LAW FIRM "MOST FEARED" GLOBALLY BY LARGE BUSINESSES
BTI Consulting Group Survey

December 2021

quinn emanuel

quinn emanuel urquhart & sullivan, llp | business litigation report

atlanta | austin | boston | brussels | chicago | doha | hamburg | hong kong | houston | london | los angeles | mannheim | miami | munich | neuilly-la defense
new york | paris | perth | riyadh | salt lake city | san francisco | seattle | shanghai | silicon valley | stuttgart | sydney | tokyo | washington, d.c. | zurich

The Changing Landscape of Business Liability for COVID-19 Exposure

What happens when a customer or client becomes infected with COVID-19 and believes the infection can be traced back to a business it visited? This article looks at the early COVID-19 liability cases brought by customers against businesses, and the steps states have taken to curb such litigation. Many states have recognized the negligent transmission of disease as a cause of action. In the first year of the COVID-19 pandemic, customers across the country relied on such negligence claims to sue businesses for purported exposure. Although these cases present hurdles in the form of identifying a duty of care and demonstrating causation, well pleaded cases have survived motions to dismiss, as seen, for example, in cases brought against the cruise ship industry described below. In response to this trend, states keen to encourage businesses to reopen have enacted legislation to limit such COVID-19 exposure liability.

Will businesses be insulated by immunity statutes? In many states, the implementation of immunity statutes remains under debate. Even the most protective statutes, such as those in Texas and Florida, hinge immunity on compliance with health and safety standards and carve out willful or reckless behavior. And although such statutes may help lower the costs of full-scale litigation and liability, business defendants will nonetheless incur, at minimum, the costs and hassle of obtaining early stage dismissal. Thus, businesses should not rely on immunity statutes alone, and be proactive in ensuring that customers and clients assume the risks associated with patronage.

I. The Onset of COVID-19 Liability Cases

"To be stricken with disease through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another's negligence." *Billo v. Allegheny Steel Co.*, 328 Pa. 9, 105 (1937). Before the COVID-19 pandemic, state courts allowed tort lawsuits alleging liability for the negligent transmission of disease. *See, e.g.*, *Earle v. Kuklo*, 98 A.2d 107, 109 (N.J. 1953) (landlord

(continued on page 2)

INSIDE

Partner Kathleen Sullivan Honored with *The American Lawyer* Lifetime Achievement Award

The American Lawyer magazine has honored Partner Kathleen Sullivan with its Lifetime Achievement award. The award is reserved for the most esteemed group of seasoned lawyers, "recognizing the indelible mark they've left on the legal profession, the longevity of their careers, and their contributions to both the profession and broader society through public service." Kathleen will be profiled in the December issue of *The American Lawyer* and celebrated at the publication's industry awards event.

Financial Litigation Lawyer Joseph Frank Joins New York and Miami Offices

Joseph J. Frank has joined the firm as a partner based in the firm's New York and Miami offices. Joe most recently served as Chief Legal Officer and Head of Mergers & Acquisitions at SS&C Technologies Holdings, Inc.—a $20 billion global provider of software and services to the financial industry. Before SS&C, Frank was a global co-head of the Securities Litigation and Enforcement Practice at Shearman & Sterling LLP, where he was recognized as "Litigator of the Week" by The American Lawyer for a major win in a residential mortgage-backed securities case.

"knowing that the premises are infected with contagious disease germs which render them dangerous, without disclosing that fact to the tenant," is liable in damages for injury to those contracting of the disease); *John B. v. Superior Court*, 38 Cal. 4th 117 (2006) (permitting "tort of negligent transmission of HIV" where defendant has actual knowledge or reason to know of HIV infection.").

The early lawsuits seeking compensation from businesses for COVID-19 related injuries have asserted primarily negligence and gross negligence claims. Negligence cases require a plaintiff to prove that the defendant breached a duty of care owed to the plaintiff, and that the breach caused the claimed injury. Other early COVID-19 liability cases have included intentional infliction of emotional distress ("IIED") and negligent infliction of emotion distress ("NIED") for mental or emotional injury.

Proving causation in a business setting may be a plaintiff's biggest roadblock. It cannot, for example, "be established based on mere speculation, conjecture and inferences drawn from other inferences." *Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 775 (2001). Whether one's visit to a business resulted in the contraction of COVID-19 will be difficult to prove given the disease's wide transmission, although methods of contact tracing may provide evidence of the source of infection.

Many of the early COVID-19-related lawsuits were directed at the cruise industry, where the close proximity of passengers over many days made causation easier to prove. For similar reasons, other businesses in the travel and events industries are at risk. And although courts have applied federal maritime law to the cruise industry cases, the arguments raised regarding duty of care and causation with regard to COVID-19 are comparable and, thus, instructive. (*See* Maritime Law Answer Book, 2015 at p. 8 available at https://legacy.pli.edu/product_files/Titles/6728/131980_sample01_20150515151255.pdf).

One of the first waves of COVID-19 cruise industry cases were dubbed the "Fear Cases," in which the plaintiffs did not test positive or suffer symptoms. Instead, they sought recovery for emotional distress damages based on their "fear" of becoming ill. In *Weissberger v. Princess Cruise Lines, Ltd.*, for example, plaintiffs alleged that the operator breached its duty "to ensure that Plaintiffs would not be exposed to unreasonable risk of harm" by: (1) "failing to take necessary precautions to keep its passengers" safe in choosing to launch after passengers had disembarked with signs of COVID-19, (2) failing to warn new passengers of the potential exposure, and (3) failing to screen new passengers before boarding. 2020 WL 3977938,*1 (C.D. Cal, July 14, 2020). These breaches allegedly caused plaintiffs to suffer emotional distress and trauma from the fear of contracting COVID-19 while quarantined aboard the ship, even though they did not exhibit symptoms. *Id.*

The judge expressed concern, however, that accepting the plaintiffs' allegations of harm without injury would create "a flood of trivial suits, and open the door to unlimited and unpredictable liability." *Id.* at *4. Believing the alleged claims were closest in form to negligent infliction of emotional distress, and applying federal maritime law, the court held that plaintiffs needed to satisfy the zone of danger test, which limited recovery to cases where plaintiffs "manifest some symptom of the feared disease." *Id.* at *2-3 (citing *Nelson v. Metro-North Commuter R.R.*, 235 F.3d 101, 113 (2d Cir. 2000)). Lacking allegations that plaintiffs contracted COVID-19 or expressed any such symptoms, the judge dismissed *Weissberger* and the other thirteen consolidated Fear Cases, with prejudice. *Id.* at *1, 5.

In another Central District of California case against the cruise industry, *Archer v. Carnival Corporation and PLC,* class action plaintiffs brought claims of negligence, gross negligence, IIED, NIED. 2020 WL 7314847 at *1 (C.D. Cal.,Nov. 25, 2020). The *Archer* court followed *Weissberger*, dismissing plaintiffs who merely feared, but did not allege that they contracted or experienced any symptoms of COVID-19. *Id.* at *7. However, the court held that the remaining plaintiffs who had alleged that they had no symptoms of COVID-19 or exposure to anyone exhibiting symptoms before boarding had adequately alleged causation to survive dismissal. Those plaintiffs had sufficiently alleged that they were exposed to COVID-19 while on the ship and that their symptoms began within 14 days of their claimed exposure. *Id.*; *see also Kantrow v. Celebrity Cruises Inc.*, 2021 WL 1976039 (S.D. Fla Apr. 1, 2021) (same). Both *Archer* and *Kantrow* proceeded through discovery, and *Kantrow* has since settled. *See* C.D. Cal. Case No. 2:20CV04203, and S.D. Fl. Case No. 1:20-CV-21997, respectively.

In *Lindsay v. Carnival Corp.*, the court addressed whether cruise operators' actions rose to the level of extreme and outrageous conduct necessary to state a claim for IIED. 2021 WL 488994, at *4 (W.D. Wash. Feb. 10, 2021). The court held that defendants' "decision to set sail in the early weeks of what would become a global pandemic, when much remained unknown about COVID-19, does not constitute conduct beyond all possible bounds of decency" especially where plaintiffs failed to allege that defendants "acted in a manner inconsistent with what the Center for Disease Control had recommended at the time." *Id.* The Court dismissed the claims without prejudice. After Plaintiffs amended their complaint three times, the case has moved beyond the pleading stage. *Id.* at *5.

On a motion to dismiss, the court in *Crawford*

v. Princess Cruise Lines Ltd., 2020 WL 7382770, at *6 (C.D. Cal. Oct. 8, 2020) addressed whether plaintiffs had standing to sue where defendant argued the alleged "physical pain" injuries from COVID-19 were *de minimis.* The court said it was not prepared to decide at the pleading stage that "only some COVID-19 symptoms are sufficiently harmful to warrant compensation," and denied the motion to dismiss. *Id.* at *4 (dismissing without prejudice for failure to sufficiently allege causation). In *Kantrow*, defendant likewise raised the argument, "that claims for cold- and flu-like symptoms are not actionable under the doctrine of *de minimis non curat lex*." *Id.* at *15. The court similarly refused at the pleading stage to determine what level of symptom was sufficient to warrant compensation. *Id.* at *16.

II. Immunity Statutes re Tort Liability for COVID-19 Exposure

In response to these cases and the threat of others, in May 2020 the U.S. Chamber of Commerce and hundreds of other trade associations wrote Congress to request "temporary and targeted liability relief legislation" for businesses. *See* Press Release, U.S. Chamber of Commerce, U.S. Chamber Calls for Liability Protection for Businesses as Fear of Lawsuits Continue to Grow (May 27, 2020) (noting that "[b]usinesses who follow public health guidelines shouldn't have to worry about lawsuits.").

However, there are critics of such protections. For example, consumer groups, including Consumer Reports, the Consumer Federation of America, and the National Association of Consumer Advocates wrote to Congress to oppose immunity legislation. *See* Letter from Consumer Reports and Others Opposing COVID-19 Liability Shield for Businesses (May 6, 2020). These organizations argued that federal legislation, "would undermine consumer and worker protections, excuse negligent conduct, and show unwarranted disrespect for state law, including centuries-old state-law remedies." *Id.* ("[I]f a consumer can prove that a store's unreasonable failure to take precautions is what caused him to get sick … the business should not be shielded from legal accountability.").

Congress has yet to act. But state legislatures have been taking on the issue. Most states implemented immunity protections for the healthcare industry for claims related to COVID-19. (*See* https://www.jackscamp.com/national-survey-of-covid-19-immunity-legislation). However, states have been slower to extend similar protections to other businesses. Roughly one-half of the states have enacted immunity statutes that extend generally to businesses beyond the healthcare industry. *Id.* In states that have enacted such protections, many require that businesses comply with federal, state, or local health and safety guidance, and none shield liability where the injury was caused by wanton, reckless, willful, or intentional misconduct. *Id.*

A handful of states have also implemented heightened pleading standards or other threshold requirements for COVID-19 claims. For example, Florida's COVID-19 immunity statute, retroactive to the beginning of the pandemic, requires a plaintiff to plead claims with particularity and submit a physician's affidavit attesting to the belief that the plaintiff's COVID-19 damages occurred as a result of the defendant's acts or omissions. (http://laws.flrules.org/2021/1). Plaintiffs also must show that the defendant was not in substantial compliance with guidelines at the time of the alleged exposure. *Id.* Texas's "Pandemic Liability Protection Act," goes even further, requiring that a plaintiff be able to show that the defendant knew of *and* failed to warn the plaintiff of a condition that was "likely to result in the exposure" to COVID-19. (*See* https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00006F.pdf#navpanes=0). The plaintiff must also show that the defendant *knowingly* failed to implement or comply with health standards. *Id.* Finally, a plaintiff must submit an expert report that provides a factual and scientific basis for the assertion that the defendant caused the plaintiff to contract COVID-19 within 120 of any answer. *Id.*

Meanwhile, legislatures in several of the most populated states, including California, New York, New Jersey, and Illinois, are still debating immunity protections for businesses. (https://www.jackscamp.com/national-survey-of-covid-19-immunity-legislation). Delaware, Washington, and Maine have no COVID-19-specific laws regarding liability, for any industry. *Id.*

III. Will Immunity Statutes Provide the Protections They Promise?

Although immunity statutes may appear protective and provide comfort to businesses, most statutes do not provide hurdles that prevent the filing of lawsuits. *Id.* Rather, they provide an affirmative defense that ***can*** be subject to resolution on a motion to dismiss . Most require defendants to demonstrate compliance with ever-changing health and safety guidelines, including those that concern vaccination, mask wearing, and social distancing. (*See* Mini Kapoor & Julie Pettit, *Innovative Tort Claims in the Wake of Covid-19*, 93 The Advoc. (Texas) 27, 27 (2020)). And no state statute can provide relief against federal claims, such as those that apply to the cruise industry.

Brady for Smith v. SSC Westchester Operating Co. LLC demonstrates the shortcomings of these state statutes. Nursing home residents sued the operator alleging negligence and willful and wanton misconduct for

exposing residents to staff who had tested positive for COVID-19 or were symptomatic. 2021 WL 1340806 at *1 (N.D. Ill. Apr. 9, 2021). Defendant argued that the Illinois Emergency Management Agency Act, which conferred immunity to any "'private person, firm or corporation' who renders 'assistance or advice at the request of the State' during a disaster shall not be civilly liable for causing death or injury to any person," required dismissal. *Id.* at *3-4.

The court disagreed. It held that "because 'an immunity defense usually depends on the facts of the case,' dismissal at the pleading stage on immunity grounds is usually inappropriate. So a complaint will not be dismissed based on immunity unless the plaintiff has unambiguously pleaded all the elements of the affirmative defense." *Id.* at *5 (quoting *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001)). Because plaintiffs alleged that defendant's actions did not comply with some requirements of the Emergency Management Act, the case could not be dismissed. *Id.* The a defendant must demonstrate that it met the standard of care before immunity is granted, which may require a trial. *Brady* thus cautions that immunity statutes may provide only delayed protection, and only to qualified defendants, but nothing against the costs and disruptions of litigation.

What can a business do to better protect itself from COVID-19 liability? It should take steps to ensure that customers and clients assume the risks associated with patronage. Options include an implied waiver from a warning sign at the business entrance or an express, written waiver that communicates the COVID-19 risks and allows customers and clients to voluntarily accept them. (Betsy J. Grey & Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 Ind. L.J. Supp. 66, 84–86 (2020)). Courts generally enforce waivers for ordinary negligence, although not all states do so for personal injury claims, which category some states may deem COVID-19 claims to fall within. (*See*, *e.g.*, Corbin on Contracts § 85.18 (2019); La. Civ. Code Ann. art. 2004 (2018)).

A business should also remain current on national, state, and local health guidelines.

NOTED WITH INTEREST

Federal Circuit Holds a Walker Process Claim Does Not Arise Under Patent Law

Because of the hybrid nature of "Walker Process" claims, which involve patent and antitrust law, courts have disagreed as to when a *Walker Process* claim arises under the patent law for jurisdictional purposes. In the U.S., all cases "arising under" patent law are heard exclusively by the federal district courts (28 U.S.C. § 1338(a)) and appealed exclusively to the Federal Circuit (28 U.S.C. § 1295(a)(1)). This aims to provide a uniform national body of patent law. However, not all cases involving patents "arise under" patent law. The so called "Walker Process" claims are named after the case *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), where the Supreme Court held that enforcement of a fraudulently procured patent may constitute a basis for an antitrust claim under the Sherman Act. A *Walker Process* claim has two prongs: (1) the antitrust defendant enforced a patent that was obtained upon knowing and willful fraud on the patent office, and (2) the antitrust plaintiff must satisfy all the necessary elements to establish an antitrust claim under the Sherman Act. Thus, whether a *Walker Process* claim arises under the patent law for jurisdictional purpose may not be straightforward.

In the recent case of *Chandler v. Phoenix Services LLC*, No. 2020-1848 (Fed. Cir. June 10, 2021), the plaintiffs sued over the defendants' enforcement of a patent that had been held unenforceable in another case, due to inequitable conduct. The Federal Circuit found that the *Walker Process* claim did not arise under patent law and transferred the case to the Fifth Circuit. In a precedential opinion, the panel reiterated that the Court's exclusive jurisdiction over patent matters extends only to cases in which (1) "federal patent law creates the cause of action" or (2) "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law." Because the case arose under the Sherman Act after the patent at issue had already been declared unenforceable in a separate case, the Court found that it lacked jurisdiction over the *Walker Process* claim.

Relevant Background Facts

The antitrust claim in *Chandler* arose from the defendant Phoenix Service's enforcement of a patent (the '993 patent) issued to its subsidiary, Heat On-The-Fly, LLC. The '993 patent claims a specific method and apparatus to heat water for use in hydraulic fracturing, also known as "fracking." When Heat On-The-Fly filed the patent application, it failed to disclose numerous prior art on-sale and public uses that would have rendered the patent invalid. After the '993 patent issued, Heat On-The-Fly aggressively enforced it against competitors, including the plaintiffs in the *Chandler* case. One of the competitors

filed a separate lawsuit against Heat On-The-Fly and obtained a declaratory judgment that the '993 patent was unenforceable due to inequitable conduct. The Federal Circuit affirmed that decision.

The plaintiffs in *Chandler* filed antitrust claims alleging that the defendants had continued to enforce the '993 patent during their appeal of the inequitable conduct finding. The district court held that those facts constituted anticompetitive behavior and allowed the *Walker Process* claim to proceed. On appeal, the threshold issue was whether the *Walker Process* claim fell within the Federal Circuit exclusive jurisdiction over matters arising under the patent law.

Xitronix v. KLA-Tencor

This is not the first time the Federal Circuit was presented with the issue of jurisdiction over *Walker Process* claims. In *Xitronix Corp. v. KLA-Tencor Corp.*, 882 F.3d 1075 (Fed. Cir. 2018) (*Xitronix*), the plaintiff asserted a standalone *Walker Process* monopolization claim based on the patent owner's enforcement of a live patent. The Federal Circuit held that it lacked jurisdiction because the case did not present a substantial issue of patent law. Although the underlying issue of whether the patent was fraudulently procured turned on patent law, no patent will be invalidated or revived based on the result of the case. The Court also relied on a 2013 Supreme Court decision, *Gunn v. Minton*, 568 U.S. 251 (2013), which held that a patent attorney malpractice lawsuit did not arise under patent law for purpose of section 1338 (which grants district courts exclusive original jurisdiction), even if it would be necessary to resolve patent law questions. As in *Gunn,* the Court reasoned that allowing a state court to resolve in a "case-within-a-case" issues of misrepresentation to the patent office would not disturb the uniform body of federal patent law since the result was limited to the specific parties and patent. The case was transferred to the Fifth Circuit after the Federal Circuit's finding of lack of jurisdiction.

Curiously, the Fifth Circuit flipped the case back to the Federal Circuit, holding that the latter's conclusion was implausible. The Fifth Circuit ruled that *Gunn* was inapplicable because *Gunn* interpreted section 1338, not section 1295. It also cited to two Federal Circuit precedents to intimate that standalone *Walker Process* claims should be appealed to the latter: In *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998), the court held that Federal Circuit law, rather than regional law, applies to *Walker Process* claims; in *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d. 1323, 1330 n.8 (Fed. Cir. 2008), the court adjudicated on a *Walker Process* claim on transfer and wrote in a footnote that "the determination of fraud before the PTO necessarily involves a substantial question of patent law."

Procedurally, a court receiving a case on transfer should accept the case so long as jurisdiction is plausible. Under a plausibility analysis, the Federal Circuit accepted jurisdiction in a nonprecedential opinion and ultimately heard the *Xitronix* case on the merits.

The Federal Circuit's* Chandler *Decision

The panel in *Chandler* concluded that it lacked jurisdiction over the appeal, on multiple grounds:

First, unlike in *Xitronix*, *Chandler* does not present even a "plausible" basis for jurisdiction because the underlying patent had already been ruled unenforceable. However, though status of the underlying patent was an important factor, the Court noted that it should not be determinative. The court's main concern was that, if the appellate jurisdiction solely turns on whether a patent is still valid and enforceable, it would create an arbitrary split where claims involving live patents would go to the Federal Circuit and those with expired patents would go to the regional circuit, even though the legal claims are the same.

Second, the Fifth Circuit's jurisdiction over Plaintiffs' *Walker Process* claim will not undermine the uniform body of federal patent law. As explained in *Xitronix*, the mere risk of another circuit making an erroneous patent law decision was not enough to trigger the Federal Circuit's exclusive jurisdiction. Where the result is "limited to the parties and the patent involved" in the instant matter, it will not produce rippling effect throughout the patent law system. Moreover, the appellate court in this case had little if any need at all to delve into substantive patent law issues since the '993 patent was already declared unenforceable in another lawsuit.

Third, the Court's ruling is consistent with its precedents. Although *Nobelpharma* held that Federal Circuit instead of regional circuit law applies to *Walker Process* claims, the scope of jurisdiction and choice of law are distinct questions. As for cases like *Cipro* and *Xitronix* where the court ultimately exercised jurisdiction over some *Walker Process* claims, the jurisdictional issues were reviewed under the lower plausibility standard instead of a de novo standard. The Court also disagreed with the Fifth Circuit's interpretation of sections 1295 and 1338 in *Xitronix* and opined that the two provisions are not divorced from each other as the Fifth Circuit suggested.

Conclusion

The Fifth Circuit has yet to react to the *Chandler* decision. But given the differing views of the Fifth Circuit and the Federal Circuit, jurisdiction over *Walker Process* claims may become a narrow, case-specific inquiry.

Product Liability Update

Ford Motor Co. v. Montana Eighth Judicial District Court

On March 25, 2021, the United States Supreme Court unanimously affirmed the finding of personal jurisdiction over Ford Motor Company in two state court cases involving automobile accidents. *Ford Motor Co. v. Montana Eighth Judicial District Cour*t, 141 S. Ct. 1017 (2021). In both cases, the Court found personal jurisdiction in state courts for product liability claims by in-state plaintiffs for injuries occurring in-state against an out-of-state defendant that did not design, manufacture, or sell the product in question within the state. *Id*. at 1026. The Court rejected the argument that the Supreme Court's 2017 *Bristol-Myers* opinion required a "causal link" between the defendant's forum contacts and the plaintiffs' claims to support specific jurisdiction. The majority held that it is sufficient to find specific jurisdiction if the claims sufficiently "relate to" the defendant's forum contacts. This significantly broadens the circumstances in which a manufacturer may find itself subject to specific jurisdiction.

Key Facts

The facts of the two underlying cases were similar. In the first, the plaintiff was driving her 1996 Ford Explorer in Montana when the tread separated from her rear tire. She died in the ensuing accident. In the second, a 1994 Ford Crown Victoria rear ended a snowplow in Minnesota. A passenger in the car suffered a serious brain injury when the air bag failed to deploy. *Id*. Neither car had been originally sold in the states where the injuries occurred. However, in both cases, the state courts found personal jurisdiction over Ford. Ford appealed, arguing that "the state court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to plaintiff's claims." *Id*. Because the cars were not designed, manufactured, or sold in the state where the accidents occurred, Ford argued that it was not subject to liability in state courts in those jurisdictions.

Ford did not dispute that it purposefully availed itself of the states at issue by conducting business there. Rather, it argued, based upon the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), that there needed to be a "causal link" between Ford's conduct in the state and plaintiffs' claims. Because the conduct Ford engaged in the states was not causally related to the injuries, it argued that jurisdiction was improper. The Supreme Court rejected Ford's argument 8-0 in three separate opinions (Justice Barrett took no part in consideration or decision of the cases).

Bristol-Myers Decision

In *Bristol-Myers*, the United States Supreme Court held that California lacked personal jurisdiction over claims brought by nonresident plaintiffs that did not allege they had obtained the prescription medication Plavix from a California source, that they suffered injury in California, or that they were treated for their alleged injuries in California. *Bristol Myers*, 137 S. Ct. at 1781. This was true even though Bristol-Myers engaged in business activities in California and sold Plavix there. *Id*. at 1781, 1783. However, it did not develop Plavix in California, did not develop its market plan there, or manufacture, label, package, or work on regulatory approval in the state. *Id*. at 1778. In *Ford Motor Company*, Ford attempted to expand the rationale of *Bristol-Myers*, extending its logic to in-state plaintiffs that were injured by the products at issue in that state where the suits were brought but whose injuries were not causally connected to Ford's activities in the state.

The Majority Opinion's "Relate to" Standard

The majority opinion (delivered by Justice Kagan and joined by Chief Justice Roberts and Justices Breyer, Sotomayor and Kavanaugh) rejected Ford's argument, holding: "When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Ford Motor Company*, 141 S. Ct. at 122. The majority rejected Ford's causation-only approach to jurisdiction. It noted that "our most common formulation of the rule demands that the suit arise out of or relate to the defendant's contacts with the forum." *Id*. at 1026 (internal quotations and citation omitted) (emphasis original). The "relate to" standard was met here because "the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home States." *Id*. at 1029.

The Concurring Opinions' Questioning of the "Relate to" Standard

While agreeing that personal jurisdiction existed in the case, both Justices Alito and Gorsuch questioned whether the "relate to" standard had meaningful limits. Justice Alito noted that "traditional notions of fair play and substantial justice"—the standard for assessing personal jurisdiction—were easily met: "Their residents, while riding in vehicles purchases within their borders, were killed or injured in accidents on their roads. Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?" *Id*. at 1032 (Alito, J. concurring) (emphasis original). Applying a "relate to" standard to

cases "without any indications what those limits might be … [will not be] terribly helpful[]" to lower courts. *Id.* at 1033-34 (Alito, J. concurring). Some "rough causal connection" is required. *Id.* at 1034 (Alito, J. concurring).

Justice Gorsuch was equally skeptical of the "relate to" standard. He questioned the majority's direction that it is enough to find an "affiliation" or "relationship" or "connection" to support personal jurisdiction. While "[t]he majority promises its new test does not mean anything goes, [] that hardly tells us what does." *Id.* at 1035 (Gorsuch, J., concurring) (internal quotations and citation omitted).

One takeaway is that, although future personal jurisdiction fights will apply the "relates to" standard to in-state conduct, the rules for what must be alleged to meet that this standard, as highlighted by the concurring opinions of Justice Alito and Gorsuch, will need more development.

Securities & Structured Finance Litigation Update

Litigating Shareholder Actions After *MFW* and *Dell*

Controlling shareholders ("controllers") who engage in self-interested transactions can be held liable for breaches of fiduciary duties owed to minority shareholders. Such "controller" claims are generally evaluated according to Delaware's stringent "entire fairness" standard. The controller bears the burden of proving both "fair price" and "fair dealing"—that the challenged transaction was substantively and procedurally fair. This is exacting and its application can result in significant liability for controllers, including exposure to shareholder class actions seeking large damages. But the Delaware Supreme Court's decision in *Kahn v. M & F Worldwide Corp. ("MFW"),* 88 A.3d 635 (Del. 2014) creates a "safe harbor" by which controllers can avoid fairness review and therefore minimize their liability. This article discusses the *MFW* decision and recent cases applying it, including the *Dell Class V* litigation, in which a court denied a motion to dismiss based on *MFW*.

***MFW*:** In *MFW*, the Delaware Supreme court held that entire fairness review does not apply to controller transactions that are conditioned, from the outset, on the approval of both: (1) a fully empowered, disinterested, and independent special committee that represents the interests of minority shareholders; and (2) a fully informed and un-coerced "majority-of-the-minority" shareholder vote. *Id.* Delaware courts evaluate six conditions to determine whether *MFW*'s requirements are satisfied:

- The controlling stockholder must condition the transaction on both special committee approval and a majority-of-the-minority vote of stockholders;
- The special committee must be independent;
- The special committee must be empowered to freely select its own advisors and definitively say "no" to the transaction;
- The special committee must fulfill its duty of care in negotiating a fair price;
- The vote of the minority stockholders must be informed; and
- There must not be any coercion of the minority stockholders.

The goal of *MFW* is to protect minority shareholders by ensuring that the procedural safeguards of an independent special committee and majority-of-the-minority vote prevent controllers from engaging in unfair transactions that advantage themselves at the expense of minority shareholders. As the *Dell* court explained: "*MFW's* dual conditions create a potent tool to extract good value for the minority because from the start of negotiations the controlling stockholder knows that it cannot bypass the special committee's ability to say 'no.'" *In re Dell Techs. Inc. Class V Stockholders Litig.* ("*Dell*"), 2020 WL 3096748, at *15 (Del. Ch. June 11, 2020). If both of *MFW's* conditions are met, the deferential business judgment rule applies, rather than the entire fairness test. Under the business judgment rule, nearly all corporate actions aside from overt waste are permissible, so if the business judgment rule applies, the plaintiffs' claims are generally dismissed.

***Getting Around MFW*:** Although several controllers have successfully invoked *MFW* to obtain the protection of the business judgment rule, more recent decisions illustrate the limits of *MFW*—and potential pitfalls for controlling shareholders seeking to escape entire fairness review.

In *Dell*, a class of investors for which Quinn Emanuel serves as co-lead counsel defeated the application of *MFW*. *Dell* concerned a 2018 transaction in which Dell's controlling shareholders redeemed a class of stock ("Class V" stock) held by minority shareholders for a mix of cash and another class of Dell stock ("Class C" stock). To invoke *MFW*, Dell's board appointed a special committee to negotiate on behalf of Class V shareholders and held a shareholder vote at which a majority of the minority shareholders voted to support the deal. Class V investors challenged the transaction as unfair and alleged the deal price was too low and that the special committee was conflicted and ineffective. The investors brought breach-of-fiduciary duty claims against Dell's controlling shareholders (Michael Dell and Silver Lake Partners) and members of the special committee. Defendants moved to dismiss under *MFW*. Vice Chancellor Laster denied the motion.

The *Dell* court found that nearly all of *MFW's* requirements were not met, notwithstanding the appointment of the special committee and the shareholder vote. *First*, the special committee was not empowered within the meaning of *MFW* because Dell had reserved the right to resort to back-up transactions—including a forcible conversion of Class V stock into Class C stock—if the proposed deal failed, and had not given the special committee authority to prevent such a "Plan B." *Id.* at *17. *Second*, the controllers "bypassed the Special Committee and negotiated directly with [shareholders]," which deprived the special committee of the power to function. *Id. Third*, the controllers "created a coercive situation by threatening" to resort to back-up options if the deal failed, such as a forcible conversion of Class V shares into Class C shares. By doing so, [Defendants] both undermined the Special Committee's ability to bargain effectively and the ability of the stockholders to vote down the deal." *Id.* at *31 *Fourth*, the special committee was conflicted, including because one of its members (David Dorman) belonged to the same highly exclusive golf clubs—Augusta National and San Francisco Golf Club—as the managing partner of Silver Lake Partners. *Id.* at *36. *Fifth*, the shareholder vote was not informed, because the controllers failed to disclose material information, including prior valuations of Dell that were far lower than the valuation used in the deal. *Id.* at *39-41.

Dell shows that courts may look beyond the formal imposition of a special committee and a majority-of-the-minority vote where a controller has merely paid lip service to *MFW* without fastidiously observing its requirements. Beyond *Dell*, other recent Delaware court decisions also illustrate the scope and limits of *MFW*'s protections for controlling shareholders.

Ab Initio *Requirement*: The controllers must appoint a special committee *ab initio*—before the transaction begins. But exactly what "*ab initio*" means—*i.e.*, when *MFW's* requirements kick in—has been the subject of frequent litigation. The Delaware Supreme Court's decision in *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 762 (Del. 2018) is instructive. There, the plaintiffs argued that the controller had failed to qualify for *MFW*'s protections because the controller sent a letter to minority shareholders proposing to take a company (Synutra) private *before* appointing a special committee. Liang Zhang and affiliates controlled 63.5% of Synutra. Zhang sent a letter proposing to take Synutra private by acquiring the remainder of its stock. One week later, the board formed a special committee, but did not discuss the proposal. Two weeks after the initial offer, Zhang sent a second letter, this time with *MFW* conditions. Price negotiations did not begin until seven months after the second letter. Minority shareholders challenged the transaction, claiming that the *first* letter should have contained *MFW* conditions. The Delaware Supreme Court disagreed and held that *MFW* applied because its twin conditions were put in place "before any substantive economic negotiations" occurred. *Id.* at 762. *Flood* confirms that not every corporate action by a controller triggers the imposition of *MFW's* requirements. But later cases make clear that controllers must be careful not to begin any "substantive economic negotiations" before appointing a special committee, or else they risk losing the protections of the business judgment rule. *Compare Olenik v. Lodzinski*, 208 A.3d 704, 717 (Del. 2019) (*ab initio* requirement not satisfied where controlling shareholder engaged in months of discussions about the valuation of a merger target before appointing special committee).

Work-a-Day Transactions: Delaware courts have also clarified that *MFW* does not only apply to "bet-the-company" transactions. If *MFW's* conditions are not satisfied, even more routine decisions may be subject to entire fairness review. In *Tornetta v. Musk*, 250 A.3d 793 (Del. Ch. 2019), the court addressed the issue of whether the compensation plan for Tesla CEO Elon Musk was subject to entire fairness review or the business judgment rule. The court found that because *MFW's* conditions had not been satisfied, entire fairness review governed, even though the challenged decision was not a "transformational" transaction such as a merger or share redemption. *Id.* at 800.

What Makes a "Controlling" Shareholder? Courts applying *MFW* have sometimes applied "entire fairness" review even to shareholders that control *less* than a majority of the voting shares of a company. In *In re Tesla Motors, Inc. Stockholder Litig.*, 2020 WL 553902, at *4 (Del. Ch. Feb. 4, 2020), minority shareholders challenged Tesla's acquisition of another company, Solar City, and sued Musk. He argued that he was not a controlling shareholder because he owned only 22% of the voting shares. The court rejected this argument and concluded that a "minority blockholder can, as a matter of law, be a controlling stockholder through a combination of potential voting power *and* management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of the stock." *Id.*

Life Sciences Litigation Update

China Establishes Patent Linkage System

On July 4, 2021, China's National Medical Products Administration ("NMPA") and the China National Intellectual Property Administration ("CNIPA") jointly issued *Implementing Measures for the Early*

Resolution Mechanism for Drug Patent Disputes (for Trial Implementation) (the "Measures"), which took effect immediately. On July 5, China's Supreme People's Court issued judicial interpretations regarding patent litigation (the "Judicial Interpretations") that is expected to flow from the new law, and CNIPA issued implementing measures regarding its administrative adjudication. The promulgation of these rules signifies the formal establishment of China's patent linkage system.

The patent linkage rules in China generally track the patent linkage framework of the United States' Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as the Hatch-Waxman Act, which aims to promote the research and development of innovative drugs while attempting to balance the interests of drug developers and the public's access to lower-cost generic drugs. Below is an introduction of the key aspects of these patent linkage rules.

Brand-Name Drug Patent Registration

Under the Hatch-Waxman Act, the U.S. Food and Drug Administration ("FDA") maintains a publication commonly known as the "Orange Book" that identifies, among other things, patent and exclusivity information associated with approved drug products. Pursuant to the Measures, China's NMPA establishes and maintains the *Patent Information Registration Platform for Marketed Drugs*, which contains information similar to the Orange Book. *See* Measures, Art. 2. Under both the U.S. and Chinese systems, the innovator (in the U.S., a New Drug Application ("NDA") holder, and in China, a marketing authorization holder ("MAH")) shall register, among other things, information relating to the granted patents corresponding to the approved drug within 30 days after obtaining marketing approval. *See* Measures, Art. 4; 21 CFR 314.53(c)(2)(ii). Patents eligible for registration under the new Chinese law mainly include patents covering active pharmaceutical ingredients ("API"), drug products or formulations containing the API, and approved medical uses of approved drug products. *See* Art. 5 of the Measures. Under both the U.S. and Chinese systems, the NDA holder/MAH is responsible for the accuracy of the information, and the FDA/NMPA typically takes a hands-off approach. *See* Measures, Art. 5; 21 CFR § 314.53(f).

Generic Drug Patent Declaration

Under the Hatch-Waxman Act, a generic applicant must make one of four certifications in its Abbreviated New Drug Application ("ANDA") regarding the patents listed in the Orange Book in connection with the brand-name drug. *See* 21 CFR § 314.94(a)(12). The Chinese system is similar. Generic applicants in China must choose one of the following four declarations—which generally track the U.S. certifications—for each listed patent: Category I, no patents are registered under the drug; Category II, the patents have expired or have been invalidated, or the applicant has obtained license; Category III, the applicant undertakes not to market the generic drug before the expiration of the patents; Category IV, the patents should be invalidated, or will not be infringed. *See* Art. 6 of the Measures. A generic applicant in China shall notify the MAH of its patent declarations and the materials supporting the declarations, including claim charts if the generic applicant declares non-infringement, within 10 working days after the generic application is docketed by the NMPA. *Id.* Similarly, in the U.S., generic applicants must provide notice of their patent certifications to the NDA holder within 20 days of the FDA accepting the ANDA for filing, and must provide a detailed statement regarding the bases for any invalidity or noninfringement positions that support the patent certifications. *See* 21 CFR § 314.95(b).

Judicial and Administrative Linkage; Stay of Approval

Under the Hatch-Waxman Act, if the generic applicant has chosen option IV (that the patents should be invalidated or will not be infringed) and notified the NDA holder that it has done so, if the patent holder files an infringement suit within 45 days after receiving the ANDA notification from the generic applicant, the FDA will be prohibited from approving the ANDA for a period of 30 months from the date of the generic applicant's notice to the NDA holder. *See* 21 CFR § 314.107(b)(3)(i).

Similarly, China provides a 45-day period for the patent holder to file a lawsuit with the Beijing IP Court, but the period starts from the date the generic application is made public. *See* Measures, Art. 7; Judicial Interpretations, Art. 1. Unlike in the U.S., where the details of generic filings are maintained by the FDA as confidential, the NMPA's Center for Drug Evaluation publishes certain details of Chinese generic applications, including the name of the applicant, the chemical name of the drug product, and the docketing date of the application. *See* Measures, Art. 11.

Patent disputes before the Beijing IP Court usually take more than a year to obtain the first-instance court decision, while patent cases in U.S. federal district courts can take several years before a ruling on the merits. In addition to the Beijing IP Court, China provides for administrative adjudication by CNIPA as an alternative forum for a patent-linkage dispute. Administrative

$90 Million Settlement with Victoria's Secret Parent

Quinn Emanuel has reached a resolution, subject to court approval, of its shareholder books-and-records action against L Brands, the parent company of Victoria's Secret. The complaint alleged that a "culture of sexual harassment and misogyny" had "plagued the Victoria's Secret for decades."

Just days after the *New York Times* published an in-depth exposé that revealed the pervasive toxic culture at L Brands, on behalf of shareholder John Giarratano, we served a books and records demand on the Company to investigate any wrongdoing. In June 2020, the firm commenced a books and records action against the Company in Delaware Chancery Court based on the Company's failure to produce documents. Two other shareholders also filed derivative actions making similar allegations. After months of discussion, the parties reached a ground-breaking settlement that addresses past harms and puts in place corrective measures to prevent future harassment and discrimination.

The Notice of Settlement has been filed with the federal court in Ohio and, if approved, will resolve all stockholder derivative claims alleging workplace misconduct, including claims made in derivative stockholder litigations pending in Ohio and Delaware and in stockholder demands sent to the Board of Directors since February 2020.

The settlement provides that L Brands will commit to a $90 million fund to implement corporate reforms, including: (a) maintenance of a Diversity, Equity and Inclusion ("DEI") Council, (ii) revamping policies on sexual harassment, anti-retaliation, and reporting and investigating sexual harassment complaints, including annual audits and surveys of employees and models, (iii) hiring a DEI consultant and use of data metrics to ensure DEI metrics are being met, (iv) elimination of Non-Disclosure Agreements (NDAs) and an agreement not to enforce past NDAs, and (v) increased training and oversight of outside contractors, including photographers.

The settlement recognizes that the efforts of Quinn Emanuel and other plaintiffs' counsel "substantially and materially contributed" to the corporate governance reforms and changes made at L Brands since February 2020. A final settlement hearing is scheduled for January 2022.

Interim Relief Victory in Emergency Arbitration

A lean team from Quinn Emanuel Paris (just three lawyers)'conceived, prepared, and ran seven parallel emergency arbitrations, against seven different companies, under two sets of rules and the law of three jurisdictions, securing an overwhelmingly favorable set of emergency decisions that preserve the firm's client's interests. And all within just three weeks.

This was a textbook example of the benefits of using emergency arbitration, if available, protect a client's rights in the face of sudden and aggressive action. Not only is emergency arbitration a powerful tool before an arbitral tribunal can be constituted. If successful, it may end the dispute before it takes off (and places the counterparty in a defensive position at the outset and impresses the tribunal as to the underlying merits).

Quinn Emanuel's client, a renowned international hotel chain, had in the past three decades established a market-leading presence in Russia. Its portfolio includes seven hotels located in strategically important Russian cities outside of Moscow and St. Petersburg. The hotels are of significant strategic importance to the client, as they ensure a continued brand presence across Russia over the next decades. Were the client to lose the hotels, it would be difficult to replace them.

This, however, was the prospect our client faced in late June 2021, when the owner of the seven franchised hotels took crude but pre-meditated measures to replace the client's brand with its own. In just 48 hours, and without providing notice, it dismantled and removed the 'client's name from the hotels' signage, installed its own website to market the hotels, contacted booking agencies to prevent bookings through the client's website, and sent notifications to its clients stating that the hotels would henceforth be operated under another brand. In two days, seven of the client's hotels disappeared. The pretext? COVID-19 and alleged impossibility of performance.

Quinn Emanuel opted for the most aggressive measure: emergency interim relief. This is not easy to secure. It requires an applicant to demonstrate that there is a serious risk of irreparable harm arising out of the impugned conduct, such that the applicant cannot await the constitution of an arbitral tribunal (*i.e.*, about one or two months), and that the harm likely to result to the party against whom the measures are sought is outweighed by the harm that will be suffered by the requesting party if the measures are not granted (balance of interests).

While the owner was busy announcing to the world its seven new additions to its brand, it was hit with seven separate emergency arbitrations in one day.

The end result? Five out of the seven emergency arbitrators—qualified in jurisdictions as diverse as England, New Zealand, Switzerland, Finland and France—independently ordered the respondent to

revert immediately to the *status quo ante*, *i.e.*, to reinstate the signage, the client's brand name, and cease all marketing of the hotels under the other brand. A sixth emergency arbitrator did not order emergency relief, but took the highly unusual step of ordering the *respondent* to pay half of the upfront costs our client had incurred. The respondents were ordered to pay almost all of our client's legal costs. The other side has now approached our client to negotiate a settlement. There is a real chance that the client will *increase* its hotel portfolio in the region. Q

(Practice area notes continued from page 9)

proceedings at CNIPA (including patent invalidation proceedings) usually finish within 6 months, which is significantly faster than the U.S. *Inter Partes* review ("IPR") system, which takes 18 months to complete. Notably, however, an administrative adjudication by CNIPA would be subject to appeal to the Beijing IP Court, whereas in the U.S., both district court and IPR decisions are both appealed directly to the U.S. Court of Appeals for the Federal Circuit.

Moreover, the stay of approval is significantly shorter in China. There, the patent holder shall notify the NMPA and the generic applicant within 15 working days after the case is docketed by the court or CNIPA. *See* Measures, Art. 7. The NMPA then sets a one-time nine-month waiting period before the generic application can be approved. *See* Measures, Art. 8. The length of the Chinese waiting period is thus much shorter than its 30-month U.S. counterpart.

Finally, in both China and the U.S., generic applicants are permitted to file declaratory judgment suits or to seek administrative adjudication if not sued by the patentee within the 45-day objection period. In both jurisdictions, technical/regulatory review of the generic drug application will proceed during the stay / waiting period, which applies only to approval itself.

Drug Review and Approval

Under China's new system, generic applications subject to litigation and the nine-month waiting period shall be processed for final administrative approval under the following circumstances: (1) the patents are invalidated; (2) the patents are not infringed; (3) the parties settle the patent disputes; or (4) no effective decisions or settlements are available upon the expiration of the 9-month waiting period. *See* Measures, Art. 9. If the patents are infringed by the generic drug, the generic application will not be processed for final administrative approval before the expiration of the patents. *Id.* In the U.S., if before the expiration of the exclusivity period, the district court decides that the patent is invalid, unenforceable, or not infringed, or the court enters an order of dismissal without a finding of infringement (for example, if the parties settle their patent disputes), the ANDA may be approved on or after the date of the judgment or order. *See* 21 CFR § 314.107(b)(3)(viii).

Exclusivity Period for the Generic Applicant

Under Hatch-Waxman, the first ANDA applicant that challenges an innovator's Orange Book patents is typically eligible for the exclusive right to market the generic drug for 180 days (during which time no other generic versions of the drug may be marketed). *See, e.g.*, *Guidance for Industry, 180-Day Exclusivity: Questions and Answers*, FDA, 2017.

China has created a similar rule, but has set a higher bar for the generic applicant and a longer exclusivity period. In China, a generic applicant has to be: (1) the first to successfully challenge the patents' validity, and (2) the first to be approved for marketing. A successful challenge requires a generic applicant to submit a Category IV declaration and successfully invalidate all of the patents registered under a brand-name drug in CNIPA's *Patent Information Registration Platform for Marketed Drugs*, which contains information similar to the Orange Book. *See* Measures, Art. 11. Winning on non-infringement or proving only some of the registered patents invalid are insufficient to be a successful challenge. The successful Chinese applicant will be provided with a 12-month exclusivity period (two times as long as the U.S. exclusivity period) starting from the date of the generic drug's approval. *Id.*

Conclusion

Chinese regulators are only starting to flesh out the country's new drug patent linkage system. China has taken many cues from the U.S. Hatch-Waxman system, but the differences may be important. Additional details will be come as the Beijing IP Court and the CNIPA adjudicate disputes arising under the system. In the meantime, pharmaceutical companies should adjust their strategies to use the new system to better protect their rights and to minimize business and legal risks in China. Q

quinn emanuel
865 South Figueroa Street, 10th Floor, Los Angeles, California 90017

business litigation report

quinn emanuel urquhart & sullivan, llp

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 875 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of November 2021, we have tried over 2,500 cases, winning 86% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $70 billion in judgments and settlements.
- We have won seven 9-figure jury verdicts and four 10-figure jury verdicts.
- We have also obtained fifty-one 9-figure settlements and nineteen 10-figure settlements.

Prior results do not guarantee a similar outcome.

ATLANTA
AUSTIN
BOSTON
BRUSSELS
CHICAGO
DOHA
HAMBURG
HONG KONG
HOUSTON
LONDON
LOS ANGELES
MANNHEIM
MIAMI
MUNICH
NEUILLY-LA DEFENSE
NEW YORK
PARIS
PERTH
RIYADH
SALT LAKE CITY
SAN FRANCISCO
SEATTLE
SHANGHAI
SILICON VALLEY
STUTTGART
SYDNEY
TOKYO
WASHINGTON, D.C.
ZURICH