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What Universities Need to Know About the Recent Changes to Title IX

Title IX of the Education Amendments of 1972 ("Title IX") prohibits sex discrimination in any education program or activity receiving federal financial assistance. In 1972, Congress delegated to the U.S. Department of Education ("DoE") the power and responsibility to hold educational institutions receiving federal funds accountable for their responses to sex-based discrimination. Since 1997, DoE has set standards governing the responsibilities of funding recipients to address sexual harassment, including sexual assault, and to take steps to prevent it. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) ("1997 Guidance").

On November 16, 2018, DoE announced and soon thereafter proposed in draft form new Title IX regulations called Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018) (the "Rule"). According to DoE, the "new Title IX regulation holds schools accountable for failure to respond equitably and promptly to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students." Press Release, U.S. Dep't of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), available at https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students. Among other things, the proposed Rule fundamentally altered the ways in which educational

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Favorable Settlement for Private Equity Firm on Eve of First Delaware "Busted Deal" Trial

In July 2020, Quinn Emanuel achieved a favorable settlement for its client Advent International in the first scheduled "Busted Deal" trial of the COVID-19 era. The week before trial, the parties reached a settlement in which Advent agreed to purchase Forescout, a leader in network access control, for $1.43 billion, a substantial reduction from the original deal size of $1.9 billion it had agreed to just five months earlier.

On February 6, 2020, Advent and Forescout finalized an agreement pursuant to which Advent would acquire all outstanding shares of Forescout common stock in an all-cash transaction valued at $1.9 billion. However, soon thereafter, Forescout announced that in the first quarter of 2020, it experienced an almost 25% decrease

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Quinn Emanuel Files Antitrust Complaint with the EU Commission Against Microsoft on Behalf of Slack

Earlier this month, Quinn Emanuel's antitrust team filed a formal complaint on behalf of Slack Technologies to the European Commission's Competition Directorate alleging that Microsoft is abusing its dominant position in enterprise software to attempt to stymie what third party analysts have described as an "existential threat" to Microsoft's business posed by Slack in violation of EU competition law, as set out in Article 102 of the Treaty on the Functioning of the European Union (TFEU).

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institutions would be required to respond to complaints of sexual harassment and assault under Title IX.

In response to the proposed Rule, DoE received over 124,000 public comments, many of which of argued that the proposed regulations actually weakened the existing Title IX protections by, for example, raising certain evidentiary standards and narrowing the definition of "sexual harassment." Notwithstanding these concerns, however, DoE issued the final Rule on May 6, 2020, which is currently set to go into effect on August 14, 2020. Should the Rule take effect as planned, it will, unlike prior guidance issued by DoE, have the force of law. Given that the new regulations impose a number of requirements for educational institutions, and the short window these institutions have to bring their Title IX programs into compliance, schools and universities that receive federal financial assistance should, if they have not already, promptly evaluate their Title IX programs to ensure compliance with the new Rule and to make any necessary changes. In doing so, these institutions should carefully consider how the Rule comports with each individual school's own policies and procedures, including their own codes of conduct. Although the Rule makes a number of important changes to the Title IX landscape, we have highlighted a few of the most noteworthy changes below. To the extent you have questions about your institution's Title IX compliance, please feel free to contact Quinn Emanuel.

Notice to the Institution. The Rule narrows the scope of when an institution is required to respond to allegations of potential sexual misconduct. In particular, Section 106.44(a) provides that "[a] recipient with ***actual knowledge*** of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent." (emphasis added). "Actual knowledge" is defined as:

> [N]otice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).90.

Section 106.30.

Sections 106.30 and 106.44(a) thus require a recipient to respond to sexual harassment only if it has "actual knowledge" of such harassment. Under these provisions, a college or university would be deemed to have actual knowledge only if notice is provided to its Title IX Coordinator or any official with the authority to institute corrective measures on behalf of the institution. The requirement that students contact specific employees before an institution has any obligation is a notable departure from DoE's prior guidance. Previously, DoE required a recipient to respond to sexual harassment if "the school knows ***or should have known*** of the harassment," including harassment the school would have found out about through a "reasonably diligent inquiry." 1997 Guidance, 62 Fed. Reg. at 12,039–12,040, 12,042 (emphasis added). Under the prior standard, institutions could be on notice if students reported the conduct to trusted adults such as a campus security officer, professor, or athletic coach, if staff themselves witnessed the harassment, or if the incident was publicized in the media or flyers about the incident widely posted at the college. *Id*. That is no longer the case. Critics have argued that the new heightened notice requirement creates a disincentive for higher education institutions to learn about possible harassment on campus because without "actual knowledge," they can avoid liability for failure to respond.

Heightened Evidentiary Standard. The Rule also allows—although it does not require—institutions to adopt a "clear and convincing evidence" standard of proof, more stringent than typically required when evaluating complaints brought under other civil rights laws, including private damages actions under Title IX. Specifically, Section 106.45(b)(1)(vii) requires institutions to "[s]tate whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment."

As a result of these changes, institutions are now free to adopt a clear and convincing evidence standard for cases involving sexual harassment and assault even if they employ a preponderance of the evidence standard in all other proceedings. This would place a heavier burden on those alleging sexual harassment than on students who allege other forms of harassment. Moreover, institutions are now required to adopt the higher standard of proof if they use it for sexual harassment complaints against faculty. *See* Section 106.45(b)(1)(vii). The Rule also now requires uniformity across the employment and student disciplinary contexts for sexual harassment, but not other forms of harassment.

Changes to the Definition of "Sexual Harassment." Sections 106.30, 106.44, and 106.45 of the Rule change the definition of "sexual harassment" to which institutions must respond in ways that exclude conduct DoE historically recognized as denying equal access to education because of sex. In particular, Section 106.30 of the Rule limits the conduct that gives rise to an institution's responsibility to act by changing the definition of harassment from a disjunctive list of "severe, pervasive, or objectively offensive"—consistently used by DoE since 1997—to a conjunctive list by replacing "***or***" with "***and***," thus requiring all three conditions to be satisfied as a condition of administrative enforcement for the first time since Title IX's passage in 1972. By requiring institutions to respond only when conduct is "severe" ***and*** "pervasive" ***and*** "objectively offensive," critics have argued that the new Rule allows recipients to ignore a substantial range of conduct that causes a student to be "denied the benefits of" education or "subjected to discrimination" because of sex. 20 U.S.C. § 1681(a).

Off-Campus Conduct and Study Abroad Programs. The Rule further limits the type of sexual harassment to which a school must respond. Superficially, the Rule makes clear that Title IX only covers sexual harassment occurring in the United States. *See* Section 106.44(a). As a result, Title IX complaints alleging conduct that occurred outside of the United States, including conduct that occurred during a study abroad program, must be dismissed. *See* Section 106.45(b)(3).

The Rule also limits Title IX sexual harassment cases to "education programs or activities" over which the institution exercises substantial control or those occurring in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. As a result, misconduct that occurs, for example, in private off-campus housing, at a third-party research conference, or at a fraternity house that is not officially recognized is beyond Title IX's reach, although it may violate other institutional policies. Previous guidance made clear that institutions had the obligation to respond to a hostile environment that exists at school or on campus even where some of the conduct that culminated in that environment occurred off campus. *See* U.S. Dep't of Educ., Q&A on Campus Sexual Misconduct (Sept. 2017), available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf. Interestingly, DoE made these changes despite recognizing that approximately 41% of college sexual assaults occur off campus. *See* 83 Fed. Reg. at 61,487 n.27.

Heightened Level of Indifference. Section 106.44 of the Rule changes an institution's obligation to respond to conduct that constitutes sexual harassment as long as it does not act "deliberately indifferent." Specifically, under Section 106.44(a), "[a] recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond in a manner that is not deliberately indifferent." A recipient is "deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." *Id.* This change, again, departs from prior guidance, which required recipients to affirmatively "take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again . . . [I]n appropriate circumstances, the school [was] also . . . responsible for taking steps to remedy the effects of the harassment on the individual student or students who were harassed." 1997 Guidance, 62 Fed. Reg. at 12,042.

Live Hearing Requirement and Cross-Examination. The Rule requires all post-secondary institutions to conduct a live Title IX hearing that allows for cross-examination of all witnesses by each party's advisor. The Rule also requires institutions to separate investigative functions from decision-making functions, effectively disallowing the "single-investigator" model that had become increasingly common at universities. And for those tasked with Title IX adjudicatory authority, the Rule requires appropriate evidentiary training for these individuals. In terms of cross-examination, the Rule forbids the presiding decision-makers from relying on any statement of any party or witness who refuses to submit to live cross-examination in reaching a determination regarding responsibility. The Rule does, however, limit the scope of cross-examination and questioning by requiring decision-makers to determine whether a question is relevant before the party or witness is required to answer. If the decision-maker(s) excludes a question as irrelevant, the decision-maker(s) must explain on the record the basis for that decision. Notably, the Rule provides rape shield-type protections for complainants that disallow questions or evidence about a complainant's sexual disposition or prior sexual history. There are, however, two exceptions to this rule. First, such evidence can be used in proving someone other than the respondent committed the conduct in question, and second, to prove consent by showing complainant's prior history with respondent.

Mandatory Appeals Process. The Rule also mandates that institutions provide an appeals process for all parties in connection with a determination regarding responsibility, and from an institution's dismissal of a formal complaint or any specific allegations in the formal complaint. The appeal process must offer an appeal based on the following grounds: (i) procedural irregularity that affected the outcome of the matter; (ii) new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; or (iii) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter. Other bases for appeal may be made available if offered to both parties. The appeal process must be equitable to both parties, including by providing notice to both parties when the appeal is filed; ensuring that the decision-maker for the appeal is not the same person as the initial decision-maker on the formal complaint, the investigator, or the Title IX Coordinator; providing both parties a chance to submit a written statement; and issuing a written decision that is provided to both parties.

The new Rule has garnered substantial controversy. Indeed, the regulations have been widely condemned by a number of advocacy groups and by leading Democrats, including House Speaker Nancy Pelosi and former Vice President Joe Biden. These critics have taken aim at several of the notable changes to Title IX, including the new cross-examination requirement, which, they argue, threatens to "re-traumatize" complainants, discourage the reporting of misconduct, make the process unnecessarily adversarial, and give an unfair advantage to those who can hire lawyers. Detractors also note that the Rule's geographic limitation of Title IX's reach to institution-controlled or -affiliated properties will allow otherwise actionable harassment to go unpunished. And educational administrators, industry groups, and politicians alike have blasted DoE for demanding compliance with the Rule by the start of the next academic year as colleges and universities grapple with the ongoing financial, health, and logistical complications of COVID-19.

The Rule has already been challenged in court by seventeen Democratic State Attorneys' General, as well as various civil rights groups. As those cases progress through the courts, Congressional Democrats are also considering legislative repeal or appropriations riders to prevent enforcement of the Rule. Such legislative measures, however, are unlikely to occur before the August 14, 2020 effective date. And absent a court order, DoE plans to move forward as scheduled with the implementation of the Rule. Nor does it seem likely that the COVID-19 pandemic will disrupt DoE's implementation plans. In fact, DoE recently acknowledged its consideration of the COVID-19 national emergency in adopting the effective date of August 14, 2020: "The Department notes that recipients have been on notice for more than two years that a regulation of this nature has been forthcoming from the Department, and recipients will have substantially more than the minimal 30 days to come into compliance with these final regulations, which become effective on August 14, 2020." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,534 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Accordingly, educational institutions should proceed with the understanding that the new Rule will go into effect as planned on August 14, 2020. To the extent you have questions about your institution's Title IX compliance, please feel free to contact Quinn Emanuel.

NOTED WITH INTEREST

Romag Fasteners Inc. v. Fossil Inc. – Willfulness Not Required for Lost Profits in Trademark Disputes

I. Summary

On April 23, 2020, the Supreme Court unanimously held in *Romag Fasteners Inc. v. Fossil Inc.* that "willfulness" is not required for trademark owners to recover lost profits from infringers under § 35(a) of the Lanham Act, 15 U.S.C. § 1117(a). 140 S. Ct. 1492 (2020).

II. Factual Background

Plaintiff Romag is a manufacturer of magnetic snaps, fasteners, and closures. Defendant Fossil manufactures, designs, and markets fashion accessories like handbags and watches. In 2002, the two companies signed an agreement in which Romag would sell its magnetic fasteners to Fossil for use in Fossil's handbags and other products. Under the 2002 agreement, Fossil instructed its Chinese factories to purchase officially licensed Romag fasteners. The controversy began when Romag noticed that sales of its fasteners to Fossil factories declined precipitously from 2008 to 2010. Romag discovered that the decline was due to Fossil's Chinese manufacturers purchasing and using counterfeit fasteners – albeit without Fossil's knowledge. Romag sued Fossil in 2010 for trademark infringement in the District Court of Connecticut.

III. Procedural Background and Split of Authority

In the district court trial, the jury found that Fossil infringed Romag's trademarks (and patents). However, although the jury concluded that Fossil had acted in "callous disregard" of Romag's rights, the jury rejected Romag's allegations that Fossil had acted willfully. *Romag Fasteners, Inc. v. Fossil, Inc.*, 29 F. Supp. 3d 85 (D. Conn. 2014). Based on controlling Second Circuit precedent requiring willfulness as a prerequisite for lost profits, the district court refused to order Fossil to turn over nearly $7 million in profits to Romag. Instead, Romag was awarded only a reasonable royalty of about $42,000 from Fossil for patent infringement. *Id.*

Romag appealed to the Federal Circuit which affirmed the district court's ruling. The result of the appeal would have been different in the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits where willfulness is considered just one of many factors the court may consider in awarding profits. The Third Circuit rationale, for example, was that the 1999 amendment to the Lanham Act expressed Congress' intent to limit the willfulness requirement to § 43(c) violations: "By… limiting [willfulness] to § 43(c) violations, Congress effectively superseded the willfulness requirement as applied to § 43(a)." *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 174 (3d Cir. 2005). In contrast, the Second Circuit, along with the First, Eighth, Ninth, Tenth, and D.C. Circuits required willfulness for an award of lost profits. The Second Circuit reasoning, for example, was that not having the willfulness requirement would result in impermissible windfall to the plaintiff where the infringement was innocent or in good faith. *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532 (2d Cir. 1992). Romag appealed and the Supreme Court took the case to resolve this circuit split.

IV. The Supreme Court Decision

The Supreme Court sided with the trademark owner Romag's position that willfulness is not required to recover the infringer's profits. Justice Neil Gorsuch wrote the opinion and was joined by all of the justices except for Justice Sonia Sotomayor, who concurred. Staying true to his reputation as a strict textualist, Justice Gorsuch focused primarily on the plain language of the statute. The statute reads:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) or (d) of this title, or a ***willful violation*** under section 1125(c) of this title, shall have been established . . . ,the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

15 U. S. C. §1117(a) (emphasis added).

The Justice began with an analysis of the statute's language, noting that the term "willful" precedes the term "violation" only with regards to § 1125(c). 140 S. Ct. at 1495. "Willful" does not appear before the term "violation" under § 1125(a) or (d). As a result, the Justice reasoned that "the statute does make a showing of willfulness a precondition to a profits award when the plaintiff proceeds under § 1125(c)." *Id.* However, in the lower courts Romag alleged and proved a violation of § 1125(a). In such cases, the Court found that "the statutory language has *never* required a showing of willfulness to win a defendant's profits." *Id.* While the words "willful" may be "read into" the statute to modify the "violation" appearing before § 1125(a) and (d), the Justice refused to take this approach, pointing to the fact that "Congress has … included the term in question elsewhere in the very same statutory provision." *Id.*

Justice Gorsuch then turned to the wider structure of the Lanham Act. He pointed out that the act "speaks often and expressly about mental states." *Id.* To support his argument he listed several examples of Congress' clear expression of mental states in other sections of the statute. Section 1117(b), for example, includes the words "intentionally" and "knowledge" while § 1117(c) uses the word "willful". *Id.* From this, Justice Gorsuch found that "the absence of such standard in the provision before us, thus, seems all the more telling." *Id.*

The Justice also addressed the statutory phrase "subject to the principles of equity" which Fossil had asserted as supporting its argument that that equity courts had a history of requiring a showing of willfulness before granting profits in trademark disputes. Justice Gorsuch rejected Fossil's argument explaining that it was "far from clear whether trademark law historically required a showing of willfulness before allowing a profits remedy." *Id.* at 1496. He concluded:

At the end of it all, the most we can say with certainty is this. *Mens rea* figured as an important consideration in awarding profits in pre-Lanham Act cases…Given these traditional principles, we do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances.

Id. at 1497.

Following the trends in the recent intellectual property cases, the Supreme Court rejected the inflexible, bright-line rule and held that willfulness is not a requirement for profit recovery under § 1125(a). However, the Court's opinion noted that while willfulness was not an "inflexible precondition," a trademark defendant's mental state may still be a "highly important consideration in determining whether an award of profits is appropriate." *Id.*

V. Practice Tips

While the Supreme Court's ruling in *Romag* does not change the willfulness requirement in trademark dilution cases under 15 U.S.C. § 1125(c), *Romag* is a significant decision impacting trademark holders' rights to recover trademark infringers' profits under 15 U.S.C. § 1117(a). As such, we recommend the following:

- Trademark users should monitor supply chains more carefully.
- As the Court expressly held that the alleged infringer's mental state may be highly relevant, the trademark users should consider obtaining a clearance opinion from a qualified attorney if possible. This may help demonstrate good faith use of a trademark.
- Defendants in trademark lawsuits should carefully consider litigation strategies even when the alleged infringement is not willful – especially if the evidence support a potential finding of "callous disregard" of the trademark owners' rights – as lack of willfulness will not shield them against disgorgement of profits.
- Both trademark owners and users should monitor the number and amount of lost profit awards going forward. Under *Romag*, district court judges and juries will have greater flexibility in determining whether lost profit awards are suitable. The long-term impact of this decision may be that judges will view this decision as a greenlight to permit a greater number of awards of infringers' profits going forward. Q

PRACTICE AREA NOTES

Trial Practice Update

Maintaining Inconsistent Positions in Discovery and at Trial

As a general matter, parties in civil litigation are permitted to plead inconsistent claims and defenses. Fed. R. Civ. P. 8. Although this may seem at odds with the court's interest in discerning the truth, the rule reflects a sensible policy. Parties often cannot know all of the relevant facts and circumstances at the outset of a case. They thus require some latitude to take inconsistent positions in order to develop the case's merits – probing alternative theories in discovery to see which, if any, is borne out by the evidence.

There are limits, however, on parties' ability to take and maintain inconsistent positions. For example, parties are only authorized to assert contradictory facts where they have made a reasonable inquiry into the matter and are legitimately in doubt about the fact in question. *Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago*, 837 F. Supp. 892, 894 (N.D. Ill. 1993) (*citing* Fed. R. Civ. P. 11). On the other hand, once a party convinces a court to adopt one of its positions, it may be judicially estopped from taking an inconsistent one in subsequent proceedings in order to protect the integrity of the courts and prevent gamesmanship. *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217–18 (6th Cir. 1990).

This approach, however, is not without risk. Indeed, just because parties *can* take inconsistent positions does not always mean that they *should*. At certain points—such as when an expert witness is preparing opinions for a report—it is important for parties to "pick a lane." Otherwise, the conflict may give fodder to opposing counsel to exploit during trial.

For example, Quinn Emanuel has represented Qualcomm in numerous cases around the world, including a recent patent case tried to a jury in San Diego, California. In that case, Qualcomm asserted several patents against Apple. For one of the patents, Apple defended itself, in part, by claiming that one of its employees—not Qualcomm's—had come up with the idea underlying the patent and therefore qualified as an "inventor." Apple had a witness willing to testify to that point at trial, and had an email from an Apple executive to a Qualcomm executive summarizing the employee's alleged idea.

To establish someone as an inventor on a patent, a party must show that the individual made a significant contribution to the patent and did not merely communicate a well-known concept in the art. *Nartron Corp. v. Schukra U.S.A. Inc.*, 558 F.3d 1352, 1356–57 (Fed. Cir. 2009). But asserting inventorship as a defense can conflict with other defenses to patent infringement claims. For instance, accused infringers often allege that an asserted patent is invalid because its concepts were well-known and thus not patentable. In the Qualcomm-Apple litigation, Apple opted to assert both defenses in its answer to Qualcomm's complaint, and made the fateful decision to pursue both theories—inventorship and invalidity—through expert discovery.

Although Apple ultimately dropped invalidity at trial in favor of an inventorship defense, the damage was already done. For example, one concept claimed in the patent at issue was that a "header" be received by a processor separately from data. Apple argued that its employee contributed this idea to the patent, qualifying him as an inventor. Apple's expert, however, had offered an invalidity opinion that concluded that this concept was "well-known in the art before 2010." *Qualcomm Inc. v. Apple Inc.*, Case No. 17-cv-1375, Dkt. 728 at 1236:1-23. So the jury was faced with two conflicting positions: (1) that the separate-receipt concept was *not* a well-known concept in the art prior to its contribution (qualifying Apple's employee as an inventor), or (2) that the separate-receipt concept *was* well-known in the art at the time of the patent's issuance (rendering Qualcomm's patent invalid). Quinn Emanuel seized on this inconsistency and used it to Qualcomm's advantage during cross-examination of Apple's expert. Apple's expert was asked "You testified that [the idea of a separate receipt of an image header and the data segments] alone means that Mr. Siva was a significant contributor, right?," to which he responded "Yes." *Id.* at 1238:1-8. He was then immediately asked, "But you also offered the opinion that the idea of separate receipt of an image header and the data segments was well-known in the art, right?," to which he also responded "Yes." *Id.* In other words, Apple's expert was forced to admit both that the Apple employee came up with something new and significant, but also that the concept was incredibly well-known in the art. Similar issues plagued Apple's non-infringement defenses. For example, Apple's expert argued that Apple did not infringe because its header came in two separate parts. *Id.* at 1219:3-7. But Apple also described its employee's alleged inventive contribution as a two-part header. *Id.* 1220:2-10.

Faced with these contradicting positions, the jury found in Qualcomm's favor on both infringement and inventorship, awarding Qualcomm all of the damages it sought.

The takeaway here is this: although parties are generally permitted to plead contradictory positions and test those positions in discovery, they should not do so in a way that impairs their ability to present a cohesive story at trial. This example illustrates that decisions on which positions to take should be made as early as possible, and likely prior to the submission of expert reports.

Antitrust & Competition Update

Commencement of Limitation and Notice of a Potential Cartel Damages Claim Under English Law

The recent judgment of the High Court in London, *Granville Technology Group Limited (In Liquidation) & Ors v. Infineon Technologies AG & Micron Europe Limited,* [2020] EWHC (Comm) 415, which was cited soon after with approval by the Court of Appeal in *DSG and Dixons v. Mastercard,* [2020] EWCA (Civ) 671, has provided long-awaited guidance on limitation in follow-on cartel damages claims under English law.

The c laimants, three c ompanies in liquidation, brought a follow-on cartel damages claim against two major suppliers of direct random access memory and Rambus DRAM (together, "**DRAM**") who were found guilty of a price-fixing cartel from 1998 and 2002 by the European Commission ("**EC**"), in a decision dated 19 May 2010 (the "**Decision**"). The claimants, who were direct purchasers, and who had all entered liquidation at different times, issued their claim in the High Court on 18 May 2016, a day short of the six year anniversary of the date of publication of the Decision.

Prior to *Granville*, doubt remained as to whether time could start to run in a follow-on cartel damages claim (brought on the back of an EC decision), prior to publication of the underlying decision. In *Granville,* however, the defendants argued that the claim was time barred as more than six years had passed since the claimants' cause of action had accrued, long before the publication of the Decision. The claimants, in turn, sought to rely on § 32(1)(b) of the Limitation Act 1980, which postpones the running of time where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant" "until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

When is a Concealment "Discovered" for the Purposes of English Law?

Under English law, "the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case." The Court clarified that the claimant need not have *knowledge* of the essential facts, which may be subject to proof at trial, but must be in possession of facts sufficient to plead a viable case, taking account of the "*generous approach*" afforded to claimants when pleading a cartel damages claim pre-discovery. Thus the *Granville* claimants, as the party with the burden of proof on establishing the claim was brought within the limitation period, had to prove that they could only have "discovered" the necessary elements to plead a cause of action when the Decision was published on 19 May 2010.

The test of whether the claimant could, with reasonable diligence, have discovered the concealed facts, is a part objective, part subjective test. Clarifying some ambiguity in earlier authority, the *Granville* Court further confirmed that a claimant is subject to the duty to exercise reasonable diligence where there is first a " trigger" event which *objectively* puts the claimant "on notice" to pursue enquiries. The Court must then assess how a person "carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources."

Discovery of Relevant Concealed Facts in the Present Case

In *Granville*, the defendants relied on substantial press coverage from 14 years prior to publication of the Decision, including: (i) a 2002 U.S. Department of Justice's ("**DOJ**") DRAM investigation into Micron for "anti-competitive practices," which contained no suggestion that the practices were limited to the United States; (ii) a 2003 plea agreement between a Micron employee and the DOJ in respect of the worldwide DRAM market; (iii) a 2004 plea agreement by Infineon, in which the DOJ referred to participation in a conspiracy "*in the United States and elsewhere;*" and (iv) the EC's 2004 investigation into the DRAM market. They also relied on Infineon's corresponding provision in its 2004 accounts for a potential fine, and two class actions filed in the United States in 2005 in relation to the DRAM cartel. The claimants, Granville and VMT, had received a copy of the draft complaint in respect of the first class action from plaintiff lawyers seeking to expand the claim to purchasers outside the United States, and the second claim included several plaintiffs who had purchased DRAM from outside the United States.

Based on this evidence, the Court found that, with reasonable diligence, Granville and VMT could have discovered not simply the US developments (which those claimants admitted they had constructive knowledge of), but also the existence and progress of the EC investigation, as well as Infineon's provision for a fine resulting from that investigation. Taken together, the Court found that these facts would have been sufficient to satisfy the statement-of-claim test and that their claim was therefore time barred.

OTC, by contrast, was found to have not been reasonably put on notice of a potential claim. Unlike Granville and VMT, OTC had gone into liquidation in January 2002, <u>prior to</u> reports emerging in the United States of the existence of a cartel in the DRAM market. The Court considered it "wholly unreal" for an administrator of a computer company to religiously scan "cover-to-cover on a daily basis […] for headlines of potential interest for years after the company had stopped trading and sold its assets." Therefore, OTC's claim was not time-barred.

The ruling in *Granville* provides important clarification on the commencement of the limitation period in follow-on cartel damages claims, making it clear that time will not necessarily start to run from publication of the EC infringement decision. It also illustrates that while claimants benefit from a "generous approach" to pleading a cartel damages claim, there are likely to be fewer "facts relevant to [its] right of action" (to borrow the language of § 32 of the Limitation Act) to establish before the clock starts running for limitation purposes. This is especially important in cases involving a global cartel subject to investigations, fines, plea agreements, and damages claims in other jurisdictions.

Of note, while the ruling will provide important guidance for years to come, it will not apply in future follow-on cartel damages cases governed by the European Damages Directive, which the UK implemented in 2017 (with no present indication of repeal post- the current Brexit transition). For those cases (i.e. where harm is suffered by infringements starting after 8 March, 2017), the limitation period will be suspended – pending a regulatory investigation – until one year after publication of a regulatory decision of the EC, CMA and/or other sectoral regulators. In the meantime, claimants before the English courts will need to carefully assess past reports of regulatory investigations and decisions in other jurisdictions that could have put the claimant on notice of the claim well before a relevant EC is published.

(Favorable Settlement for Private Equity Firm on Even of First Delaware "Busted Deal" Trial continued from cover)

in year-over-year revenue growth and it missed street consensus earnings projections by more than 70%. It identified COVID-19 as the primary cause for its drastic underperformance.

Advent was shocked; it had reasonably expected that Forescout's business model could weather the shift to the work-from-home environment that became predominant as a result of the COVID-19 crisis, especially since many of Forescout's competitors in cybersecurity thrived in the first quarter. As a result of Forescout's underperformance in the first quarter, Advent believed that the closing conditions for the deal had not been satisfied.

Three days before the scheduled May 18, 2020 closing of the merger of Advent's affiliate with and into Forescout, Advent announced that it would not consummate the deal. On May 19, Forescout sued for specific performance of the $1.9 billion transaction.

Advent had three reasons for backing out of the deal, each of which presented challenges:

The first reason was that Forescout's poor first-quarter performance constituted an MAE (Material Adverse Effect) under the parties' Merger Agreement.

Establishing an MAE can be a difficult task and in fact there has been only one case in the history of Delaware Chancery Court declaring an MAE. More challenging still, the Agreement specifically excluded any downturns in performance caused by "pandemics" from constituting a Material Adverse Effect, unless the company was *disproportionately* impacted by the pandemic. Advent therefore had to show Forescout's dramatic downturn was *unique* among its peers.

The second reason was that Forescout had failed to operate the company as it would in the ordinary course, which it was obligated to do by the parties' Agreement. This presented novel interpretation challenges in light of the pandemic: what does it mean to operate in the "ordinary course" in light of a global pandemic, with shut-down orders and other government prohibitions? Courts are grappling with whether such a requirement should be evaluated in the context of a global pandemic, or in the context of the pre-pandemic world, a question that may turn on the specific wording of the ordinary course provision. And even if the measuring stick is how a company should operate in a global pandemic, courts are struggling with *how* to measure what a company should do during a pandemic, given COVID-19's unprecedented impact on the world.

The third reason Advent argued was that specific performance could not be awarded under the contract unless the debt financing contemplated by the Agreement was available, and that such financing was not available because Advent could not, in good faith, deliver a solvency certificate to the lenders. Advent had a good faith basis to believe that Advent could not shoulder the $400 million debt load necessary to consummate the transaction as written and therefore it refused to sign the solvency certificate. Forescout argued, however, that the deal was not contingent on financing and, in any event, Advent had an obligation to seek alternative financing for the transaction and if it refused to do so, Forescout should be permitted to line up alternative financing itself.

Compounding the complexity was an extremely expedited trial schedule for this $2-billion case. Two days after Advent was sued, and before it even filed an opposition, Delaware Vice Chancellor Glasscock set trial for the first week of June, giving Advent an unprecedented ***one week*** to take document, fact, and expert discovery, and prepare for trial. Through a stipulation of the parties, the trial setting was ultimately moved six weeks out to July 20th, 2020, a date chosen by the Chancery Court to permit it to render a decision before the August 6 debt financing "drop dead" date. Although that drop-dead date was arguably rendered moot as a result of a notice by the lenders that they would no longer be funding the debt, the Court declined to reschedule the trial, instead ordering the first ever full Zoom trial in Delaware Chancery Court history.

In the seven weeks leading up to the settlement, Quinn Emanuel took twenty-five depositions via Zoom, filed seven expert reports, filed two motions to compel, and, in partnership with co-counsel and local counsel, reviewed over 200,000 documents, all while simultaneously learning the case and preparing for trial.

On the eve of trial, Forescout agreed to a significantly reduced purchase price. Advent can now look forward to owning a company that develops and sells world-class cybersecurity products at a price more reflective of the actual state of the business and with a dramatically reduced debt load. Q

(Quinn Emanuel Files Antitrust Complaint with the EU Commission Against Microsoft on Behalf of Slack continued from cover)

Over the past few years, Slack has emerged as the leading channel-based messaging platform and gateway to cloud work for millions of business users. Like Zoom and Microsoft Teams, Slack has recently experienced enormous increased demand because of the coronavirus-induced shutdowns that have forced millions to work from home. It features an open gateway approach that allows developers to write apps that run on Slack in contrast to Microsoft's closed "gatekeeper" approach. Slack has often been described as an "email killer" which threatens Microsoft's Outlook, its dominant email client which is the cornerstone of its dominant Office productivity suite (which includes Outlook, Word, Excel and PowerPoint). Slack also threatens Microsoft's hold on the highly profitable enterprise software market, because Slack's open platform allows users to seamlessly access thousands of cloud based best-in-breed applications, as well as creating their own custom integrations.

The Complaint alleges that Microsoft deliberately copied Slack when it designed its competing Teams collaboration product and that it is currently taking a series of actions targeted at Slack to undermine it and foreclose competition. Specifically, the Complaint alleges that Microsoft illegally ties Teams into Office, force installs Teams for millions of users, blocks its removal, hides the true cost to enterprise customers and refuses to provide necessary interoperability information.

Commentators have noted that the current dispute echoes the internet browser wars in the 1990s between Microsoft and Netscape Communications, the commercial pioneer of browser software, which lead to a landmark federal antitrust case against Microsoft in the United States. Since then, Microsoft has largely avoided the same intense antitrust scrutiny that other tech giants have undergone.

Now, online cloud software is the major platform, and Teams is included in Microsoft's Office 365/ Microsoft 365 cloud suite. In reporting on this case, The New York Times quoted Michael Cusumano, a professor at the Sloan School of Management at the Massachusetts Institute of Technology, who emphasized the growing importance of online collaboration platforms stating: "[o]nline collaboration platforms and related tools have become as important to us as smartphones and computers."

As Slack noted in its press release, "this is much bigger than Slack versus Microsoft – this is a proxy for two very different philosophies for the future of digital ecosystems, gateways versus gatekeepers. Slack offers an open flexible approach that compounds the threat to Microsoft because it is a gateway to innovative best-in-class technology that competes with the rest of Microsoft's stack and gives customers the freedom to build solutions that meet their needs."

The Complaint requests that the European Commission impose remedies on Microsoft which would, amongst other things require it to (i) untie Teams from Exchange, Sharepoint, Office, Office 365/ Microsoft 365 by removing it from all of its Office 365/ Microsoft 365 packages, (ii) ensure that customers can only purchase Teams on a stand-alone basis, (iii) remedy the situation with regard to existing users of Office 365/ Microsoft 365, (iv) stop the auto-installation of Teams to Office 365/Microsoft 365 users; (v) provide all necessary interoperability information, and (vi) cease providing unlawful financial incentives.

The European Commission will now review the complaint and decide whether to open a formal investigation into Microsoft's anti-competitive practices. Slack has not yet taken any similar action in the United States but is having conversations with the relevant authorities and has not ruled out actions in the U.S.

Quinn Emanuel invites other Software as a Service or Infrastructure as a Service companies, especially application developers who benefit from Slack's open platform and wish to support the Complaint or who may have other issues which need to be dealt with, to contact the firm at the following confidential email address: MicrosoftAntitrust@quinnemanuel.com Q

VICTORIES

Victory for StubHub and eBay in Federal Trade Secret and CFAA Suit

After nearly half a decade of litigation, Quinn Emanuel successfully obtained summary judgment for clients StubHub and eBay on a federal trade secret claim in a case against Calendar Research, LLC involving a social planning mobile application named "Klutch." StubHub considered acquiring the company that developed the Klutch app in early 2015, but when the deal fell through, the app development company became insolvent. StubHub hired three employees from the company (the former founder and two engineers), and those three individuals—who are also defendants to the suit—thereafter developed an app for StubHub.

Calendar Research bought the defunct app development company's assets, and sued StubHub and eBay for trade secret misappropriation and violation of the Computer Fraud and Abuse Act ("CFAA"), alleging that the companies had misappropriated trade secrets related to the Klutch app. The Honorable Stephen V. Wilson of the Central District of California immediately ordered an expert source code review and, after a multiple-month expedited discovery period, granted partial summary judgment, concluding that "the Klutch code is not a protectable trade secret, even as a compilation" and that there was no genuine issue of material fact regarding misappropriation of source code by StubHub in its applications. However, in a clarification order, the Court held that the case could proceed as to the theory "that StubHub misappropriated the Klutch code in different ways than using the code." Quinn Emanuel conducted a second round of discovery on the non-code based DTSA and CFAA claims.

Calendar Research identified four categories of purported trade secrets in this second round of discovery: (1) viral capability (or the "ability of [an] application to grow its user base organically with user-to-user interactions, rather than through marketing"), (2) UI/ UX and design, (3) venue focus, and (4) integration of third-party applications. Quinn Emanuel extracted key admissions during depositions of the Plaintiff's experts and main witnesses and moved for summary judgment on the basis that Calendar Research had failed to identify a single trade secret, offer any proof in support of their misappropriation, or provide evidence that the defendants had conspired to unlawfully access plaintiff's computers. In an extensive 41-page order, Judge Wilson agreed and held that Calendar Research failed to provide a reasonable particular definition of any of its four categories of purported trade secrets, noting that the disclosures were so vague that they "read[] like an inventory of categories of Plaintiff's scientific or strategic business information."

The only federal claim remaining, brought under the CFAA, was dismissed shortly after the Court's summary judgment order on the trade secrets claim, confirming that StubHub and eBay will not face liability on the federal claims. The Court is now considering whether it should retain jurisdiction over state law claims in the case, or remand the case to Los Angeles Superior Court.

Victory for Johns Hopkins and International Students Against Trump Administration

We obtained a significant victory on behalf of Johns Hopkins University in a lawsuit filed against the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) in the U.S. District Court for the District of Columbia, seeking emergency injunctive relief against a Directive which would have threatened to strip millions of international students in the United States of their F-1 visa status.

The July 6, 2020 Directive issued by ICE reversed prior March 2020 Guidance, which—"for the duration of the [COVID-19] pandemic"—permitted F-1 students to remain in the country even as all of their classes transitioned online. The July Directive would have nullified the March Guidance, despite the ongoing COVID-19 emergency and would have forced F-1 students taking an entirely online course load to leave the country. The Directive would also have mandated that universities certify within barely a week whether they would transition entirely online for the fall term.

The Directive would have had a colossal impact on universities, as well as the hundreds of thousands of F-1 students in the United States. For universities, the Directive would have required a decision within *nine days* whether they intended to proceed entirely online in the coming semester—upending multiple months and thousands of hours of planning by schools who had carefully planned out their curricula in reliance on the March Guidance. For Johns Hopkins, it would have meant having to suddenly revise a plan to proceed entirely online after Thanksgiving—based on careful study and consultation with leading health experts. This was all the more jarring in light of Johns Hopkins' status as a leader in the global battle against COVID-19, including the coronavirus world map, which multiple government entities (including DHS) had used themselves (and which, notably, was developed by F-1 visa holders).

And the Directive would have been devastating for many students. For those enrolled at institutions that had decided to transition entirely to remote learning in the fall; for those with health conditions putting them in an especially high-risk category in the event of contracting COVID-19; and for those whose schools may have been later ordered to comply with shutdown orders from state or local governments in the event of an autumn resurgence of the virus, the Directive effectively would have forced them to undertake international travel on little notice and to lose their visa status.

Quinn Emanuel filed a complaint within a few days of the Directive and sought a TRO and PI, asserting multiple bases for enjoining the directive, including Administrative Procedure Act, Due Process, and First Amendment academic freedom principles. Multiple parallel suits were filed by other universities and over 17 states (joined by hundreds of amici). At first, the government appeared to be prepared to proceed in these suits, filing opposition briefs in parallel cases. But after Quinn Emanuel filed its forceful and compelling TRO/PI papers—which included declarations from multiple affected students and causes of action not asserted in other suits—the government capitulated, agreeing to rescind the July 6 Directive even before the motions could be heard.

The government's agreement to return to the March 2020 Guidance will enable international students to continue to pursue their studies in the United States and will permit Johns Hopkins and countless other schools to continue to provide education in the manner best suited to the academic and public health needs of their students and communities. For these efforts, **Crystal Nix-Hines**, **Derek Shaffer**, and **Bill Burck** received Honorable Mention in AmLaw's Litigator of the Week.

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business litigation report

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Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

- We are a business litigation firm of more than 800 lawyers — the largest in the world devoted solely to business litigation and arbitration.
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- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
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- We have won five 9-figure jury verdicts and one 10-figure jury verdict.
- We have also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

Prior results do not guarantee a similar outcome.

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