PEDP's estate, and therefore the suit was barred by the doctrine of sovereign immunity. The district court affirmed, and PEDP appealed.

To analyze PEDP's claimed property interest in the gaming license, the Third Circuit turned to state law and, more specifically, the Pennsylvania Horse Racing Development and Gaming Act (the "Gaming Act"), under which the license had issued, and the Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA").

The Court first observed that the Gaming Act plainly provides that "[t]he issuance or renewal of a license … shall be a revocable privilege" and the Board can "revoke … any … license … [if] the applicant ... is in violation of any provision of this part." The Court also noted that the Gaming Act states that a license issued by the Board "shall not be sold, transferred or assigned," and that the Gaming Act should not be construed "to create in any person an entitlement to a license." Therefore, the Court found that the Gaming Act gave PEDP "a revocable, discretionary, non-transferable privilege to operate a facility with slot machines," not a recoverable property interest.

The Court explained that under the PUFTA, the definition of "[p]roperty" included "[a]nything that may be the subject of ownership." Ownership, in turn, was defined as "the right to possess a thing." Returning to the Gaming Act, however, the Court concluded that the license was not something a licensee could "own," and therefore found that the adversary proceeding was properly dismissed.

PEDP urged that the license constituted estate property because commentary in the PUFTA provides that "governmental licenses constitute property even if not transferable." The Court rejected this argument, holding that the more specific provisions of the Gaming Act controlled. The Court concluded that because a license cannot be a licensee's property under the Gaming Act, the Commonwealth retained its immunity.

Takeaways

The Third Circuit's decision in *Philadelphia Entertainment* is narrow and a product of gaming laws unique to Pennsylvania. The Court's holding leaves undisturbed longstanding exceptions to sovereign immunity in the bankruptcy context and should have little impact on fraudulent transfer claims against state entities where the debtor retains an interest in the property transferred. Notably, the debtor in *Philadelphia Entertainment* did not seek to avoid the $50 million fee paid to the Commonwealth in 2006 (that transfer was time-barred). Rather, the "fraudulent transfer" was focused on the Commonwealth's authorized revocation of the license in 2010, which under the statute did not deprive the debtor of any property right.

Indeed, this decision comes on the heels of another, precedential Third Circuit opinion in which the Court rejected the State of California's sovereign immunity defense. In that case, the estate sought to recover the value of the debtor's gas and oil processing facility, which had been taken by the California Land Commission through inverse condemnation. *See Davis v. State of California (In re Venoco)*, 998 F.3d 98 (3d Cir. 2021). The Third Circuit noted that although the adversary proceeding was not clearly *in rem* in form, its function was to decide rights to the debtor's property. The *Davis* decision confirms the strength of the general proposition that sovereign immunity is not a bar to fraudulent transfer actions in bankruptcy.

VICTORIES

Landmark Criminal Justice Reform Statute

On June 16, 2021, New York Governor Cuomo signed a bill that was the culmination of the firm's years-long battle defending the constitutionality of a prior and related criminal justice reform statute. The background of the matter goes back to the summer of 2018, when supermajorities of the Legislature passed Article 15-A of the Judiciary Law. The landmark statute created a watchdog commission to investigate and censure professional ethical violations by state prosecutors.

The law was challenged by the District Attorneys Association of the State of New York. Because the state attorney general was recused from defending the law as it normally would, Quinn Emanuel represented New York State Assembly Speaker Carl E. Heastie, effectively representing the interest of the state as a whole. In January 2020, Quinn Emanuel obtained a trial court order rejecting seven out of eight of the prosecutors' constitutional arguments for invalidating the law. While the court found that elements of the statute's appellate review procedures violated certain technical requirements of the state constitution's judiciary provisions, it upheld the constitutionality of the commission itself and its role as a prosecutorial watchdog against any separation-of-powers challenge. As a result, the legislature was in the position to pass an amendment curing the identified technical issues and allowing the law to proceed, which it did in June.

Under the now-operative text of Article 15-A, the commission has powers to investigate and to censure (and even recommend removal of) prosecutors who engage in wrongful conduct, such as when they wrongfully conceal exculpatory evidence, knowingly pursue convictions of innocent defendants, or violate other standards of professional ethics. Criminal justice reform advocates, criminal law professors, and many others view the commission as a groundbreaking step toward reducing the rate of wrongful convictions, addressing racial bias in charging and sentencing, and otherwise making the criminal justice system more fair. California and other states have viewed Article 15-A as a bellwether for future reform efforts outside of New York, and may well model their own statutes and commissions after New York's example.

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business litigation report

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