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Nobel-Prize-Winning Insights for Trial Lawyers

In his day job, Daniel Kahneman is a renowned psychologist. On the side, he is a Nobel laureate in economics. In his lucid and fascinating book, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011), Kahneman shares with the lay reader psychology's understanding of, well, understanding—the hows and whats of human thought. In the processes of the mind, careful and conscious thought—the part of thinking that we think of as thinking—is actually an intermittent, reluctant and junior participant. The book is a rewarding and essential read for trial lawyers given Kahneman's lessons related to decision making and their applications to persuasion.

How does a psychologist win a prize in economics? As it happens, rational economic decision making—specifically, the ability to rationally decide the value of things—is the foundational assumption of microeconomic theory. However, Kahneman showed that people do not and cannot make such rational decisions. Yes, people regularly and routinely decide the value of things; we certainly intend and firmly believe those decisions to be rational; and they demonstrably and invariably are not. That is psychology for economists.

Although the irrational way people actually think and value things is not the existential threat to legal practice that it is to economics, it remains absolutely consequential because it dictates the levers of persuasion. (Spoiler Alert: The logical application of law to fact isn't happening, try as we may.)

A. Kahneman and Valuation

The civil law is concerned almost exclusively with valuation—with estimates of what sums will justly compensate a plaintiff for some inflicted harm. Although Kahneman does not directly address how juries arrive at damages estimates, he describes experiments that demonstrate how people estimate value is influenced by factors that have nothing to do with actual value.

For example, Kahneman urges readers to consider two questions: (1) "Was Gandhi more or less than 144 years old when he died?" and (2) "How old was Gandhi when he died?" Introduction of a random number like 144 in the example above will often produce answers that are affected by this absurdly high number, which has the effect of anchoring the response. Suggestion has a priming effect. For example, if we asked a group whether Gandhi died older than the age of 35, and then we asked the same group to guess what age Gandhi actually died, predictions will be closer to 35. Participants who are asked whether Gandhi was more or less than 144 years old when he died will predict that Gandhi was much older at his death than the group of participants who were asked whether Gandhi was older than 35 at the time of his death. The impact of introducing these meaningless numbers is completely unrecognized by the person making the estimate.

Kahneman performed another experiment where a "Wheel of Fortune" type wheel was spun to come up with a random number. The wheel was rigged. With one group of participants, the wheel stopped at

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INSIDE

Partner Robert Becher Named "Cannabis Law Trailblazer" by *The National Law Journal*

The National Law Journal recently released the list of the 2020 Cannabis Law Trailblazers, and recognized partner Robert Becher for creating one of the first litigation practice groups dedicated to cannabis-related matters and litigating cutting-edge disputes. Q

10, and the participants were asked to write the number down. A second group of subjects did the same, except the wheel of fortune came to rest on 65 instead of 10. Each group was then asked to estimate what percentage of nations in the UN were African Nations. Those who spun a 10 gave an average estimate of 25%. Those who spun a 65 estimated that nearly twice as many—45%—of the nations in the UN were African. The Wheel of Fortune was an incredibly persuasive, albeit entirely subconscious, factor in estimating "value"!

In the Wheel of Fortune experiment, the participants were laypeople with little to balance against the wheel other than gut feeling. They were neither trained nor experienced, and had no meaningful information to weigh against mere suggestion. But Kahneman describes an experiment that fills in these holes. The experiment involved professional real estate agents—people who routinely and seriously evaluate home prices. A group of them confidently reported that they were not influenced by being told another's conclusion, and a biased one at that—the price "asked." These real estate professionals were wrong.

In the experiment, real estate agents were asked to value a real house on the market. The agents visited the house and were given a comprehensive booklet of information that included a summary of sales and industry-type data, a listing price, and an asking price. Half of the agents were shown an asking price that was substantially higher than the listed price. The other half of the agents were shown an asking price that was substantially lower than the listed price. Each agent was then asked to give his or her own estimate on a reasonable buying price for the house and the lowest price at which he or she would sell the house if he or she owned the house.

After giving their estimates, the agents were asked what factors affected their judgments. Although the real estate agents claimed confidently that they completely ignored the asking price, as any professional should in estimating a reasonable buying price, the results showed otherwise. The asking price had a 41% *anchoring effect* on the real estate agents' reasonable buying price calculations. Despite the real estate agents' pride in their self-perceived ability to ignore the asking price, the agents' *anchoring effect* was only 7% lower than the 48% effect the asking price had on a set of business school students with no real estate experience who went through the same experiment.

We have long known that the seller's asking price is important, but that importance goes beyond what was thought. It is not merely the price that the seller is asking; it is the *value* the seller is *teaching*—teaching even the well taught who are trained to ignore that piece of data. Yes, "the ask" is the vital start and sometimes end of negotiations, but the effect on perceived value is greater. Asking price does not alter finishes, increase the number of bathrooms or move neighborhoods, hearts or desires. These are elements of value against which asking price has no power—except that we cannot escape its powerful influence. If we try, we "notice" the erroneous feeling that we were not influenced.

We've seen how professional realtors' estimates of market value were impacted by a mere asking price. Are there similar effects on legal decision-making, on the minds of well-trained legal scholars? That issue was tested in the context of criminal sentencing by actual, experienced judges. Kahneman describes an experiment in which German judges were given an identical case file, with identical facts, applying identical laws to an identical offender, and asked to state an appropriate sentence. Prior to passing that sentence, each judge was given a factually meaningless hypothetical question. Each judge rolled a pair of dice, copied the result onto a piece of paper, and was asked whether their sentence would be higher or lower than the number they just recorded. The judge was then asked what his or her actual sentence would be. The dice were loaded, with half the judges "randomly" rolling 3 and half of them "randomly" rolling 9. Judges who wrote down the meaningless 3 sentenced the defendant to an average 5 months imprisonment. Those who rolled 9 imposed 60% more time in prison—an average sentence of 8 months instead of 5. This result transcends the "after and before lunch" folklore about how judges sentence defendants. It is difficult to imagine a single factor that would swing the appropriate punishment as much as did a meaningless roll of the dice.

These and other experiments are presented by Kahneman to confirm his conclusion that irrational thoughts and associations that cross one's mind—and there always are such thoughts and associations—hold unnoticed and massive influence over what we experience to be thorough rational thought. These are the minds to which we trial lawyers present our cases.

What insight does this research give about one of the law's most fundamental tasks—estimating damages to be awarded to a plaintiff? As noted above, this is a question not considered explicitly by Kahneman. But his research tells us that the jury's estimate will not be based entirely on rational factors. Indeed, it suggests that when plaintiffs are presenting damages numbers at trial, they should strongly consider putting large numbers before the jury, even if there is a fear that the jury will consider the number inflated. Defendants often rely on the "greedy plaintiff" defense—that the numbers put out by plaintiff are so absurd that the damages number, if not the entire case, should be rejected by the jury. But Kahneman's research shows that one asked to make a "valuation" or estimate can know a high number is ridiculous, overstated, irrelevant, and even false, and yet

that number can impact the value that person is asked to come up with, because it acts as an anchor. Anchoring for damages can be done directly or indirectly. For example, in a case seeking lost profits, a plaintiff should emphasize the huge revenue from which the profits will be calculated. That significantly large number may act as an anchor that gives the jurors comfort in awarding the significantly lower (but nonetheless large) damages number.

This is not to say that a plaintiff should not be worried about credibility. However, if you have a solid and emotionally appealing liability case and have built credibility on the issue of liability, large numbers presented for damages seem unlikely to hurt your credibility on liability, and may result in a larger award.

Kahneman also reported that people are more confident in their conclusions if they do not hear an opposing side of an issue. Defendants are often loathe to give the jury an alternative to plaintiff's damages number, thinking that they don't want to dignify the number with an alternative. Kahenman's research suggests this is a dangerous strategy. The lack of an alternative number makes it easier for the jurors to conclude that plaintiff's number is the correct one. This is because it is in our nature to avoid the rigors of analytical thought. Humans try to avoid the cognitive strain of analytical thought. So, as a defendant, don't give the jury an easy path to avoiding difficult analysis. Present the jury with an alternative. Preferably, a simple and understandable one.

B. Reducing Cognitive Effort

The research about the anchoring effect in estimating values is a species of Kahneman's analysis of how the brain takes pathways of thinking that reduce cognitive effort. Simply put, the mind is disinclined to think rationally—it always begins with the easy, the familiar, the closest at hand and the common, the "fast" thinking of Kahneman's title, to which the mind applies minimal, if any, effort and consideration (effort and consideration being the titular "slow" thinking). So don't expect people to make the effort required to apply logic to a complex problem, especially if there is an easier path. In fact, give them easy pathways to arrive at the "logical" or evidence-supported conclusion that is favorable to you. These pathways include the use of analogies, reference to common experience (or experience the hearer believes is "common"—Kahneman discusses widely held factual beliefs that simply are not true). The general principle is that anything you can do to reduce cognitive effort will help.

Some of the simple techniques identified by Kahneman to reduce cognitive effort by making things easier to understand are well-known to jury consultants: He explains, for example, that for graphics you want to maximize the contrast between characters and their background. If you use color, you are more likely to be believed if your text is printed in bright blue than in a middling shade, better bright red than green or yellow. A simple reason—it is easier to read. If you care about being thought credible and intelligent, do not use complex language, which is more demanding of the listener. Complex writing makes writers seem less smart, more pretentious and untruthful. Don't make the reader or listener have to work! In addition to making your message simple, try to make it memorable, that way it may be more easily called to mind. Put your ideas in verse if you can; they will be more likely to be taken as truth. Far and away the most memorable argument in the annals of American criminal defense? "If the glove doesn't fit, you must acquit."

But a finding that might be most relevant to the trial lawyer is that people will subconsciously reduce cognitive effort by substituting a complex question they are being asked to answer with a simpler question, which the person will feel comfortable deciding, and which will be used as a functional substitute for the complex question. Kahneman calls this "substituting" questions. It is something that is a common tool of the human mind and that even the highly educated do without prompting.

This is most documented when people are asked to judge probability. Kahneman explains: "We asked ourselves how people manage to make judgments of probability without knowing precisely what probability is. We concluded that people must somehow simplify that impossible task, and we set out to find how they do it. Our answer was that when called upon to judge probability, people actually judge something else and believe they have judged probability." This is the phenomenon of "slow thinking" giving way to "fast thinking" in action. People avoid answering questions that require thoughtful analysis "if the answer to a related and easier heuristic question comes readily to mind."

An example Kahneman gives is "The Linda Problem," a problem in which college students substituted intuition for rational analyses. The students were given information about a profile of a young woman named Linda: She is single, very bold and very intelligent. As a student, Linda was deeply concerned with issues of discrimination and social justice. The graduates were then asked which of the following two options is more likely to be true? (A) Linda is a bank employee, or (B) Linda is a bank employee who is also active in the feminist movement.

Most of the people who participated in this experiment chose option B. That choice is wrong as a matter of logic and probability. In both options, Linda is a bank employee. If the options were identical, the probability of those options being true would be identical. But option B ADDS a detail—that Linda is ALSO involved in the feminist movement—which can only lower the

probability of B being true compared to A. In fact, even among students in Stanford's Graduate School of Business who had extensive training in probability, 85% said the statement "Linda is a feminist bank teller" was more likely than the statement "Linda is a bank teller." Why? In answering the question, an easy question (how much sense does statement B make?) was substituted for the more difficult question (how probable is statement B compared to statement A?).

This suggests that in trial, you should appeal to a jury's intuition—common sense, prior experiences, analogies, etc.—when asking them to answer questions that require a difficult application of law to fact. Indeed, if you can, present the jury with an easier question that will help them come to a decision on a more complex question. A possible example: The average person is relatively comfortable with judging a witness's honesty and credibility. It doesn't take specialized training or education to do so. However, the average person is much less comfortable deciding who is correct on a question that requires the testimony of highly educated experts to provide the answer. So if you have two opposing experts who do detailed and complex analyses that point to two different conclusions, present jurors with a question they are more comfortable answering—such as, which expert seemed more forthcoming? Which expert did they think they could trust? Substituting the "complex" question with the "intuitive" easier question presents the jury with an easier pathway to reach the conclusion you desire.

In other words, make the human mind's predisposition to "fast thinking" work for you, and recognize when it may work against you.

Conclusion

Kahneman tells us a lot about the how of thinking, and demonstrates that "slow thinking," the careful analysis of rational thought, often does not exist and, even if possible, is easily derailed by "fast thinking." These "human" minds are the only minds to which civil trial lawyers can present their cases: minds tasked with turning bone and blood, insights and effort, memories and even lives into dollars—and arriving at not a number on a pair of dice, but the literal value of everything. Economists gave Kahneman their Nobel Prize for his insights. It is the least we lawyers can do—always to keep such minds in mind and address them mindfully insofar as our minds allow.

NOTED WITH INTEREST

Eleventh Circuit Clarifies Forum Non Conveniens Doctrine

A recent federal decision provided significant guidance on a frequently disputed issue in transnational litigation: applying the *forum non conveniens* doctrine. On July 1, 2020, the U.S. Court of Appeals for the Eleventh Circuit reversed a district court ruling that a Mexican court was a more convenient forum for a lawsuit brought by two U.S. and 37 non-U.S. plaintiffs. *See Otto Candies LLC v. Citigroup Inc.*, 963 F.3d 1331, 1335 (11th Cir. 2020). The Eleventh Circuit reversed and remanded the case because the district court mistakenly gave only "reduced" deference to the domestic plaintiffs' choice to sue in the United States, and the U.S. defendant failed to support its claims that most of the relevant documents and witnesses were located in Mexico. *Id.* The case, in which Quinn Emanuel represents the plaintiffs, has important implications both for plaintiffs seeking to bring cross-border disputes in the United States, and for defendants seeking to dismiss those lawsuits.

Overview

Forum non conveniens allows U.S. courts to dismiss cases in favor of having them proceed in another country's courts. Among other considerations, U.S. courts must (1) give proper deference to plaintiffs' choice to bring their lawsuit in the United States; (2) analyze the parties' access to documents and witnesses ("private interest factors"); and (3) evaluate the U.S. and non-U.S. interests in the lawsuit ("public interest factors"). *Id.* at 1338. U.S. courts may also try mitigate the practical difficulties of *forum non conveniens* dismissals by making them subject to certain dismissal conditions, such as defendants' agreement to provide documents relevant to plaintiffs' claims. *Id.* at 1352. *Forum non conveniens* is a fact-intensive inquiry and district court decisions are subject to review under the abuse-of-discretion standard, making appellate court reversals rare.

The plaintiffs in the *Otto Candies* case are former creditors of Oceanografía, a now-bankrupt Mexican company that provided drilling services to Pemex, Mexico's state-owned oil and gas company. Plaintiffs allege that Citigroup established credit facilities within its Mexican subsidiary, to provide cash advances to Oceanografía, but did not adequately monitor the facilities and granted approximately $750 million in advances to Oceanografía knowing they were based on forged Pemex signatures. When the fraud was exposed in February 2014, Oceanografía declared bankruptcy and plaintiffs lost over $1.1 billion.

Deference to Forum Choice

The Eleventh Circuit held that the U.S. District Court for the Southern District of Florida committed legal error by failing to give greater deference to the choice of the two U.S. plaintiffs to file their lawsuit in the United States, as domestic plaintiffs are entitled to a "strong presumption" in favor of their forum choice that can be overcome only in "unusually extreme circumstances." *Id.* at 1339-46. Instead, the district court improperly accorded less deference because the U.S. plaintiffs conducted business with a non-U.S. company (Oceanografía)—a position that neither the U.S. Supreme Court nor U.S. circuit courts have recognized. *Id.* at 1339-41. The appeals court declined to create such an "international commerce" exception to the strong presumption in favor of U.S. plaintiffs' forum choice, especially where the sole defendant (Citigroup) is a U.S. company. *Id.* at 1340-43. In addition, the Eleventh Circuit, similar to the Ninth and D.C. Circuits, found no basis to reduce deference for the two U.S. plaintiffs because 37 non-U.S. plaintiffs were also part of the lawsuit. *Id.* at 1343-45 (citing *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011); *Simon v. Republic of Hungary*, 911 F.3d 1172, 1183 (D.C. Cir. 2018).

The appeals court further emphasized that the non-U.S. plaintiffs' choice to sue in the United States is also entitled to deference, albeit a "reduced" form of deference. *Id.* at 1345-46. It also instructed the district court on remand to consider whether allowing the U.S. plaintiffs to proceed in a U.S. court while dismissing the non-U.S. plaintiffs in favor of a Mexican court (i.e., "splitting" the lawsuit) would be inconvenient for all the parties, including Citigroup. *Id.* at 1345.

Private and Public Interests

The Eleventh Circuit also held that the district court committed error by (a) failing to accept as true the allegations in plaintiffs' complaint, which state that Citigroup's actions in the United States aided Oceanografía in completing the fraud, and instead focused on conduct in Mexico; (b) accepting Citigroup's statement that it needed documents and witnesses in Mexico for its defense, despite already gathering evidence and having it in the United States for internal and U.S. government investigations into the fraud; and (c) placing the burden of establishing such private interest factors on plaintiffs (as opposed to Citigroup). *Id.* at 1346-51.

As to Citigroup's claims of needing to access documents and witnesses in Mexico, the Eleventh Circuit held that defendants must present evidence and detailed explanations to support their arguments that a non-U.S. court would be a more convenient location for a lawsuit (e.g., submitting an affidavit describing numerous specific documents that can only be accessed abroad, and/or naming key witnesses located abroad that greatly outnumber U.S. witnesses and cannot easily travel to the United States). *Id.* at 1348-49 (citing, *inter alia*, *Simon*, 911 F.3d at 1186 ("Digitization, moreover, has eased the burden of transcontinental document production and has increasingly become the norm in global litigation.")).

As to the public interest factors, the appeals court instructed the district court to compare Mexico's interest in the litigation to the interest of the United States as a whole—rather than just the interest of a state or district—in determining where plaintiffs' lawsuit should take place. *Id.* at 1351-52. As for the United States' interests, the appeals court noted that both the U.S. Department of Justice and U.S. Securities and Exchange Commission investigated the fraud at Oceanografía, illustrating the lawsuit's connection to the United States. *Id.*

Dismissal Conditions

Finally, the Eleventh Circuit noted several practical difficulties with the district court's dismissal condition that Citigroup provide "reasonable" access to documents and witnesses in Mexico, without specifying the requirements of that condition. *Id.* at 1352-54. These difficulties include how and on what basis the court would resolve disputes regarding this condition, particularly given that a court in Mexico would have primary jurisdiction over the case. *Id.* at 1353-54 (citing *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205 (2d Cir. 1987)). The Eleventh Circuit thus advised the district court to consider under what specific circumstances plaintiffs could reinstate their lawsuit in the United States if the discovery condition was not satisfied.

Takeaways

The Eleventh Circuit's decision reinforced that U.S. plaintiffs, are entitled to a "strong presumption" in favor of their forum choice regardless of their engagement in international commerce or the inclusion of several non-U.S. plaintiffs in their lawsuit. In addition, the decision articulated the standards defendants must meet to show convenience of a forum abroad and the need for defendants to provide more than mere assertions of a need for documents and witnesses outside the United States. Lastly, the decision noted the impractical nature of *forum non conveniens* dismissals that rely and are contingent on defendants purportedly providing "reasonable" access to discovery in the non-U.S. jurisdiction. In sum, plaintiffs seeking to bring cross-border disputes in the United States, and defendants seeking to dismiss those lawsuits, should carefully consider the implications of *forum non conveniens*, as articulated by this decision, on their lawsuit. Q

Appellate Update

Supreme Court Holds Nonsignatories May Enforce Agreements To Arbitrate

The Supreme Court continues to weigh in on the meaning and scope of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*, most recently in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020). In a unanimous decision, the Court held that a nonsignatory to an arbitration agreement may compel arbitration notwithstanding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention."

When the United States became party to the New York Convention in 1970, Congress enacted implementing legislation in Chapter 2 of the FAA, including language that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." *Outokumpu* asked the Court to examine one such potential conflict: the application of domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories.

Petitioner GE Energy was a subcontractor that had supplied motors to a manufacturing plant owned by ThyssenKrupp Stainless USA, LLC. Respondent Outokumpu purchased the plant from ThyssenKrupp and, when the motors failed, filed suit against GE. GE moved to dismiss and compel arbitration, citing the arbitration clauses in the contracts between ThyssenKrupp and its contractor. The U.S. District Court for the Southern District of Alabama granted the motion, and the Eleventh Circuit reversed, holding that the Convention "require[d] that the parties *actually sign* an agreement" to compel arbitration and, because GE was not a signatory to ThyssenKrupp's contract, permitting GE to compel arbitration via state-law equitable estoppel doctrines would contravene the treaty's requirement.

In an opinion authored by Justice Thomas, the Court reversed the Eleventh Circuit, ending a circuit split on the question. The Court began with the text of the New York Convention, which is "simply silent on the issue of nonsignatory enforcement." The Court determined that silence was "dispositive" in the absence of anything in the Convention that "could be read to otherwise prohibit the application of domestic equitable estoppel doctrines."

The Court concluded that nothing in the Convention's drafting history indicated that it sought to prevent members from applying traditional domestic legal principles allowing nonsignatories to enforce arbitration agreements; further, other nations have not interpreted the Convention to preclude the application of domestic law addressing arbitration enforcement. Thus, the Court held the external evidence confirmed the absence of a conflict that would prevent a nonsignatory from using the doctrine of equitable estoppel to enforce an arbitration agreement. In a concurrence, Justice Sotomayor agreed that the Convention does not categorically bar the application of domestic doctrines to permit nonsignatories to enforce arbitration agreements, but expressed that "[a]pplicable domestic doctrines must be rooted in the principle of consent to arbitrate."

Outokumpu is the latest in a recent string of Supreme Court decisions reflecting the FAA's policy in favor of arbitration agreements. For instance, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), the Court held in a unanimous decision that agreements to arbitrate the threshold question of arbitrability must be enforced according to their terms, rejecting the exemption under which certain courts previously had decided arbitrability disputes where the arguments in favor of arbitration were "wholly groundless." That same term, the Court decided *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), in which a unanimous Court held an employer was not entitled to compel arbitration where a truck driver's agreement to drive was considered a "contract of employment" excluded from the scope of the FAA. Future terms will no doubt see the Court resolving further arbitration-related questions, reflecting the Court's continued engagement with the arbitral process from the bench.

Life Sciences Litigation Update

Traditional Commercial Patent Incentives in the Spotlight in the Race to Develop a COVID-19 Vaccine

As the COVID-19 pandemic continues to persist, the race to develop a vaccine barrels forward. Due to the breadth of the pandemic, traditional commercial incentives associated with intellectual property are under scrutiny, particularly given the rights available to the government arising from any investment in the development of a vaccine for COVID-19, and the societal pressure on companies to rapidly develop and mass produce a viable, safe, and affordable vaccine.

As reported, to date, the federal government has entered into agreements with several companies, providing billions of dollars toward the development of a vaccine. In light of the government's investment, ownership of intellectual property rights is an important question. The Bayh-Dole Act of 1980 permits the government to retain ownership rights in certain patents that are created as a result of government-funded research. *See* 35 U.S.C. §§ 200, 201(e), (c), 202(a). The Act allows companies to "elect to retain title to any subject invention", *id.* § 202(a), so long as they "fulfill a number of obligations imposed by the statute." *Stanford Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 782 (2011). If a company fails to

do so, the government may receive title to the invention *Id.* Moreover, the agencies that granted the federal funds receive "a nonexclusive, nontransferable, irrevocable, paid-up license to practice" the invention, 35 U.S.C. § 202(c)(4), and exercise march-in rights permitting "the agenc[ies] to grant a license to a responsible third party." *Stanford*, 563 U.S. at 782. Though the government does not often take advantage of these rights, the urgency of finding a vaccine for COVID-19 and making it available to the public raises the specter of their use in a way not presented before.

Indeed, even companies working to develop a vaccine *absent* government funding are not insulated from these issues. The government may be able to exercise a quasi-eminent domain right and use *any* patented product, without permission, so long as it provides "reasonable compensation" to the patent holder. *See* 28 U.S.C. § 1498. That compensation may be delayed and is not without limitation, however, as "reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* The upshot is that, to the extent the government side-steps patent rights for the sake of the public good, patent holders may not be fully compensated for the cost of developing the vaccine. Such a concern is not without precedent: in the early 2000s, the anthrax antidote was provided to the public at a 50% discount by the patent holder in the face of the government's threat that it would exercise its rights under §1498. (*See* Chinh H. Pham, *The Race for a COVID-19 Vaccine is On: Key Factors May Impact Patent Protection*, The National Law Review (May 26, 2020), https://www.natlawreview.com/article/race-covid-19-vaccine-key-factors-may-impact-patent-protection.)

Beyond the rights of the government vis-à-vis the rights of a patent holder, there is tremendous pressure on private companies to share their intellectual property and make any resulting vaccine affordable and widely accessible. (*See* Molly Callahan, *Should Pharmaceutical Companies Give Up Their Patent Protections to Find a Vaccine for COVID-19?*, News @ Northeastern (Apr. 14, 2020), https://news.northeastern.edu/2020/04/14/should-pharmaceutical-companies-give-up-their-patent-protections-to-find-a-vaccine-for-covid-19/.) Although prices for patented products are typically determined by the company and the free market, given the pandemic companies are now being urged "to pool diagnostics, drugs, and vaccines" and make the vaccines affordable for all. (*Id.*) In fact, some have already agreed not to enforce their patent exclusivity rights and have agreed to make vaccines available on a not-for-profit basis. (*Id.*) In light of this societal pressure, it remains to be seen how commercial incentives and intellectual property will play out in the face of the COVID-19 global pandemic.

Product Liability Litigation Update

New Jersey Supreme Court Rules on Statements Against Interest by Settling Defendants

In *Rowe v. Bell & Gossett Co.*, 239 N.J. 531 (2019), the Supreme Court of New Jersey spoke on an evidentiary issue that parties often confront in tort actions where the plaintiff sues multiple defendants and then settles with some portion of those defendants prior to trial. In *Rowe*, the Court held that statements by the settling defendants in the form of certified interrogatory responses and corporate representative deposition testimony were admissible over a hearsay objection as "statements against interest" under New Jersey Rule of Evidence 803(c)(25). *Rowe*, 239 N.J. at 540. Those statements could therefore be considered in allocating fault to the settling defendants, who were not present at trial. *Id.* at 539-41.

Plaintiffs Ronald and Donna Rowe alleged that Ronald Rowe had contracted mesothelioma as a result of exposure to asbestos-containing products manufactured and sold by defendants or their alleged predecessors-in-interest. *Rowe*, 239 N.J. at 539, 542. Plaintiffs initially sued 27 defendants. *Id.* at 542. Prior to trial, Plaintiffs settled with eight defendants, then proceeded to trial against only one remaining defendant, Universal Engineering Co. *Id.* at 543-44.

At trial, Universal offered excerpts of the settling defendants' answers to interrogatories and corporate representative deposition testimony, "contending that the evidence was admissible as testimony in a prior proceeding under N.J.R.E. 804(b)(1), statements by a party-opponent under N.J.R.E. 803(b)(1), and statements against interest under N.J.R.E. 803(c)(25)." *Id.* at 545. The trial court admitted certain interrogatory responses, "[e]vidently relying on N.J.R.E. 803(b)(1)" (statements by a party-opponent), and admitted certain corporate representative deposition excerpts of out-of-state settling defendants as "the prior testimony of unavailable declarants." *Id.* Universal's counsel thus read to the jury those interrogatory and deposition excerpts. *Id.* at 546. The jury rendered a verdict for Plaintiffs, but allocated only twenty percent of the fault to Universal. *Id.* at 547. The jury allocated the remaining eighty percent to the eight settling defendants, in varying proportions. *Id.*

The New Jersey Appellate Division reversed the trial court's decision admitting the settling defendants' interrogatory responses and corporate representative deposition testimony. *Id.* at 548-49. The New Jersey Supreme Court granted Universal's petition for certification, and the applications of multiple entities to appear as amici curiae. *Id.* at 549. Plaintiffs and the New Jersey Association for Justice (as amicus curiae) argued, among other things, that the interrogatory responses

and corporate representative deposition testimony of the settling defendants were not "statements against interest" under N.J.R.E. 803(c)(25) because they were admitted against plaintiffs, not the settling defendants who made the statements—who were not at trial. *Id.* at 551.

The New Jersey Supreme Court held that the interrogatory responses and deposition testimony were admissible as statements against interest. *Id.* at 563. The court explained that "to be admissible as a statement against interest, a statement must have been contrary to the declarant's interest at the time that it was made," but the declarant "need not be a party to the action in which the statement is admitted." *Id.* at 559. The court recognized that "[w]hen the relevant statements were made, each declarant was a defendant in [the *Rowe*] case or in other asbestos product liability cases." *Id.* at 560. The court found that the settling defendants' statements were sufficiently contrary to the settling defendants' "'pecuniary, proprietary, or social interest[s],' and 'so far tended to subject' the defendants 'to civil . . . liability,' that 'a reasonable person in [defendants'] position would not have made the statement unless the person believed it to be true.'" *Id.* at 540 (quoting N.J.R.E. 803(c)(25)) (interlineations in *Rowe*). The Court accordingly reversed the Appellate Division and reinstated the judgment entered by the trial court. *Id.* at 541, 564.

Bankruptcy and Restructuring Litigation Update

The Bankruptcy Courts vs. FERC: A Jurisdictional Clash over the Rejection of Energy Contracts

A jurisdictional conflict has emerged between federal courts overseeing bankruptcy cases and the Federal Energy Regulatory Commission ("FERC") over the rejection of energy contracts. Ordinarily, a court's authority to allow rejection is exclusive and unquestioned. But when a contract authorized and regulated by FERC is at issue, the court must decide whether permitting rejection impermissibly infringes on FERC's regulatory domain.

I. The Sources of Competing Jurisdictional Authority

Section 365 of the Bankruptcy Code allows a debtor to reject "all executory contracts," subject to court approval. The ability to reject an executory contract "is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Rejection is governed by the deferential "business judgment" standard, which requires a court to approve a rejection motion as long as it finds that the debtor exercised its sound business judgment in determining that rejection is in the best interests of its estate. *See, e.g.*, *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019).

The Federal Power Act and Natural Gas Act vest FERC with exclusive authority to regulate rates for sales of electric energy and transportation and sale of natural gas, respectively. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). In practice, this means that FERC can modify or abrogate a contract if it finds that the agreed-upon rate is not "just and reasonable." *Id.* However, under the *Mobile-Sierra* doctrine, FERC must presume that the rate in a freely negotiated contract is "just and reasonable," which presumption may be overcome "only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 530 (2008).

The statutory powers granted to FERC led to the judicially-created "filed rate doctrine," under which the "right to a reasonable rate is the right to the rate which the [FERC] files or fixes, and, . . . except for review of the [FERC's] orders, a court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988). Thus, "the reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts," and may be challenged only before FERC or a court reviewing the Commission's order. *Id.* at 375.

II. Conflicting Decisions in Various Jurisdictions

The apparent overlap in statutory authority conferred to bankruptcy courts and FERC has been addressed by a number of conflicting circuit and district court rulings.

The ***Fifth Circuit*** was the first circuit court to address this issue, holding that FERC cannot "preempt a district court's jurisdiction to authorize the rejection of an executory contract subject to FERC regulation as part of a bankruptcy proceeding." *In re Mirant Corp.*, 378 F.3d 511, 522 (5th Cir. 2004). The court reasoned that rejection is not modification or abrogation of a filed rate, and that the plain language of Section 365 shows that Congress did not intend to exclude energy contracts from rejection. *Id.* Nevertheless, the court suggested that on remand, the district court should consider applying a more rigorous standard than "business judgment," to account for the "unique" nature and "public interest inherent in the transmission and sale of electricity." *Id.* at 525. The court proposed that the district court weigh the public interest impact of rejection, including whether rejection would cause any disruption in the supply of electricity to other public utilities or to consumers, against the burdens of the agreement, and that rejection should be authorized only if "the equities balance in favor of rejecti[on]." *Id.* Significantly, the court also noted that FERC should be welcome to assist in the "balancing [of] these equities." *Id.*

at 526.

Decisions from the ***Southern District of New York*** have sided with FERC in this jurisdictional debate. In *In re NRG Energy, Inc*, the district court held that it lacked jurisdiction to vacate a FERC order requiring the debtor to perform under a contract that the bankruptcy court had subsequently authorized the debtor to reject. 2003 WL 21507685, at *3. (S.D.N.Y. June 30, 2003). The court held that actions taken by FERC "are reviewable only by the federal courts of appeals," and because FERC had acted first "within its legal authority," the district court was "not the proper forum for Plaintiff to challenge FERC's regulatory action." *Id*. at *3-4. *In re Calpine* then extended *NRG's* expansive view of FERC's authority, holding that "FERC has plenary jurisdiction over filed rate energy contracts," and that "neither the jurisdictional grant to the bankruptcy courts, nor the rejection authority limits FERC's plenary jurisdiction." 337 B.R. 27, 32-33 (S.D.N.Y. 2006). The court explicitly refused to adopt what it described as *Mirant's* "narrow[]" interpretation of the filed rate doctrine as to only reach modifications of the rate, rather than rejections or terminations. *Id*. at 38.

Subsequently, in the second circuit-level decision on this issue, the ***Sixth Circuit*** held that even "if the bankruptcy court's jurisdiction is not exclusive . . . its position in the concurrent jurisdiction is nonetheless primary or superior to FERC's position." *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019). The court concluded that "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of [the] FERC's having complete or exclusive authority to regulate energy contracts and markets." *Id*. at 445-46. The Sixth Circuit also agreed with *Mirant* that a heightened standard should apply, concluding that bankruptcy courts must consider "the impact of the rejection of these contracts on the public interest." *Id*. at 454. Unlike *Mirant*, however, the court required—rather than invited—FERC to participate in the rejection determination, mandating that FERC provide an opinion on the public interest pursuant to the *Mobile-Sierra* analysis it ordinarily employs when assessing a rate modification or abrogation. *Id*.

The most vigorous defense of the courts' jurisdiction over rejection came in the ***Northern District of California***, where the court concluded that "the rejection of an executory contract is solely within the power of the bankruptcy court, a core matter exclusively this court's responsibility." *In re PG&E Corp.*, 603 B.R. 471, 486 (Bankr. N.D. Cal. 2019). Distinguishing its holding from *Mirant,* the court did not conclude that the public interest needs to be considered every time a party seeks to reject a FERC-regulated agreement, but "may need to be considered in the context of a specific rejection of a specific [energy agreement]." *Id*. at 490. The case is now on direct appeal to the Ninth Circuit, which held oral argument on August 14, 2020.

The most recent case to address this issue was *In re Ultra Petroleum Corp.* in the ***Bankruptcy Court for the Southern District of Texas***. Two weeks before Ultra filed for bankruptcy, Rockies Express Pipeline LLC ("Rockies") filed a petition with FERC asserting that FERC "has concurrent jurisdiction with U.S. Bankruptcy Courts," and seeking a ruling that Ultra may not reject its shipping agreement with Rockies in Ultra's forthcoming bankruptcy "without FERC's prior approval." *See* FERC Docket No. RP20-822-000. Following Ultra's bankruptcy filing and motion to reject, and statements from the court suggesting that pursuit of the petition would violate the Bankruptcy Code's automatic stay, Rockies voluntarily withdrew the petition. Nevertheless, the court repeatedly requested that FERC participate in the rejection proceeding as a party-in-interest, while FERC responded that without a formal proceeding, its ability to take a position was limited. Relying on *Mirant*, the *Ultra* court held that because "[r]ejection is, simply, a breach" that does not abrogate, rescind, modify, or terminate a contract, "FERC's jurisdiction concerning rate setting is unaltered by rejection." *In re Ultra Petroleum*, No. 20-32631, 2020 WL 4940240, at *12 (Bankr. S.D. Tex. Aug. 21, 2020). Turning next to the public interest analysis it found to be mandated by *Mirant*, the Court rejected Rockies' and FERC's arguments that it should permit rejection only if it found that *continuation of the contract* would harm the public interest, determining instead that the appropriate analysis was whether *rejection* would harm the public interest. *Id*. at *11 The court concluded that the evidentiary record showed that the impact of rejection on the public interest would be minimal, and granted Ultra's motion to reject. *Id*. at *12-13.

Conclusion

As the energy sector braces for a potential onslaught of bankruptcy filings, the jurisdictional conflict between the federal courts and FERC is far from settled. Debtors with onerous energy contracts they are hoping to reject, and creditors of such debtors, should thus take great care in choosing the location of a bankruptcy filing, which may mean the difference between a successful or unsuccessful motion to reject.

QE Rescues COVID-19 Treatment Funding for Rural Hospitals

On July 8, 2020, the bankruptcy court in Greenville, North Carolina, entered an order authorizing the chapter 11 trustee in the *CAH Acquisition Company 12, LLC* case to transfer to our client, Rural Wellness, Inc., millions of dollars, which funds are to be used in a rural hospital for the express purpose of treating COVID-19 patients, over the sustained opposition of the U.S. Department of Health & Human Services ("DHHS"). This was a first of its kind case addressing the CARES Act and the authority of bankruptcy courts in relation to CARES Act monies that end up in bankruptcy estates.

In February 2020, Quinn Emanuel's client contracted to purchase the Fairfax Hospital, a 15-bed hospital located in Fairfax, Oklahoma, and the deal closed on March 20, 2020. Seven days later, Congress passed and the president signed into law the CARES Act. One part of the CARES Act had DHHS distribute $30 billion under the Provider Relief Fund to hospitals that billed Medicare in 2019 and would "attest" that the funds would be used to treat COVID-19 patients, upgrade equipment to address COVID-19, or replace revenue lost because of COVID-19. No application was needed (or even existed), but if a recipient received funds it had to "attest" within a certain timeframe that the funds would be used for the requisite purposes.

DHHS sent nearly $3 million for the Fairfax Hospital—but to the bankruptcy trustee and not to the firm's client. DHHS took the position that under the CARES Act no funds could be transferred to hospital purchasers, but only to entities with tax identification numbers associated with the funds DHHS delivered, and that it wanted a nationwide, uniform policy and would not make exceptions for this bankruptcy case. This meant that the hospital could easily lose critical funds necessary to prepare for and treat patients suffering from COVID-19, and yet there was no obvious way to proceed given that the bankruptcy court likely lacked jurisdiction to compel DHHS to change its policies.

Quinn Emanuel came up with a novel solution: (i) the tax identification number would constitute property of the bankruptcy estate; (ii) the trustee would use the funds under Bankruptcy Code section 363; (iii)the firm's client would be the trustee's "subrecipient" for the cash the trustee had received, and, finally, (iv) the trustee would "attest" to the client's use of the funds. The firm drafted an agreement that protected the bankruptcy trustee from liability in the event the funds were not used as the hospital intended, ensured that the funds could be transferred to the hospital consistent with existing DHHS policies, and prohibited DHHS from exercising rights of setoff or recoupment. DHHS filed a response stating that, while it did not consent to the relief requested, it also did not object, and even credited our client with crafting a "creative" solution. The bankruptcy court approved it and the order become final and non-appealable.

The end result is that, through the firm's work of crafting an agreement that had never been tested, a hospital serving a rural community is receiving critical funds, in the manner that Congress intended when it passed the CARES Act.

Non-Compete Victory for California Company Against Non-California Employee

Quinn Emanuel recently obtained a preliminary injunction enforcing an employee non-compete agreement for its client, Farmer's Business Network Inc. ("FBN"), in South Dakota state court. The injunction prohibits FBN's former Head of Seed, Ron Wulfkuhle, from working for FBN's competitor, Inari Agriculture, Inc. ("Inari"), for one year.

FBN is a successful agricultural start-up that launched in 2014 and has built an online community of over 10,000 farmers who can share information about agricultural techniques, inputs, and growing conditions. FBN allows its members to use that information to identify and purchase the most productive agricultural inputs (nutrients, pesticides, etc.) for their particular farm from FBN.

In 2018, FBN decided to start developing and selling seeds—a market that for years has been dominated by a few industry giants. FBN sought to disrupt the market by removing intermediaries and selling directly to farmers with greater transparency about seed features and pricing. FBN hired Mr. Wulfkuhle, an industry veteran, to lead that effort and build FBN's seed business from scratch as the Head of Seed. In connection with his employment, Mr. Wulfkuhle signed FBN's standard employment agreement that contained, among other provisions, a one-year non-compete agreement governed by South Dakota law (where Mr. Wulfkuhle would live and work).

Despite the success of FBN's seed business, Mr. Wulfkuhle suddenly resigned as Head of Seed in February 2020. Unbeknownst to FBN, he had already accepted a position with Inari, a Cambridge, Massachusetts start-up that states it is working to develop gene editing technology (e.g., CRISPR) to create next-generation corn seeds. FBN only found out about Mr. Wulfkuhle's move in April, when a contractor who intended to email an Inari business plan to him at Inari accidentally sent the email to his FBN email account.

Upon learning of the email, FBN hired Quinn Emanuel to seek enforcement of the non-compete agreement and prevent Mr. Wulfkuhle from working for Inari. The firm quickly filed a complaint and sought injunctive relief in South Dakota state court. Inari and Mr. Wulfkuhle pushed

back, claiming that Inari and FBN are not competitors, because Inari was solely in the "gene editing" space, and because Mr. Wulfkuhle had not taken any FBN confidential information or otherwise solicited (much less taken) any of FBN's customers, business partnerships, or employees.

Based on conflicting evidence, the court set an evidentiary preliminary injunction hearing with live witness testimony for four weeks later, and granted FBN's request for expedited discovery. During those four weeks, Quinn Emanuel opposed Defendants' motion to dismiss; prepared and responded to written discovery requests; successfully moved to compel improperly withheld evidence; crafted expert reports; and took or defended some 10 depositions. During discovery, Quinn Emanuel uncovered documents and obtained admissions that put the lie to Defendants' claims, and showed that they were in fact engaged in the same seed development business as FBN.

Just one weekend after the end of expedited discovery, the parties conducted a two-day evidentiary hearing, akin to a bench trial, including a combined opening/closing presentation, submission of 263 exhibits and approximately 1,400 pages of designated deposition testimony, and live testimony from four witnesses (one in person in the courtroom, three by Zoom).

As demonstrated by the court's decision after several weeks of deliberation, Quinn Emanuel methodically dismantled all of Defendants' arguments. The court issued a lengthy, detailed order adopting all of Quinn Emanuel's arguments and evidence, and issuing a preliminary injunction prohibiting Mr. Wulfkuhle from working for Inari for one year. The case is proceeding as FBN seeks to recover for any economic harm caused by Mr. Wulfkuhle's and Inari's improper competition.

Firm Wins Decision That Motion Picture Academy Properly Expelled Roman Polanski

Quinn Emanuel obtained a victory for longtime client, The Academy of Motion Picture Arts and Sciences, concerning the Academy's expulsion of Roman Polanski from its membership.

In the wake of the Harvey Weinstein scandal, the Academy—like other institutions—undertook a review of its policies, practices, and membership to ensure that each reflects the Academy's values. It developed standards of conduct and optional procedures for bringing and hearing complaints against members, with the full Board of Governors expressly retaining its authority to act on any member's status for violations of the Academy's Standards of Conduct.

In May of 2018, the Board of Governors voted to expel Roman Polanski from its membership in light of his sexual crime with a minor and subsequent decades-long fugitive status. It did so at a normally organized meeting of its Board of Governors and with a supermajority voting in favor of expulsion, as required by its bylaws. Mr. Polanski, nevertheless, complained he had not been afforded all the process he was due to argue his conviction and flight did not justify expulsion.

In response, the Academy afforded Mr. Polanski the opportunity to present any and all materials he deemed relevant for the Board of Governors' review before a reconsideration vote on Mr. Polanski's expulsion. Mr. Polanski provided hundreds of pages of materials as well as a written argument from his attorney, and presented himself to the Board of Governors via a prerecorded video. The Board again voted to expel Mr. Polanski, and Mr. Polanski sued, claiming he still had not been afforded a fair process.

Quinn Emanuel defeated Mr. Polanski's arguments in the Los Angeles Superior Court's writ division, which heard Mr. Polanski's petition to be reinstated as a member of the Academy. The court held that the procedures afforded Mr. Polanski by the Academy were "fair and reasonable" in the circumstances of Mr. Polanski's conviction and the nature and purposes of the Academy. Because the court found the Academy's process substantively fair and reasonable, it did not need to reach more technical arguments about the disentitlement of fugitives from pursuing civil remedies in the courts from which they fled. Q

Brussels Office Lawyer Analyzes the Public Order Exception in Newly Published Book

Dr. Zena Prodromou, Senior Associate in Quinn Emanuel's Brussels office, recently published *The Public Order Exception in International Trade, Investment, Human Rights and Commercial Disputes*. Parties to international disputes increasingly invoke the need to protect the domestic public order to justify actions otherwise in breach of their obligations under international law. The term "public order" nevertheless remains unclear, as do the criteria and factors against which different international dispute bodies assess parties' claims. Dr. Prodromou's book is the first to present, systematize and synthesize all relevant jurisprudence in this field of law and provides practical insights to any party wishing to invoke the public order exception in international trade, investment, human rights or commercial disputes. Q

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business litigation report

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