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Latest Developments in Corruption Enforcement in China

The past quarter has been an active one for Chinese government enforcement activities, and the year ahead promises more of the same. Recent developments include: the strengthening of Chinese bribery laws, increased action against and investigation of State-Owned Enterprises and their private sector business partners, further publication of Administration of Industry and Commerce (AIC) enforcement actions against multinational companies, and actions against company employees for receiving bribes and kickbacks. Set forth below are some of the most noteworthy developments of the last quarter and potential movement in the months to come.

Ninth Amendment to the 1979 Chinese Criminal Law Increases Penalties for Bribery Offenses

On August 29, 2015, Amendment IX to the Chinese Criminal Law (the "Amendment") was passed by the National People's Congress Standing Committee. The Amendment will take effect on November 1, 2015. Since the release of the initial draft Amendment for public comment in November 2014, the Amendment has undergone three rounds of intensive review, revision, and discussion, as its provisions are particularly important to strengthening China's anti-corruption laws. The Amendment's revisions to existing criminal law include increasing penalties for bribery offenses, reducing mitigating factors, removing the monetary threshold amount that triggered criminal liability, and substantially broadening the scope of criminal bribery offenses. Whereas Chinese criminal law previously focused more on the acceptance of bribes, the Amendment includes provisions that specifically criminalize the offering and payment of bribes. Furthermore, the Amendment substantially limits the circumstances under which a confessing

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INSIDE

Stephen Jagusch Named One of the Top 25 Most Highly Regarded International Arbitration Practitioners by *Who's Who Legal*

Stephen Jagusch has been recognized once again as one of the Top 25 most highly regarded international arbitration practitioners by *Who's Who Legal*. This list, spanning 441 firms and 86 countries, recognizes top arbitration experts globally. When the list is narrowed to only those who serve as advocates at arbitration hearings, Mr. Jagusch ranks in the Top 10. Based in Quinn Emanuel's London office, Mr. Jagusch is Global Chair of the firm's international arbitration practice and is praised by *Who's Who Legal* "for his 'effective counsel' and 'astute legal mind.'" Q

Fred Bennett Receives AAA Award for Outstanding Director Service

Fred Bennett, the Global Vice-Chair of the firm's international arbitration practice, and Chair of the U.S. practice, recently completed his third (and final, because of term limits) four-year term as a member of the American Arbitration Association's Board of Directors and Executive Committee, and received the AAA's award for Outstanding Director Service. During his tenure, Fred served on the AAA's Nominating and Governance Committee (which is in charge of nominating new members of the Board), chaired the task force for revising the AAA Commercial Rules for the first time in over a decade (new rules adopted in October 2014), and served on the committee for revision of the international arbitration rules for the AAA's International Center for Dispute Resolution. He has been appointed to help implement the AAA's newly created "Master Mediation Panel" for California and the Western United States. Q bribe offeror may be exempted from criminal liability. The Amendment also adds an employment restriction targeting white-collar professions—if an individual utilizes his or her profession to commit a crime, the individual may be prohibited from participating in that profession for three to five years following the completion of a jail term or release on parole. The terms of the Amendment are a significant demonstration of the Chinese government's ongoing and proactive efforts to target and deter corruption, both internally and at multinational companies.

Internal Anti-Corruption Enforcement and Whistleblower Activities Are on the Rise

The recent increase in internal anti-corruption enforcement actions in China has been accompanied by, and is partially fueling, an unprecedented rise in whistleblower activities. Chinese government units and large State-Owned Enterprises ("SOEs") have been targeted for aggressive investigations and penalties. The Central Committee of the Communist Party of China recently approved and initiated the year's second round of special anti-corruption inspections, which immediately followed the completion of the first round of special inspections in June 2015. The second round of inspections, completed in September 2015, targeted 26 SOEs and government units across key industries and sectors including commodities, transportation, defense, aviation, and construction. As with the previous round, the Central Commission for Discipline of the Communist Party of China ("CCDI"), will publish its findings by posting an official report on CCDI's webpage. In addition to public announcements that welcome anti-corruption whistleblower reports, the CCDI has created, and made publicly available in June 2015, a mobile application (with photo and video submission capabilities), as well as an online message board, specifically designated as corruption- and public funds-related reporting channels. The availability of the new anti-corruption reporting channels is expected to further increase whistleblower activity and subsequent investigations in China. These growing internal whistleblower and enforcement activities expose multinational companies that have Chinese SOE and/or state-related dealings to increased risks of also becoming enforcement targets.

Chinese Regulators Implement Publication of Corporate Penalties and Blacklisting Decisions

Following the 2014 promulgation of new regulations requiring public disclosure of various administrative violations and sanctions, including bribery-related violations, the Administration of Industry and Commerce (the "AIC") has implemented online publication systems in most major cities and provinces in China. As of the last 12 months, the AIC websites of Beijing, Shanghai, and Shenzhen have actively published decisions and penalties for various violations. The published details include the company name, the violation and/or problematic conduct, the regulatory authority behind the decision, and, in certain cities, the penalty amount. To date, at least 28 of the AIC's published decisions and penalties have been against multinational companies for commercial bribery offenses. Many of these multinational companies are in the import and export sector, and several are in the medical devices industry. A number of other large multinational companies, such as major retailers and pharmaceutical companies, have been issued published penalties on non-bribery bases. It should be noted that companies in the medical and healthcare sector in China are subject to additional public disclosure requirements as well as regional blacklists pursuant to the regulations of the National Health and Family Planning Commission (the "NHFPC"). Under the publication and blacklisting system, which has a very broad scope and criteria, any company in the industry with a bribery-related offense, charge, or penalty, could be subject to a two-year ban on the sale of goods or services to all publicly-funded hospitals and healthcare institutions in the province where the conduct occurred. The NHFPC is then required to publish and/or republish these regional blacklists. As of September 2015, the NHFPC has republished regional blacklists from Sichuan, Chongqing, and Hainan, listing 12 domestic companies. For multinational companies, these publication practices by the AIC and by the NHFPC also carry the potential for negative media attention as well as risks of anti-corruption liability in other jurisdictions.

Chinese Stock Market Fluctuations Trigger Investigations and Regulatory Intervention

As a result of China's recent stock market selloff, China's benchmark Shanghai Composite Index has fallen approximately 38 percent since its eight-year peak in June 2015. The market fluctuations have elicited strong reactions from Chinese regulators—notably, proposed revisions of margin trading and short selling rules and a wave of investigations into "malicious" short selling. The China Securities Regulatory Commission has proposed new securities regulations that could potentially ease volatility in margin trading by allowing for more flexible contracts and the tightening of lending requirements. Contemporaneously, China's Ministry of Public Security has initiated numerous high-profile investigations in connection with the market fluctuations. According to various media reports, at least 10 financial institutions have become the investigation targets of the Public Security Bureau for suspected violations of short selling laws. In August 2015, Chinese authorities reportedly detained Li Yifei, the chairwoman of the China unit of the world's largest publicly traded hedge fund, Man Group Plc, as part of their investigation into market volatility. Li, however, later denied the reported detainment and her involvement in the investigation. Other senior executives at securities firms have also become targets of investigations. The scrutiny and intensified enforcement by Chinese regulators will likely continue through the implementation of the China Securities Regulatory Commission's proposed securities law revisions.

Former Employees of Chinese Tech Giant Detained in Bribery Probe

The two largest Chinese internet companies, Tencent Holdings Ltd and Alibaba Group Holding Ltd, have been implicated in a bribery investigation by Chinese regulators. In June 2015, the Public Security Bureau detained several former employees of Tencent, including current Alibaba executive, Patrick Liu. Shortly after, Tencent stated in a press release that it first uncovered improper practices by its online video department employees through an internal investigation in 2014 and reported the matter to local authorities. The internal investigation found that the individuals potentially accepted kickbacks from online video providers; the Chinese authorities believe the amount of kickbacks may have totaled millions (RMB). The developments in this investigation signal that domestic Chinese companies are gradually becoming more attuned to their own internal anti-corruption practices and could potentially begin adopting more robust compliance programs and self-reporting mechanisms. Q

NOTED WITH INTEREST

Florida Federal Court Adopts Rule Barring Discovery Prior to Particularized Identification of Alleged Trade Secrets

California is the only state with a statutory requirement that plaintiffs pursuing misappropriation claims identify their alleged trade secrets with reasonable particularity "before commencing discovery." Cal. Civ. Code 2019.210. However, on July 10, 2015, the firm persuaded a Southern District of Florida court to impose this same discovery limitation. Recognizing the underlying policy that if discovery is permitted a plaintiff may simply review a defendant's files and claim whatever it finds as its own trade secrets, the court barred plaintiffs from seeking *any* discovery from defendants until first identifying with particularity their alleged trade secrets. The court went further and held that this same requirement applied to the plaintiffs' common-law claim for misappropriation of a "novel business idea," becoming the first court to do so.

Applicable Law on Particularized Identification of Trade Secrets or Novel Ideas

Certain state legislatures have imposed statutory requirements that a plaintiff alleging a trade secret claim identify their alleged trade secret with reasonable particularity during discovery. Even in the absence of such a statutory mandate, a number of federal courts across the country have imposed this same requirement. *E.g. Del Monte Fresh Produce Co. v. Dole Food Co. Inc.*, 148 F. Supp. 2d 1322, 1325-26 (S.D. Fla. 2001); *Switch Commc'ns Grp. v. Ballard*, No. 11-cv-00285, 2012 WL 2342929, at *6 (D. Nev. June 19, 2012); *Ikon Office Solutions, Inc. v. Konica Minolta Bus. Solutions, U.S.A., Inc.*, No. 08-cv-539, 2009 WL 4429156, at *4 (W.D.N.C. Nov. 25, 2009); *Dura Global Technologies, Inc. v. Magna Donnelly, Corp.*, No. 07-cv-10945, 2007 WL 4303294, at *5 (E.D. Mich. Dec. 6, 2007); *DeRubeis v. Witten Technologies, Inc.*, 244 F.R.D. 676, 680–81 (N.D.Ga. 2007); *AutoMed Technologies, Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001); *Xerox Corp. v. Int'l Bus. Machines Corp.*, 64 F.R.D. 367, 371 (S.D.N.Y. 1974). Thus, at the onset of discovery in a suit where the plaintiffs asserted claims for trade secret misappropriation under Florida's Uniform Trade Secret Act, and misappropriation of a novel business idea under Florida and New York common-law, Quinn Emanuel on behalf of the defendants demanded that the plaintiffs identify with reasonable particularity each alleged trade secret and novel idea at issue. In response, the plaintiffs provided a statement that broadly described purported "proprietary analyses" and "insights," but they did not identify any of the specific analyses or insights to which they were referring.

Notably, California is the only state with a statute holding that until a particularized disclosure is provided, a plaintiff is barred from seeking discovery from defendants. Cal. Civ. Code 2019.210. As California courts have described: "Experience has shown that it is easy to allege theft of trade secrets with vagueness, then take discovery into the defendants' files, and then cleverly specify what ever happens to be there as having been trade secrets stolen from plaintiff." *Jobscience, Inc. v. CVPartners, Inc.*, No. 13-cv-04519, 2014 WL 1724763, at *2 (N.D. Cal. May 1, 2014). A handful of other courts outside of California have addressed the impact of trade secret disclosures on the timing of discovery in the absence of an applicable statute, but the results have been inconsistent. Some courts have rejected defendant's attempts to avoid discovery prior to receiving a particularized statement from the plaintiff. *E.g. St. Jude Med. S.C., Inc. v. Janssen-Counotte*, __ F.R.D. __, 2015 WL 1299753, at *11 (D. Or. Mar. 23, 2013). Others have found that a defendant need not disclose its *own* trade secrets prior to receiving a particularized statement, but then note that discovery on claims unrelated to the trade secret dispute may proceed. *Switch Commc'ns Grp. v. Ballard*, No. 11-cv-00285, 2012 WL 2342929, at *6 (D. Nev. June 19, 2012). No jurisdiction outside of California has a uniform rule like the California statute unequivocally barring discovery prior to the alleged trade secret holder's particularized disclosure. Further, we have found no case holding that a plaintiff concurrently pursing a common-law claim for misappropriation of a novel business idea—in which the alleged idea need not qualify for trade secret status—must be stayed pending identification of the specific idea at issue.

Florida Court Orders That Discovery Is Stayed Pending Particularized Disclosure

Arguing that the same policy underlying the California statute applied with equal force in Florida, the firm brought a motion to compel a more particularized statement and simultaneously sought a protective order staying all discovery pending its receipt of that disclosure.

Following extensive oral argument, the Southern District of Florida court agreed and granted the motion to compel and a protective order. The court ordered that the plaintiffs identify with reasonable particularity every alleged trade secret and novel business idea at issue, and held that until such disclosure was provided, neither the defendants nor any third party need to respond to discovery requests from plaintiffs. The court ordered that in addition to a written disclosure, the plaintiffs must identify one or more exemplar documents that reference or reflect each alleged trade secret and/or novel business idea. Finally, the court held that if the plaintiffs amended their disclosure after discovery commenced, they would be required to provide a written explanation for the change and allow a deposition to pressure-test the reason behind the amendment.

This Southern District of Florida order shows that courts may be willing to impose common-law discovery stays pending particularized disclosure even in the absence of express statutory or precedential authority on point, based on similar policy grounds underlying the California statute. Defendants should thus consider pursuing a similar strategy in trade secret or novel idea misappropriation litigations in order to prevent plaintiffs from molding their claims based on information received during discovery. Q

Fracking-Related Earthquake Litigation Gains Momentum

On June 30, 2015, the Oklahoma Supreme Court issued a decision that opened the courthouse doors to lawsuits for property damage and personal injuries caused by earthquakes purportedly related to fracking activities. *See Ladra v. New Dominion, LLC*, --- P.3d ----, No. 113396, 2015 WL 3982748, 2015 OK 53 (Okla. June 30, 2015).

Sandra Ladra, a resident of Prague, Oklahoma sued New Dominion LLC and Spess Oil Co. alleging that an earthquake triggered by the companies' disposal of fracking wastewater in wells near her home caused a portion of her chimney to collapse. The trial court dismissed the case on lack of jurisdiction grounds, agreeing with the defendants that they lawfully operated their injection wells under permits from the Oklahoma Corporation Commission, the state's oil and gas regulator, which had exclusive jurisdiction over the dispute. The Oklahoma Supreme Court reversed, holding that the trial court does have jurisdiction to hear the dispute and that the regulatory body has no authority to award damages or to decide disputes between private parties.

The decision paves the way for such disputes to be heard by a jury. Several recent reports by academics and regulators purporting to find a link between wastewater injection wells and seismic activity have resulted in the proliferation of similar lawsuits in Oklahoma and in other states like Arkansas where fracking is common.

Although scientists have known for decades that man-made activities can trigger seismic activity, it is only recently that academics and regulators have started focusing on the potential link between the use of wastewater injection wells by the oil and gas industry and increased quake activity. In April, the Oklahoma Geological Survey issued a statement confirming that it "considers it very likely" that most of the hundreds of earthquakes in the state in recent years were triggered by the use of injection wells. Oklahoma Geological Survey, Summary Statement on Oklahoma Seismicity, Apr. 21, 2015, http://earthquakes.ok.gov/wpcontent/uploads/2015/04/OGS_Summary_Statement_2015_04_20.pdf. According to the OGS, in 2014, Oklahoma experienced 585 quakes of at least a 3.0 magnitude (big enough to be felt indoors), which is more than the total number of quakes in the state over the previous 30 years, and the most of any state in the contiguous United States.

Similarly, researchers from the U.S. Geological Survey have concluded that most induced earthquakes in the United States are a result of the deep disposal of wastewater related to oil and gas production. *See* Justin L. Rubinstein & Alireza Babaie Mahani, *Myths and Facts on Wastewater Injection, Hydraulic Fracturing, Enhanced Oil Recovery, and Induced Seismicity*, 86 Seismological Res. Letters 4, 1 (2015), *available at* https://profile.usgs.gov/myscience/upload_folder/ci2015Jun1012005755600Induced_EQs_Review.pdf.; Mark D. Petersen, *et al.*, U.S. Geological Survey, *Incorporating Induced Seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 Workshop and Sensitivity Studies*, Open-File Report 2015-1070, *available at* http://pubs.usgs.gov/of/2015/1070/pdf/ofr2015-1070.pdf. Both OGS and the USGS have clarified that the primary source for suspected triggered seismicity is not fracking itself, but rather the use of injection/disposal wells during oil and gas production, including fracking.

While causation is not conclusive, there may be sufficient scientific data for these lawsuits to have legs and pose a real threat to the oil and gas industry as well as its insurers. Q

Scott Watson Named a *Law360* "Rising Star" in Intellectual Property

Law360 has named Los Angeles partner Scott Watson a 2015 Intellectual Property "Rising Star." Mr. Watson had a key role in defending against Apple's "holy war"—Steve Jobs's words—on the Android smartphone operating system. Mr. Watson significantly contributed to Samsung's victory in the face of allegations that it infringed five patents and owed Apple $2.2 billion in damages. Mr. Watson and Quinn Emanuel convinced the jury that two of Apple's patents were not infringed and that Apple's damages were less than 5.5% of the amount Apple sought. The trial team further convinced the jury that Apple itself was an infringer, having used technology covered by one of Samsung's asserted patents. *Law360* "Rising Stars" are selected from a highly competitive group, making Mr. Watson one of the nine foremost up-and-coming IP attorneys under 40. In addition to IP litigation, Mr. Watson practices in the areas of antitrust litigation, trade secret litigation, and significant business disputes. Q

Bankruptcy & Restructuring Litigation Update

Third Circuit Heads in Opposite Directions Regarding the Doctrine of Equitable Mootness. In two recent opinions issued within a month of each other, Third Circuit judges have argued in favor of overturning, and then preserving, the Court's "equitable mootness" doctrine. Pursuant to this doctrine, an appellate court may forbear deciding (indeed, even reaching) the merits of appeals in bankruptcy cases that would "undermine the finality and reliability of consummated plans of reorganization." *In re Tribune Media Co.*, Nos. 14-3332 & 14-3333, at *10 (3d Cir. Aug. 19, 2015). Equitable mootness is not identified in the Bankruptcy Code, but rather is a judicially-created "prudential" doctrine that is intended to bring finality to a confirmed plan when that plan has been substantially consummated, and granting the relief requested in the appeal will "(a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *Id.* at *12. All other Circuit Courts of Appeal also have found bankruptcy appeals to be equitably moot, although there is disagreement in the standards for applying the doctrine.

The Third Circuit adopted the equitable mootness doctrine *en banc* in a 7-6 decision in *In re Cont'l Airlines*, 91 F.3d 553 (3d Cir. 1996) (en banc), with then-Judge Alito leading the dissent. *Continental Airlines* can only be overturned by *en banc* reconsideration, which is precisely what Judge Krause requested in her concurring opinion in *In re One2One Commc'ns, LLC*, No. 13-3410 (3d Cir. July 21, 2015) (Krause, J., concurring) (the "Krause Concurrence").

Judge Krause criticized the equitable mootness doctrine with a three-pronged attack, arguing that its constitutionality was dubious, it was not authorized by any statute, and that it caused inequitable and inefficient results. Judge Ambro addressed these criticisms in his defense of the equitable mootness doctrine in his concurring opinion in *Tribune* (the "Ambro Concurrence"). Interestingly, Judge Ambro was the author of another Third Circuit opinion that cautioned strongly against the broad application of equitable mootness, and indeed was interpreted by some as a suggestion that he would not apply the doctrine but for the mandate of *Continental Airlines*. *See Samson Energy Res. Co. v. SemCrude (In re SemCrude, L.P.)*, 728 F.3d 314 (3d Cir. 2013) ("The presumptive position remains that federal courts should hear and decide on the merits cases properly before them").

Abstention. Judge Krause's constitutional concerns with equitable mootness began with the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," Krause Concurrence, at *5 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Believing federal courts to be required to exercise their jurisdiction unless there is an exception, she distinguished equitable mootness from the "narrow and deeply rooted abstention doctrines recognized by the Supreme Court." *Id.* at *5. Specifically, she argued that the abstention doctrines recognized by the Supreme Court, namely, *Pullman*, *Burford*, *Younger*, and *Colorado River*, allow federal courts either to relinquish jurisdiction in favor of another forum, or postpone its exercise. *Id.* at *5-7. On the other hand, equitable mootness yields to no other forum, and there is no later exercise of jurisdiction. While Judge Ambro did not address Judge Krause's abstention argument directly, it appears that he disagreed that a federal judge who determines that a plan confirmation appeal is equitably moot has abstained from exercising jurisdiction; instead, Judge Ambro believed that this judge has simply made an equitable determination to not award any relief. Ambro Concurrence, at *5-8.

Statutory Basis for Equitable Mootness and Related Constitutional Concerns. Judge Krause found no statutory support for equitable mootness in the Bankruptcy Code or related jurisdictional statutes. Krause Concurrence, at *8-14. Yet, Judge Ambro found that Bankruptcy Code sections 363(m) and 1127(b) "bespeak a congressional intent 'that courts should keep their hands off consummated transactions.'" Ambro Concurrence, at *4-5 (quoting *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994)). Judge Ambro agreed with the *UNR* Court that this congressional intent permits courts to fill in the interstices of section 1129—the plan confirmation provision, which is silent on judicial authority to modify or reverse plan confirmation orders on appeal—by protecting the finality of consummated plans with the equitable mootness doctrine. *Id.* at *5. Judge Krause, however, interpreted these provisions as narrowly prescribing certain specific orders that cannot be disturbed on appeal absent a stay, and not establishing a general policy supporting equitable mootness.

Judge Ambro also contended that because bankruptcy courts are courts of equity that apply the principles of equity jurisprudence, courts may decline to decide a case on the merits when granting relief would dismantle a consummated plan or disturb third parties' reasonable reliance on the finality of such a plan. *Id.* at *6. Judge Ambro compared the equitable mootness doctrine to the balance of harms inquiry undertaken by courts considering whether to award an injunction, in which a court will consider the harms to be suffered by the parties and the public if an injunction is or is not awarded. *Id.* at *6-8. Just as a court may decline to award injunctive relief because it would be inequitable—even after finding a strong likelihood of success on the merits—Judge Ambro argued that a court may decline to issue equitable remedies in the bankruptcy context.

For Judge Krause, even assuming, *arguendo*, that there were a statutory reading supporting equitable mootness, this reading would implicate serious constitutional concerns. Krause Concurrence, at *15-19. Bankruptcy courts are "Article I" courts, in that they do not conform to the requirements for the exercise of judicial powers provided by Article III of the U.S. Constitution. Among other things, bankruptcy judges are appointed by Circuit Court judges for 14-year terms, and thus differ from federal district and appellate judges who are appointed by the President, confirmed by the Senate, and have life tenure and salary protection. Judge Krause argued that a litigant has a constitutional right to an Article III adjudicator, which is frustrated if there is no appellate review of a bankruptcy court's adjudication. Krause Concurrence, at *15 (citing *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015)). She also contended that the result of equitable mootness is that an Article III judge does not adjudicate Article III business, so that the congressional decision to authorize bankruptcy judge adjudication impinged on the power of the Judicial Branch. Judge Krause noted that the Supreme Court recently approved adjudication of general litigation claims (*i.e.* claims not involving exclusively "core" bankruptcy matters) by bankruptcy judges with the parties' consent, but only with appellate review by Article III courts. Krause Concurrence, at *17.

Judge Ambro responded that a litigant's right is "to have claims decided before judges who are free from potential dominations by other braches of government," and because Article III courts apply equitable mootness, this right is not infringed. Ambro Concurrence, at *2 (quoting *Schor*, 478 U.S. at 848). With respect to Judge Krause's structural concern, Judge Ambro argued that Supreme Court jurisprudence warns against congressional efforts to transfer adjudication from state courts and Article III courts to bankruptcy and other so-called "Article I courts," rather than Article III courts declining to hear a case, as with equitable mootness. Ambro Concurrence, at *2.

Prudential Problems. The final battleground between Judge Krause and Judge Ambro is not whether equitable mootness is legitimate, but whether it actually works. Judge Krause questioned the efficacy of equitable mootness, finding that it has promoted uncertainty and delay rather than finality. Krause Concurrence, at *19. Judge Krause complained that proponents of plans of reorganization rush to implement them so that they may utilize an equitable mootness defense, instead of litigating the merits of the appeal. *Id.* at *20. Yet, rather than promoting finality, a fight of equitable mootness could simply delay the resolution of the merits, and thus prolong the uncertainty. The *One2One* procedural history is illustrative of this; the district court in *One2One* found the appeal of the plan confirmation order to be equitably moot, but on further appeal to the Third Circuit this finding was reversed and remanded for a ruling on the merits, two years after the parties briefed the district court appeal. *Id.* at *21. Judge Krause reasoned that because a district court's equitable mootness ruling could be reversed by the Third Circuit, the equitable mootness doctrine does not achieve finality. *Id.* at *21. Furthermore, Judge Krause wrote that removing appellate review harms the bankruptcy adjudication system by shielding errors and impeding the development of uniformity in bankruptcy law. *Id.* at *21-22.

Judge Ambro cautioned that the abolishment of the equitable mootness doctrine would likely thwart complex reorganizations from being consummated until all appeals were terminated. Ambro Concurrence, at *8. He further predicted that any litigious creditor could coerce other constituents to pay settlement consideration in order to drop a plan confirmation appeal by threatening to delay emergence from bankruptcy for years. *Id.* at *9. Judge Ambro contended that any delay is costly, as a company will have difficulty attracting investors, employees, and possibly even customers as long as it remains in bankruptcy. *Id.*

Judge Ambro acknowledged (as he did previously in *SemCrude*) that equitable mootness is the "rare exception," and is "only in play for consideration when modifying a court order approving a since-consummated plan would do significant harm." Ambro Concurrence, at *8. Nonetheless, he suggests that it may be applied in "[c]omplex bankruptcies reorganiz[ing] thousands of relationships among countless parties," which are routinely filed in the Delaware bankruptcy court, and whose appeals go to the Third Circuit. Ambro Concurrence, at *8.

However, Judge Krause argued that the equitable mootness doctrine has been overused. She noted that "district courts have continued to invoke the doctrine in modest, non-complex bankruptcies and where appellants have sought limited relief," Krause Concurrence, at *2-3, even though the Third Circuit designed the doctrine "to be 'limited in scope and cautiously applied'", Krause Concurrence, at *1 (quoting *Continental*, 91 F.3d at 559), only for "attempts to 'unscramble *complex* bankruptcy reorganizations,'" *id.* at *2 (quoting *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001) (emphasis in original)), and inapplicable when limited relief is available on appeal.

Conclusion. The recent, internal Third Circuit debate over the legitimacy and efficacy of the equitable mootness doctrine, and the significance of the doctrine in the bankruptcy realm, indicate that the Court may be prepared to revisit whether the doctrine should be modified or abolished. Moreover, given differing standards among the Circuits as to when and how equitable mootness should be applied, *see In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012) (appeal is presumed moot when plan is consummated and burden is placed on appellant), and now-Justice Alito's concerns about the doctrine as expressed in *Continental Airlines*, the Supreme Court may elect to consider this issue in the not too distant future.

Securities & Structured Finance Litigation Update

Renewed Potency for Personal Jurisdiction Defenses in the United States. Personal jurisdiction may be an afterthought for many lawyers. But recent developments—including an August 4, 2015 decision in the ongoing *LIBOR* multidistrict litigation—mean that personal jurisdiction defenses have become a potent weapon for corporate defendants in U.S. litigation.

The Supreme Court Changes the Landscape. For years, companies generally conceded personal jurisdiction in every state where they were doing business because "minimum contacts" meant that plaintiffs were able to show personal jurisdiction based on a defendant's business in that state.

That started to change in 2011, when the Supreme Court issued its opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In that case, the Supreme Court rejected the exercise of general jurisdiction in North Carolina over various subsidiaries of a United States tire manufacturer in a suit arising out of a French bus accident. *Goodyear*, 131 S. Ct. at 2858. The Court held that general jurisdiction required a forum like the corporation's domicile, place of incorporation, or principal place of business, "in which the corporation is fairly regarded as at home." *Id.* at 2853-54.

Three years later, in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Supreme Court rejected the exercise of personal jurisdiction over a German company in California. *Id.* at 762. The Court held that—despite the extensive contacts between the German company's U.S. subsidiary and California—the German company was not subject to general jurisdiction in California for injuries allegedly caused by the conduct of its Argentinian subsidiary in Argentina, because California was not defendants' principal place of business or state of incorporation. *Daimler*, 134 S. Ct. at 761. General jurisdiction was no longer available in every jurisdiction in which a corporation "engages in a substantial, continuous, and systematic course of business" (*id.*), but, absent "exceptional circumstances," was to be available only in "the place of incorporation and principal place of business" of the corporation. *Id.* at 760.

Then, in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Court rejected the exercise of specific personal jurisdiction in Nevada against a Georgia DEA officer who filed an allegedly false affidavit against plaintiff, a Nevada citizen, about an incident at the Atlanta airport. *Walden*, 134 S. Ct. at 1118. The Supreme Court held that "random, fortuitous, or attenuated contacts" are insufficient; that a defendant's suit-related conduct must create a substantial connection with the forum state; and that "the mere fact that [defendant]'s conduct affected plaintiffs with connections to the forum state does not suffice to authorize jurisdiction." *Walden*, 134 S. Ct. at 1126.

The Fallout: LIBOR IV. On August 4, the effect of the recent turn in personal jurisdiction case-law was brought home by a decision in the Southern District of New York in the ongoing *LIBOR* litigation on motions to dismiss brought by multiple defendants on personal jurisdiction grounds.

The Court's August 4, 2015 opinion followed the recent trend in Supreme Court cases. *First*, the Court rejected the exercise of general jurisdiction outside a defendant's place of incorporation or principal place of business. *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 4634541, at *21 (S.D.N.Y. Aug. 4, 2015). Even representations to the Federal Reserve and the FDIC that the New York branches of certain moving defendants were "significant to the activities of a critical operation or core business line" were insufficient to create general jurisdiction and did not present an "exceptional case." *Id.* at *21.

Second, the Court upheld specific jurisdiction only as to claims that "ar[ose] out of or [are] relate[d] to the defendants' forum-related conduct." *Id.* at *15. The Court rejected specific jurisdiction over co-conspirators, holding that "a bare allegation of a conspiracy…is not enough" to establish specific jurisdiction. *Id.* at *24. The Court also rejected specific jurisdiction based on the marketing of LIBOR into particular forums, on the ground that "the importance of LIBOR was its universal significance, not its projection into any particular state," and that this theory of specific jurisdiction "would improperly create 'de facto universal jurisdiction.'" *Id.* at *25. The Court further rejected specific jurisdiction over bond and MBS issuers, holding that securities may arrive in the hands of plaintiffs anywhere in the world by plaintiffs' own trades—not at the direction of the issuers—and that such a "fortuitous, plaintiff-driven contact cannot support personal jurisdiction." *Id.* at *26. And the Court rejected specific jurisdiction based on a LIBOR-related government investigations or settlements in the United States or a particular state, because those activities were not the "basis of plaintiffs' claims." *Id.*, at *28.

The thrust of the Court's ruling was that even banking defendants in New York, for example, with permanent offices and thousands of employees in New York, who hold themselves out to the Federal Reserve as central to the U.S. banking system, are not subject to suit in New York if New York is not their place of incorporation or principal place of business, or if the suit does not otherwise directly arise out of their activities in New York.

The consequences of this position are far-reaching. Plaintiffs in complex lawsuits must now consider bringing claims in different jurisdictions against different defendants to establish personal jurisdiction. Corporate defendants now routinely bring motions to dismiss on personal jurisdiction grounds for suits not in their principal places of business or state of incorporation. And, as demonstrated by the *LIBOR* decision (consistent with dozens of other decisions applying *Daimler*), these motions are now far more likely to be granted.

ITC Update

Suprema: *Restoring the Reach of Section 337.* On August 10, 2015, the Federal Circuit resolved the largest challenge to the International Trade Commission's ("ITC") jurisdictional reach in recent years: whether 19 U.S.C. § 1337 ("Section 337") allows the ITC to issue remedies over induced infringement of method claims, and whether Section 337's broad language encompasses articles that do not directly infringe method claims of an asserted patent at the time of importation, but only after the article is combined or modified domestically—in this case by having software installed on the imported device.

Background. Cross Match Technologies, Inc. filed a complaint with the ITC on May 11, 2010, alleging that Suprema, Inc.'s imported fingerprint scanners infringed Cross Match's patents, either by themselves or when combined post-importation with software created and installed by Mentalix, Inc. *See Suprema, Inc. v. Int'l Trade Comm'n*, No. 2012-1170, at 4-5 (Aug. 10, 2015) ("*Suprema II*"); *see also Certain Biometric Scanning Devices, Components Thereof, Associate Software, and Products Containing the Same*, Inv. No. 337-TA-720, Comm'n Op. at 3-4 (Nov. 10, 2011) ("*Scanning Devices*"). Former Chief Administrative Law Judge Luckern found that the combination of Suprema's imported devices with Mentalix's domestic software directly infringed the asserted claims and that Suprema induced this infringement by, *inter alia*, providing a software development kit to Mentalix; therefore finding a violation of Section 337, which the Commission upheld on review. *See generally Scanning Devices*, Comm'n Op.; *Scanning Devices*, Initial Determination (June 17, 2011).

Suprema and Mentalix appealed several of the Commission's findings to the Federal Circuit, including the finding of direct infringement by Mentalix and indirect infringement by Suprema of claim 19 (a method claim) of U.S. Patent No. 7,203,344. *Suprema II*, No. 2012-1170 at 10. A divided three-judge panel of the Federal Circuit reversed, finding that Section 337 has a temporal requirement – that the ITC's jurisdiction over "articles that infringe" requires accused products to be infringing at the time of importation. *See Suprema, Inc. v. Int'l Trade Comm'n*, 742 F.3d 1350, 1363 (Fed. Cir. 2013) ("*Suprema I*"). The panel's December 13, 2013 opinion concluded that the ITC's authority did not reach articles that only infringed asserted method claims following post-importation activities. *See Suprema I*, 742 F.3d at 1353 ("[A]n exclusion order based on a violation of § 337(a)(1)(B)(i) may not be predicated on a theory of induced infringement where no direct infringement occurs until post-importation."). The panel's decision was vacated in May 2014, when the Federal Circuit granted an *en banc* hearing, reinstating Suprema and Mentalix's appeals.

The* En Banc *Decision. Circuit Judge Reyna wrote the opinion for the court, with four of the ten-

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Trial Victory for AngioScore

The firm recently obtained an important trial victory for client AngioScore, Inc. in the Northern District of California. The Court awarded AngioScore approximately $20M in damages plus additional relief. AngioScore manufactures and sells specialized angioplasty balloon catheters. A member of the company's Board of Directors—while on the Board—developed a competing angioplasty balloon catheter. He resigned from the Board when his development work was discovered. Angioscore sued the director's companies for patent infringement when the new product was released. During discovery, Angioscore learned that the work on the competing product had begun while the director was still on the board and added claims alleging breach of fiduciary duty. At that point, Quinn Emanuel was retained.

The firm completed discovery on the fiduciary duty claims. Summary judgment practice established key elements of Angioscore's case. Trial was conducted over six days. The Court's 110 page Findings of Fact and Conclusions of Law will likely be regarded as a landmark explanation of the duties of members of boards of directors. In particular, the opinion reinforced the law that a person's right to innovate may not interfere with the fiduciary duties of a director. Because the case was decided under Delaware law, it will be particularly influential.

Groundbreaking *Pro Bono* Equal Protection Victory

The firm won a groundbreaking Second Circuit decision holding that a portion of the Immigration and Nationality Act is unconstitutional under the Equal Protection Clause of the Fifth Amendment.

In 2012, Quinn Emanuel was appointed by the Second Circuit to act as *pro bono* appellate counsel to Luis Morales-Santana in his petition for review of a Board of Immigration Appeals ("BIA") decision denying his motion to reopen removal proceedings to evaluate his claim that, although he was born in the Dominican Republic to a Dominican mother and Puerto Rican father who were not married at the time, he nevertheless obtained American citizenship at birth derivatively through his father, who obtained American citizenship in 1917 pursuant to the Jones Act of Puerto Rico (codified at 8 U.S.C. s. 1402 (1917)).

In the decision below, in which Mr. Morales represented himself *pro se*, the BIA denied Mr. Morales's citizenship claim because, under the statutory scheme in effect at the time Mr. Morales was born, a child born abroad to an unwed U.S. citizen *father* and non-citizen mother—like Mr. Morales—has citizenship at birth only if the father was present in the United States or outlying possession prior to the child's birth for a period of ten years, with at least five of those years occurring after the father turned fourteen. Mr. Morales's father departed the U.S. outlying possession of Puerto Rico 20 days before his nineteenth birthday, and the BIA held that he therefore fell 20 days short of satisfying the statutory requirements. Under the same statutory scheme, however, a child born outside of the United States to an unwed U.S. citizen *mother* and non-citizen father derives American citizenship at birth so long as the mother was present in the United States or one of its outlying possessions for a continuous period of only one year at some point prior to the child's birth. Thus, Mr. Morales's father could satisfy the one year requirement applicable to mothers, but not the age-calibrated 10 year requirement applicable to fathers. (This discriminatory scheme exists in the current version of the statute in a slightly less onerous form.)

The firm challenged the statutory scheme as unconstitutional under the Equal Protection Clause of the Fifth Amendment, and the Second Circuit agreed. The Court held, *inter alia*, that (1) the statute is facially discriminatory; (2) intermediate scrutiny applies; (3) the Government failed to demonstrate that the discriminatory scheme is substantially related to an important governmental objective; and (4) the appropriate remedy is to extend to unwed citizen fathers the more favorable treatment the statute affords to unwed citizen mothers.

In so holding, the Second Circuit split with the Ninth Circuit on this issue of national importance—an issue that also split the Supreme Court 4-4 (with Justice Kagan recused) when it was presented on appeal from the Ninth Circuit—and dramatically altered the statutory scheme at issue.

The decision has broad implications not only as a matter of constitutional and statutory law, but also for numerous individuals (here in the United States and abroad) who are now deemed to be American citizens as of their birth.

As a result of the decision, the Court declared that Mr. Morales—who has been in federal detention subject to a deportation order for over two years pending the outcome of his appeal—derived American citizenship at birth from his father, and therefore he cannot be deported. Mr. Morales was released from federal detention the day after the Second Circuit issued its decision. He is now an American citizen as a matter of law.

Victory in *Pro Bono* Habeas Petition

The firm recently obtained a writ of habeas corpus for our *pro bono* client, Adalgisa Rivas, who had been imprisoned by DHS for months and could have remained in prison for years had she not been granted relief. Ms. Rivas immigrated to the United States in her teens and has lived in the country legally for over 30 years. She has three children and two grandchildren who are United States citizens. In early 2015, Ms. Rivas applied for citizenship herself, but was instead imprisoned by ICE and placed in line for lengthy deportation proceedings. Her detention was premised on a federal statute that calls for mandatory detention of certain ex-criminal aliens "when . . . released" from custody. While Ms. Rivas had previously been convicted of a non-violent felony, the incident took place over 15 years prior, and she had never been imprisoned in her life. If given an opportunity to be heard, her record would have reflected virtually no risk of flight nor threat of harm to her community. Nonetheless, the government refused Ms. Rivas the opportunity for an individualized bond hearing because its position was that her detention was mandatory as a matter of law rather than discretionary.

The firm filed a petition for writ of habeas corpus in the United States District Court for the Southern District of New York to request that the Court compel the government to grant Ms. Rivas the opportunity for release on bond. With the Southern District deeply fractured on how to interpret the mandatory detention statute, Quinn Emanuel prepared briefing for an uphill battle on multiple grounds ranging from plain language statutory interpretation to substantive due process. At the same time, the firm negotiated with the U.S. Attorney's Office and requested that it consider Ms. Rivas' particular circumstances in view of the constantly evolving case law in the District. Before oral argument was required, the firm convinced the U.S. Attorney's Office to not contest its petition and to grant Ms. Rivas an expedited bond hearing—the ideal conclusion given the time-sensitive nature of the relief our client required. As a result of the firm's efforts and the invaluable support of the Legal Aid Society, Ms. Rivas had her bond hearing and has been released from custody while she fights the deportation proceedings. Q

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Judge panel dissenting. The Court applied a *Chevron* analysis to find the ITC's interpretation of Section 337 was "consistent with the statutory text, policy, and legislative history of Section 337." *Suprema II* at 20; *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Federal Circuit held that Section 337 was designed to be "broad enough to prevent *every type and form* of unfair practice" and that the ITC's jurisdiction "should not be limited to, or by, *technical definitions* of those types of acts." *Suprema II* at 21-22 (emphasis in original) (citations omitted).

Indeed, the Court expressly protected the ITC's right to investigate violations of Section 337 involving induced infringement, holding:

> "The panel's interpretation of Section 337 would eliminate relief for a distinct unfair trade act and induced infringement. There is no basis for curtailing the Commission's gap-filling authority in that way. Indeed, the practical consequence would be an open invitation to foreign entities (which might for various reasons not be subject to a district court injunction) to circumvent Section 337 by importing articles in a state requiring post-importation combination or modification before direct infringement could be shown."

Id. at 25. In so finding, the Federal Circuit held that Section 337 did not unambiguously exclude induced infringement related to post-importation activities from the ITC's jurisdiction, *see id.* at 12-19, and that the ITC's interpretation of Section 337 was consistent with both Congress's intent and the statute's text. *See id.* at 19-26.

Going Forward. The ITC still faces significant questions as to how far-reaching Section 337's jurisdiction truly is, such as in the recently-argued *ClearCorrect* case, in which the ITC interpreted the definition of "articles" under Section 337 to include electronic transmissions, thus holding that Section 337 grants the ITC jurisdiction over digital models and data that were uploaded from Pakistan to a computer server in the U.S. *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 2014-1527 (Fed. Cir. 2015). Nevertheless, the Federal Circuit's protection of Section 337's ability to remedy post-importation infringement ensures that the ITC will remain an important venue for litigating method patents. Q

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business litigation report

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