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Business Litigation Report

FIRM ANNOUNCEMENTS

Quinn Emanuel Welcomes New Partner Class
PAGE 2

PRACTICE AREA UPDATES

Life Sciences Update: Commercially Reasonable Efforts in Earnout Cases
PAGE 13

Financial Services Update: Cryptocurrency: Federal Preemption Issues in Pending Legislation
PAGE 15

VICTORIES

Quinn Emanuel Secures an Unprecedented Win for Anne Wojcicki and TTAM Research Institute in 23andMe Bankruptcy Auction
PAGE 18

FIRM ANNOUNCEMENTS

Quinn Emanuel Welcomes New Partner Class

The firm recently announced that it has elected twelve lawyers to partnership. This class spans offices from Los Angeles to Munich, reflecting he firm's continued global expansion and depth across key practice areas.

The newly elected partners are:

Veronica Bartholomew – Based in Wilmington, Delaware, Veronica focuses on corporate litigation, with significant experience representing both public and private companies, private equity firms, founders, and directors in Delaware litigation. She has successfully represented plaintiffs and defendants through trial or resolution in M&A disputes, breach of contract cases, fiduciary duty litigation, and Delaware statutory proceedings. Her notable representations include multiple post-trial victories and pleading stage dismissals in the Delaware Court of Chancery. Veronica graduated from Duke Law School (top 5%) and the University of Notre Dame (summa cum laude, Valedictorian candidate), where she was also an NCAA Division 1 Women's Basketball National Finalist.

Alex Bergjans – Based in Los Angeles, Alex focuses on complex commercial, media, employment, and intellectual property litigation. He has been a member of teams that successfully tried high-profile cases in state and federal courts and in arbitration. Alex has helped clients win complete defense verdicts on multi-billion dollar claims and protect those judgments on appeal. Alex previously served as a Deputy City Attorney in the Los Angeles City Attorney's Consumer Protection Unit, where he first-chaired criminal trials and led complex civil investigations and litigation, including an investigation that resulted in one of the nation's largest civil judgments for COVID-19 testing fraud. He graduated from Georgetown Law (cum laude) and Northwestern University.

James Bieber – Based in Los Angeles, Jimmy focuses on complex commercial litigation and other high-stakes disputes. He represents clients in a wide range of complex business litigation matters, including contract disputes, intellectual property litigation, and technology disputes. Jimmy joined the firm after graduating in the top 1% of his class from UCLA School of Law.

Leigha Empson – Based in New York, Leigha has a practice that centers on complex commercial litigation with an emphasis on securities litigation. She represents both plaintiffs and defendants in a broad range of complex commercial disputes from pre-complaint investigations through trial, with significant experience in state and federal courts across the country and in arbitration. Leigha joined the firm in 2017 and graduated from Harvard Law School.

Jonathan Feder – Based in New York, Jonathan specializes in M&A and corporate governance litigation. With industry-leading experience taking deals through trial, he has obtained post-trial termination, specific performance of closing, and exposed a "dodgy bargain" in expedited deal-enforcement trials. In a recent representation, Jonathan successfully forced a complete change of control at Delaware, Nevada, and Texas entities. Jonathan currently represents and advises several clients in litigation and on pre-litigation strategy in major pending deals. He also litigates high-profile corporate governance matters in the Delaware Court of Chancery and has successfully defended individuals and entities facing public and private prosecutions alleging corporate misconduct. Jonathan graduated magna cum laude from the University of Pennsylvania Law School, where he served on the board of the University of Pennsylvania Law Review.

Yehuda Goor – Based in New York, Yehuda focuses on high-stakes complex litigation, including major commercial disputes, sovereign and judgment enforcement litigation, and contentious finance, tech, insurance, and energy matters. His practice spans federal and state courts across the country, as well as multinational litigation in various jurisdictions. Admitted to practice in both New York and Israel, Yehuda often represents Israeli companies and individuals facing U.S. litigation and regulatory challenges, and advises international clients on cross-border matters involving Israel. Prior to joining Quinn Emanuel, he served as a legal officer at the United Nations and clerked for the Honorable Uzi Vogelman of the Supreme Court of Israel. Yehuda received his LL.M. from Harvard Law School and his LL.B. magna cum laude from Tel Aviv University, where he was Editor-in-Chief of the Law Review.

Dr. Andreas Hahne – Based in Munich, Andreas is a German qualified attorney (Rechtsanwalt) whose practice focuses on national and cross-border patent litigation. He represents clients before the Unified Patent Court (UPC) and the major German patent infringement courts (Düsseldorf, Mannheim/Karlsruhe, and Munich) at the trial and appellate levels, in nullity proceedings before the German Federal Patent Court and the Federal Supreme Court, and in opposition proceedings at the European Patent Office (EPO). His expertise covers all aspects of complex patent litigation over a wide range of technologies such as life science, IT, telecommunications, and automotive. Andreas joined the firm in 2016 and obtained his Ph.D. in Law (Dr. jur.) from Ludwig Maximilian University of Munich and his LL.M. from Queen Mary University of London.

Nicholas Inns – Based in Washington, D.C., Nick joined the firm in 2021 following a decade of service in the Navy as a member of the Judge Advocate General's Corps. During his military career, he prosecuted and defended sailors accused of felonies and litigated more than thirty contested cases to verdicts. His practice focuses on complex international commercial litigation and white collar matters, including economic sanctions and global disputes. He graduated from Harvard Law School and Northwestern University.

James McSweeney – Based in London, James focuses on white collar criminal defense and corporate investigations, complex commercial litigation, and defamation. His practice includes all aspects of white collar crime and corporate investigations, and he has experience representing clients in complex commercial disputes before English courts. James joined the firm in 2017 and is qualified as a barrister in England and Wales.

Kate Scherling – Based in New York, Kate focuses on corporate bankruptcies and bankruptcy-related litigation, including fraudulent transfer, recharacterization, and breach of fiduciary duty matters. She has represented creditors and debtors in contested matters, including DIP financing challenges, rejection motions, and contested plan confirmations, and has advised numerous independent directors in connection with restructuring transactions and investigations. Kate also worked in the U.S. Senate Office of the Legislative Counsel, where she drafted legislation related to bankruptcy and banking. She graduated from Fordham Law School cum laude.

Eric Wolkoff – Based in Boston, Eric focuses on complex commercial and securities litigation, including cases for private equity, venture capital, and hedge fund clients and their portfolio companies. He has successfully represented clients in the financial services, healthcare, pharmaceutical, and life sciences industries in a wide range of matters, including matters involving unfair competition, trade secret litigation, fraud, breach of contract, partnership disputes, and breach of fiduciary duty claims. Eric has significant courtroom experience, having examined and cross-examined both fact and expert witnesses at trial and in arbitration, taken and defended numerous depositions, and argued dispositive motions. He is admitted in Massachusetts and New York and graduated from Columbia Law School.

Jianjian Ye – Based in New York, Jianjian (JJ) specializes in complex commercial litigation, with particular expertise in M&A disputes, bankruptcy-related litigation, securities fraud class actions, and judgment enforcement matters. With native Mandarin fluency and deep cultural understanding, JJ serves as a strategic advisor to Chinese and Asian clients navigating U.S. litigation and regulatory challenges. Prior to joining the firm in 2019, JJ clerked for the Honorable J. Paul Oetken of the United States District Court for the Southern District of New York. He graduated cum laude from Harvard Law School, and received his LL.B. from Tsinghua University.

SECTION 72 OF THE UK ARBITRATION ACT: RIGHTS OF PARTIES WHO DO NOT PARTICIPATE AT ALL IN ARBITRATION PROCEEDINGS TO CHALLENGE AWARDS

Creditor-on-Creditor Violence: How Liability Management Exercises Became the New Bankruptcy

On December 31, 2024, two appellate courts issued decisions that crystallized the current state of corporate restructuring in America. In *In re Serta Simmons Bedding, L.L.C.,* 125 F.4th 555 (5th Cir. Dec. 31, 2024), the court invalidated an uptier exchange based on its credit agreement language. The same day, in *Ocean Trails CLO VII v. MLN Topco Ltd.*, 2024 N.Y. Slip Op. 06660 (App. Div. 1st Dep't Dec. 31, 2024), a different court upheld a nearly identical transaction interpreting subtly different contract language. Small differences in hundreds of pages of credit documents drove opposite outcomes in billion-dollar disputes.

These decisions matter because liability management exercises have fundamentally transformed corporate restructuring. According to Oaktree Capital Management's Q4 2024 report "The LME Wave," over 50% of corporate defaults now occur through Liability Management Exercises (LMEs) rather than traditional Chapter 11 bankruptcy. Yet many companies executing LMEs still file bankruptcy subsequently, suggesting these transactions often delay rather than prevent insolvency. For business leaders—whether running leveraged companies, investing in leveraged loans, or serving on corporate boards—understanding LME structures, litigation outcomes, and creditor dynamics has become essential.

How Liability Management Exercises Became the Dominant Restructuring Tool

The rise of LMEs can be traced back to three market transformations. First, covenant-lite loans grew from roughly 1% of the leveraged loan market in 2000 to over 90% by 2021, replacing quarterly maintenance covenants with incurrence covenants tested only when taking specific actions. This gave borrowers extraordinary flexibility. Simultaneously, institutional ownership replaced relationship banking, with collateralized loan obligations now holding 60-65% of leveraged loans, creating a diffuse creditor base that struggles to coordinate. Finally, credit agreement drafters inadvertently created exploitation opportunities through flexible investment baskets, undefined terms, and sacred rights provisions that failed to address modern restructuring techniques.

J. Crew's dropdown transaction in 2016 and 2017 established the template. The company transferred valuable intellectual property to an unrestricted subsidiary by stacking multiple investment baskets, then used that IP to collateralize new financing outside existing lender protections. The transaction spawned "J. Crew blockers" in subsequent deals. However, market data shows only about 9% of recent loans contain comprehensive dropdown protections, compared to roughly 70% containing uptier blockers—suggesting the market learned to defend against uptier exchanges but left dropdown vulnerabilities largely unaddressed.

The uptier exchange emerged as the dominant structure in 2020. Boardriders and Serta Simmons demonstrated how majority lender coalitions could create super-priority debt and subordinate non-participants. The mechanics are designed to exploit a gap: whereas amendments affecting principal, interest, maturity, and collateral release require unanimous consent, lien subordination historically did not. The market responded with anti-subordination provisions jumping from roughly 10% of new deals to 70% post-2020, but the installed base of existing loans remains vulnerable. The pattern is clear: exploitation becomes standard playbook, protective provisions evolve, new structures follow.

The Transaction Playbook: How Value Gets Redistributed

These market conditions enabled two main transaction structures, uptier exchanges and dropdown transactions, that now dominate liability management exercises with many other creative offshoots.

Uptier exchanges allow borrowers to work with lenders holding sufficient debt—typically at least 50.1% ("Required Lenders")—to create new priority tranches that subordinate existing ones. Participating lenders exchange existing debt for "second-out" priority (terms for converting existing debt into new priority positions) while providing "first-out" new money (first-out debt is first in line for repayment from the company's assets). Exit consents—amendments that departing lenders approve as they leave—strip protections from legacy debt: wider covenants, removed events of default, and amended no-action clauses (provisions preventing individual lenders from suing without meeting minimum thresholds) to inhibit litigation. In the Travelport transaction, subordinated lender recovery estimates dropped from 75% to 0% according to S&P. In some transactions, this new priority debt can exceed US$1 billion, fundamentally reshaping the capital structure.

Dropdown transactions transfer collateral assets from the restricted credit group to entities outside lender protections, automatically releasing liens. Investment basket capacity enables these transfers: credit agreements permit dedicated unrestricted subsidiary investments, general investment baskets, and "builder" baskets that

accumulate based on financial performance. Companies have stacked multiple baskets to designate entire profitable business segments as unrestricted. For example, Envision Healthcare transferred its valuable ambulatory business outside the credit group. J. Crew blockers focused narrowly on intellectual property but left other assets unprotected.

The creativity does not stop there. Beyond uptiers and dropdowns, sophisticated advisors continue developing new structures that exploit document gaps:

- **New money purchases into creditor classes:** Investors buy enough debt to control amendment votes, then approve transactions benefiting themselves at other creditors' expense.
- **Double-dip structures:** A subsidiary borrows money with parent guarantees (first claim), then lends that money to the parent and pledges the IOU back to the lender (second claim)—creating two recovery paths from one loan.
- **Priming lien structures:** Creative covenant interpretation elevates certain debt above previously equal-priority obligations.
- **Amendment and extension transactions:** Borrowers bifurcate lender groups by offering some lenders extended maturities with different economics, splitting the class.
- **Selective consent payments:** Borrowers manipulate "most favored nation" provisions through carefully structured payment terms that technically comply but create economic pressure.

The pattern is consistent: transaction structures evolve faster than protective provisions can be embedded in new deals. For those drafting credit agreements, specific prohibitions get circumvented through new structures, while principles-based protections that prohibit subordination or value transfers "directly or indirectly" fare better but have disappeared in the era of "cov-lite" loans.

The Systematic Sorting: Who Wins and Who Loses

LME transactions divide creditors into distinct tiers. Understanding transaction mechanics is only half the picture—the other half is understanding who gets invited to participate in structuring these deals. Steering committees comprising the largest lenders negotiate directly with borrowers and receive the best economics: new money fees, backstop commitments, and the most favorable terms for converting existing debt into new priority positions. Ad hoc participants achieve some protection but on less advantageous terms. Non-participating lenders hold subordinated legacy debt with recovery prospects that can deteriorate from investment-grade to near-zero overnight.

Information asymmetry drives outcomes. Steering committees receive non-public information under confidentiality agreements and negotiate term sheets weeks before public announcement. Ad hoc groups form through self-identification—creditors finding each other through bilateral contacts or advisor outreach. Smaller investors often learn about transactions only when publicly announced, by which time key economic terms are set. This dynamic has driven creditors to seek collective defenses.

Cooperation agreements have emerged as the primary defensive mechanism, with more than ten formations reported in the first half of 2024 alone according to Reorg. These binding agreements require creditors to work together, vote collectively on group-approved proposals, and reject non-approved offers. Transfer restrictions ensure members can only sell positions to other participants or purchasers who sign joinders. In the Altice France transaction, over 90% of term lenders joined the cooperation agreement, creating formidable collective leverage. However, these agreements favor early participants, with materially different economics for initial parties versus those who join later, and some recent agreements now limit subsequent participation entirely.

Family offices represent a case study in structural disadvantage. Family offices merit particular attention because they represent a growing portion of leveraged loan buyers yet lack the institutional infrastructure to protect themselves. Position sizes are typically too small for steering committee access—committees typically form around lenders holding US$50 million or more. They maintain limited restructuring expertise compared to dedicated distressed teams at large institutional investors. Decision-making moves more slowly: whereas major institutional restructuring groups commit capital in days, family offices may need weeks for investment committee approval. They have fewer relationships with restructuring advisors who facilitate group formation. Legal fees for active participation can exceed US$50,000 to US$100,000, difficult to justify ex ante but minimal compared to subordination losses.

Most critically, family offices learn about transactions too late. Steering committees operate under confidentiality for weeks. By public announcement, the family office investor must decide within days whether to participate in a transaction whose terms were negotiated without their input. The lesson extends beyond family offices: any creditor without scale, relationships, and dedicated expertise faces systematic disadvantage. Specialized litigation counsel can provide partial offset to these resource disadvantages, creating the possibility of challenging disadvantageous terms or negotiating better treatment. It is particularly important for family office investors to retain special litigation counsel early in the process if they perceive stress in one of their investments.

Independent Directors: When Process Protects Against Claims

Although creditor positioning determines who wins and loses economically, companies face a different challenge: managing liability risk from the transaction itself. Companies appoint independent directors when conflicts exist with equity sponsors—nearly universal in PE-sponsored LMEs. Delaware law provides the framework: directors of solvent companies owe duties to shareholders, not creditors, even in the "zone of insolvency." Only upon actual insolvency do creditors gain standing for derivative claims.

Process provides protection. True independence means directors with no financial ties to the sponsor or management, separate legal and financial advisors hired by the committee (not company management), and actual authority to approve or reject the transaction rather than merely recommend. J. Crew's dropdown succeeded partly because independent directors with complete discretion retained independent consultants for solvency opinions. The resulting factual record withstood scrutiny and substantially undermined subsequent fraudulent transfer claims—allegations that a company transferred assets or incurred debt while insolvent, potentially allowing courts to unwind transactions. Conversely, in SportCo Holdings, all directors were PE sponsor or company employees—the court denied dismissal of duty of loyalty claims. *Friedman v. Wellspring Capital Mgmt., LLC (In re SportCo Holdings, Inc.)*, No. 20-50554, 2021 WL 4823513 (Bankr. D. Del. Oct. 14, 2021).

Why Contract Language Determines Everything

Process protections only matter if the underlying transaction complies with the credit agreement. And that determination turns entirely on contract language. The *Serta Simmons and Mitel Networks* decisions demonstrate how minutiae drive billion-dollar outcomes. In Serta, the credit agreement permitted non-pro rata assignments "through open market purchases." The Fifth Circuit held "open market purchase" requires purchase on the secondary market for syndicated loans—privately negotiated debt exchanges do not qualify. It allowed excluded lenders to have a "strong case" for breach. The Mitel credit agreement permitted "purchase" without the "open market" qualifier. The New York Appellate Division found refinancing can constitute a "purchase." Transaction upheld. Two-word difference, opposite outcomes.

Sacred rights provisions require unanimous consent for key amendments: principal, interest, maturity, collateral release. Historically, lien subordination did not require unanimous consent. Strong anti-subordination provisions now prohibit amendments that "subordinate, or have the effect of subordinating" liens without affected lender consent. Weak provisions prohibit subordination "unless all lenders are offered ratable participation"—allowing circumvention through selective solicitation.

The phrase "have the effect of" proved critical in Wesco/Incora. Participating noteholders issued additional notes (simple majority), creating the required vote threshold by first issuing new debt to friendly parties, then used the manufactured supermajority to release liens. Judge Isgur ruled the first amendment "had the effect of" releasing liens even though indirect. The phrase captured the multi-step transaction, invalidating it. Courts increasingly collapse multi-step transactions rather than blessing each step separately.

The takeaway is clear, precision in contract drafting determines outcomes. Courts give minimal weight to policy, industry practice, or fairness once applying plain-meaning interpretation. Given this unpredictability, parties increasingly recognize that litigation risk must be managed from day one.

Litigation Across the Transaction Lifecycle

The role of litigation counsel extends far beyond courtroom advocacy. Value is created at multiple touchpoints.

Document analysis before negotiations is critical. Courts apply "plain meaning" interpretation and reject deference to market conventions. Litigation counsel assesses how courts will likely interpret provisions—distinct from transactional counsel's understanding of market practice. At origination, this means drafting provisions that actually prevent modern structures: true anti-subordination language, anti-stacking limitations, defined terms like "open market purchase," and voting mechanics preventing manufactured supermajorities.

Pre-transaction strategy for companies focuses on controlling the narrative and building defensive records. J. Crew filed a declaratory judgment action—a lawsuit seeking court confirmation that actions comply with contracts—immediately after closing. This controlled venue, timing, and narrative framing. According to market reports, 88% of term loan holders ultimately agreed to settlement. Independent special committee documentation creates the factual record essential for defending fraudulent transfer and implied covenant claims.

Creating leverage for excluded creditors requires speed. In TriMark USA LLC (New York Supreme Court), excluded lenders' litigation settled with non-participants exchanging debt dollar-for-dollar at par—complete recovery. *See Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 72

Misc. 3d 1218(A) (Sup. Ct. N.Y. Cnty. 2021). In *Boardriders*, excluded lenders ultimately received full repayment when Authentic Brands acquired the company during litigation. See *ICG Global Loan Fund 1 DAC v. Boardriders, Inc.,* Index No. 655175/2020 (Sup. Ct. N.Y. Cnty. Oct. 17, 2022). The litigation created settlement leverage translating into better economics than original offers. Critical barriers exist: no-action clauses prevent individual lawsuits without administrative agent consent or minimum debt thresholds, often 25% or more. Speed matters because transactions close within days of term sheet circulation.

Quinn Emanuel's Special Situations Group brings experience representing the full spectrum: companies executing transactions, participating lenders protecting positions, excluded creditors challenging treatment, and independent directors navigating fiduciary obligations. The firm's approach combines rigorous document analysis with litigation strategy from the outset, recognizing that LME transactions are negotiated with litigation risk in clear view.

An Evolving Landscape

Liability management exercises now represent the majority of significant corporate defaults. Yet the success rate tells a sobering story: industry data suggests that approximately 14% of companies executing LMEs successfully avoid subsequent bankruptcy filing. These transactions often delay rather than resolve fundamental business challenges.

The sophistication arms race continues: transaction structures evolve faster than protective provisions can be embedded in new credit agreements. Information and resource asymmetries that advantage large institutional investors over smaller creditors are structural features, not accidents. And as Serta and Mitel demonstrate, outcomes turn on contract language minutiae that only become clear through litigation.

The timeline matters critically. By the time term sheets circulate to the broader creditor base, steering committees have negotiated basic structure under confidentiality and positions are hardening. For all stakeholders—companies structuring deals, lenders protecting positions, excluded creditors challenging treatment, independent directors managing fiduciary risk—early engagement with specialized litigation counsel has become essential infrastructure. The sophistication required spans both transactional mechanics and litigation strategy. In this environment, that combined expertise is not a luxury. It is the cost of participation.

PRACTICE AREA UPDATES

Life Sciences Update:

Commercially Reasonable Efforts in Earnout Cases

Acquisition and license agreements in the life sciences space frequently contain earnout provisions. An earnout is a provision that makes a portion of the purchase price payable to the seller (or licensor) if/when certain post-closing performance targets (often called "milestones") occur.

Because earnout payments depend on achievement of the targets, sellers typically prefer to maintain some measure of control in the acquired pharmaceutical product or device. Buyers (or licensees), by contrast, prefer sole discretion over development and to minimize earnout payments. Parties often resolve these competing interests by negotiating a provision requiring the buyer to devote certain efforts toward meeting the targets.

One such provision is called "commercially reasonable efforts"—requiring the buyer to devote a certain measure of efforts to develop the product and/or achieve the targets. But what level of efforts are "commercially reasonable" is left to the parties to negotiate. So-called "outward-facing" provisions, for example, judge a buyer's efforts relative to those of similarly-situated industry participants. "Inward-facing" provisions, on the other hand, set efforts expectations based on the buyer's typical practices with its own products.

Disputes between parties to acquisition agreements can arise when earnout targets are not met, leading to litigation regarding whether the buyer devoted the requisite level of "commercially reasonable efforts" to achieve them. Because parties often resolve such disputes privately, caselaw interpreting "commercially reasonable efforts" provisions is limited. However, two recent decisions from the Delaware Chancery Court addressed the issue head-on, and serve as a warning that damages for failing to live up to "commercially reasonable efforts" provisions can be steep.

First, in *Fortis Advisors LLC v. Johnson & Johnson*, 2024 WL 4048060 (Del. Ch. Sept. 4, 2024), J&J acquired Auris Health, Inc. for US$3.4 billion up front and another US$2.35 billion upon the achievement of various milestones tied to, among other things, the development of an Auris surgical robot called iPlatform. J&J agreed to use commercially reasonable efforts akin to its "usual practice" for a "priority medical device" in furtherance of those milestones. However, J&J ultimately shelved iPlatform, and former shareholders of Auris represented by Fortis sued for breach of contract and other causes of action.

Examining J&J's efforts relative to its practices for another priority medical device (a J&J surgical robot called Velys), the court found that J&J failed to use commercially reasonable efforts to develop iPlatform. For example, J&J pitted iPlatform against another surgical robot called Verb to determine which to prioritize, an exercise that had no benefit for iPlatform. J&J also instituted an employee incentive program with targets different from the milestones in the merger agreement with Auris—an act the court found was designed to deprioritize the milestones themselves and was something J&J never did for Velys.

The court awarded US$900 million in damages for milestone payments that would have been achieved but for J&J's contractual breaches, weighted by the parties' estimated probability of achievement at the time of the merger. The court reasoned that a probability-weighted measure of damages captured what Auris reasonably expected to gain prior to J&J's breaches.

Second, in *Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.*, 2024 WL 4052343 (Del. Ch. Sept. 5, 2024), Alexion acquired Syntimmune, Inc. for US$400 million up front and US$800 in installments tied to milestones for the development of a monoclonal antibody drug product called ALXN1830. Alexion agreed to use "commercially reasonable efforts" to achieve the milestones for seven years benchmarked by the efforts a similarly-situated company would expend on a similar product. However, after AstraZeneca plc acquired Alexion, the company paused a trial of ALXN1830 that was set to dose its first patient the following week, and ultimately terminated the ALXN1830 program entirely. Former shareholders of Syntimmune sued for breach of contract.

The court first found that one of the contractual milestones had been achieved and awarded damages in the amount of US$130 million—the amount due under the contract tied to that milestone. The court next examined whether Alexion had exercised commercially reasonable efforts to achieve the remaining milestones, and found that it had not.

Because the drug product presented no safety concerns and had an advantage over competing products that other companies were developing, the court reasoned a similarly-situated company would have continued developing ALXN1830. The court concluded Alexion instead terminated the program due to AstraZeneca's pursuit of merger synergies for its shareholders rather than out of any concern about ALXN1830 or development issues caused by COVID, as Alexion had argued.

The court awarded damages of approximately US$180 million in a separate decision issued this year, 341 A.3d 513 (Del. Ch. 2025). Similar to the approach used in *Fortis*, the court calculated damages by weighting each milestone's earnout payment by its probability of success, discounted to present value at the time of breach. As the court explained, "compensating for lost expected value, rather than with full value whenever earnout payments are likely and zero value whenever earnout payments are unlikely, strives to hit the mark on the parties' reasonable expectations, rather than award windfalls for some promises and goose eggs for others."

As these cases illustrate, failure to adhere to commercially reasonable efforts obligations tied to earnout payments can result in large damages awards—even for milestones not due to occur for years. This is because courts will endeavour to put the plaintiff in the same position it would have been absent the breach, which can be accomplished by ascertaining milestones' expected value.

Financial Services Update:

Cryptocurrency: Federal Preemption Issues in Pending Legislation

As cryptocurrency has become more commonplace over the past several years, states have taken various measures to regulate digital currency by amending existing statutes, creating new regulatory regimes, enacting licensing requirements, and pursuing regulatory and criminal enforcement actions.

Shortly after his second term commenced, President Trump issued an executive order that established a Presidential Work Group on Digital Asset Markets that was tasked with "propos[ing] a Federal regulatory framework governing the issuance and operations of digital assets." Exec. Order No. 14178, 90 Fed. Reg. 8647 (Jan. 31, 2025). This past July, the Working Group released a comprehensive report, "The President's Working Group on Digital Asset Markets, Strengthening American Leadership in Digital Financial Technology at 55" (July 2025). The Report included several recommendations, including the recommendation that Congress adopt legislation that divides jurisdiction over digital asset regulations between the SEC and CFTC. The Report also urged Congress to "provide that federal law preempts state law with respect to securities and commodities laws applicable to SEC- and CFTC-registered intermediaries, including in the areas of state virtual currency business, 'blue sky,' and commodity broker laws." *Id*.

In line with the Trump Administration's recommendations, recent and pending federal legislation has sought to provide a clear regulatory framework to govern digital currency and blockchain technology.

On July 18, 2025, President Trump signed the GENIUS Act into law. Fact Sheet: the GENIUS Act Protects American Consumers, U.S. Senate Committee on Banking, Housing, and Urban Affairs. The GENIUS Act creates a comprehensive regulatory framework for stablecoins, which are a type of cryptocurrency that are backed by assets considered to be reliable, such as national currency or a commodity. The GENIUS Act requires that state regulators have stablecoin

frameworks that are "substantially similar" to the federal framework the GENIUS Act creates.

The Digital Asset Market Clarity Act of 2025 (the "CLARITY Act") was passed by the U.S. House of Representatives on July 18, 2025, with a bipartisan vote of 294 to 134. The Senate Banking Committee and the Senate Agriculture Committee have recently announced that they will hold markups of the CLARITY Act on January 15, 2026, during which the committees will review, amend, and vote on the bill in committee before it advances to a full floor vote in the Senate.

The CLARITY Act establishes a framework for regulating digital assets that proposes dividing jurisdiction between the CFTC and the SEC. The bill gives CFTC authority to regulate digital currencies, which it defines as blockchain-based assets that are not securities under federal law, and the intermediaries that trade or custody them. Thus, the CFTC would have exclusive authority over digital commodity spot markets. The SEC, on the other hand, would have authority over primary market crypto transactions.

The CLARITY Act would preempt many state laws aimed at regulating digital currency. The bill amends the Securities Act to define digital commodities as "covered securities" under Section 18(b) of the Securities Act. **H.R.** 3633 § 308. This would preempt state laws and regulations that require the registration of digital commodities, thereby preempting the application of state blue-sky laws. The Clarity Act also gives the CFTC exclusive jurisdiction over digital commodity exchanges. *Id*. § 404. And it has a provision preempting state laws governing registered digital commodity brokers. *Id*. § 406.

If the CLARITY Act becomes law, there is also the possibility that courts find that it implicitly preempts state law, as courts have found that state law that conflicts with the federal securities laws may be preempted even in the absence of explicit preemption. See, e.g., *Credit Suisse First Boston Corp. v. Grunwald,* 400 F.3d 1119 (9th Cir. 2005); *Jevne v. Superior Court*, 35 Cal. 4th 935 (2005).

In addition to the CLARITY Act, the Senate has released discussion drafts of the Responsible Financial Innovation Act of 2025 ("RFIA"). The RFIA draft released by the Senate Banking Committee in September 2025 contains a provision that would expressly preempt state licensing and regulatory requirements, including blue-sky laws and state money-transmitter laws. Senate Banking Committee's RFIA draft § 109(f).

In light of the Trump administration's efforts to establish a federal regulatory regime to regulate digital currency and assets, many states have expressed the need to preserve state authority over digital asset regulations in the name of consumer protection. Indeed, state pushback to federal efforts to regulate digital currency is not new. Under the Biden administration, states challenged the SEC's position that all cryptocurrencies were investment contracts under the Securities Act, as illustrated by the amicus brief filed by multiple states in *Lejlex v. SEC*. Letter from Brenna Bird, Attorney General of Iowa, *et al*. to SEC Commissioner Hester Pierce (Oct. 20, 2025). The brief emphasized the importance of preserving state authority for consumer protection in digital asset regulations. Brief of Amici Curiae Iowa *et al.*, *Lejilex v. SEC*, No. 4:24-cv-00168-O (N.D. Tex. July 10, 2024); *see also Kentucky v. SEC*, No. 3:24-cv-00069 (E.D. Ky. Nov. 14, 2024).

As of 2025, at least 40 states have introduced or passed legislation concerning digital assets. See Bird Letter, *supra*. For example, Utah created a "Blockchain and Digital Innovation Task Force" comprised of several government officials and experts in cryptocurrencies to develop legislation. Utah Code Ann. § 36-29-110. The New York State Department of Financial Services (NYDFS) created a licensing regime for digital asset firms operating in New York, known as the BitLicense, which imposes regulatory requirements for businesses involved in digital assets, including both intermediaries and custodians. Virtual Currency Business Licensing, N.Y. State Dep't of Fin. Servs. Wyoming created a regime for "special purpose depository institutions" that sets standards for digital asset custodians. Wyo. Div. of Banking, Special Purpose Depository Institutions. California enacted a digital asset-specific regime that takes effect in July 2026, and that prohibits an entity from engaging in digital asset business activity unless the entity holds a license from the state's Department of Financial Protection & Innovation. Cal. Fin. Code §§ 3101-3907.

Many states' money-transmitter laws extend to digital asset custodians and trading platforms. These laws generally mandate that such intermediaries register as money transmitters with the state in order to provide services to customers within that state. *See, e.g.*, Ala. Code § 8-7A-2; Fla. Stat. §560.204; Ga. Code § 7-1-680(30); *see also United States v. Harmon*, 474 F. Supp. 3d 76 (D.D.C. 2020); *State v. Espinoza*, 264 So. 3d 1055 (Fla. Dist. Ct. App. 2019). Some states' statutes, including those in Alabama, Georgia, Florida, and D.C., define money transmission to include virtual currencies. An October 25, 2025, letter from 21 State Attorney Generals to SEC Commissioner Pierce urged the SEC to not take actions that would preempt these money-transmitter laws. Bird Letter, supra, at 5. According to the letter, state money

transmitter laws "ensure that transmitters maintain financial stability, conduct thorough customer due diligence, and report suspicious activities, thereby mitigating risks like money laundering and consumer exploitation in digital asset transfers." The letter argues that without state-level safeguards, consumers will be vulnerable to scams and financial losses.

Some states have attempted to regulate digital assets under state blue-sky laws. For example, the Oregon Attorney General sued Coinbase for "creat[ing] and operat[ing] an exchange for the purchase and sale of crypto assets," and thus allegedly engaging in "the sale of unregistered securities" under Oregon's blue-sky law. Oregon v. Coinbase, Inc., No. 3:25-cv-00952 (D. Or. June 2, 2025). In addition, the New York Attorney General has taken the position that transactions in assets based on decentralized protocols like Ether ("ETH")—the native asset of Ethereum, one of the most-used blockchains in the world—constitute securities under New York's blue-sky law. *People v. KuCoin*, No. 450703/2023 (N.Y. Sup. Ct. Mar. 9, 2023).

If digital commodities are to be treated as "covered securities" under the Securities Act—as the CLARITY Act proposes—states should still theoretically be able to bring enforcement actions for fraudulent practices, which are not preempted by the Securities Act. Bird Letter, supra, at 6. Some states are concerned, however, that criminal laws that do not involve fraud or deceit, such as theft, would be preempted. There is also concern that state unfair or deceptive acts or practices statutes could potentially found to be preempted for the same reasons. *Id*.

VICTORIES

Quinn Emanuel Secures an Unprecedented Win for Anne Wojcicki and TTAM Research Institute in 23andMe Bankruptcy Auction

Quinn Emanuel recently secured a major win for TTAM Research Institute and its founder Anne Wojcicki with TTAM's successful bid to acquire the assets of 23andMe, Inc., the direct-to-consumer genetic testing and research company that Ms. Wojcicki co-founded in 2006. This result demanded an innovative strategy -- reopen a closed auction and then to overcome dozens of sale objections, including those from nearly all fifty states presenting novel legal issues regarding the transfer of genetic data and consumer privacy protections. This remarkable outcome represents not just a legal triumph for TTAM, but also a pivotal moment in safeguarding the future of genetic research, which TTAM will continue to pursue alongside its commitment to protecting consumer privacy rights.

The stakes could not have been higher: 23andMe (the Debtor) was auctioning off the world's largest database of genetic material, containing information from millions of consumers who had entrusted their most personal biological data to the company Ms. Wojcicki had co-founded. With this win, Quinn Emanuel, alongside co-counsel Skadden, Arps, Slate, Meagher & Flom LLP, ensured that the world's largest database of genetic material will find its new home with TTAM, a nonprofit public benefit corporation spearheaded by the same visionary that co-founded and led 23andMe for nearly two decades and driven by its unwavering goal of democratizing access to genetic data for individuals and researchers.

Reopening the Closed Auction

Committed to reacquiring the Debtor's assets (the genetic data that serves as an incomparable platform for groundbreaking genetic research), Ms. Wojcicki participated in a complex bankruptcy auction in the Eastern District of Missouri before Judge Brian C. Walsh through her nonprofit research institute TTAM. The auction itself was unprecedented, as the asset at stake was the largest dataset of genetic material in the world built over nearly two decades with a direct-to-consumer model. The sale thus had the potential to implicate not just the millions of 23andMe customers, but also the rest of the world, which is poised to benefit from the groundbreaking research enabled by researchers' access to the dataset. But when Quinn Emanuel entered, Ms. Wojcicki had seemingly lost the final round of the Debtor's auction to pharmaceutical giant Regeneron Pharmaceuticals, Inc.

Quinn Emanuel quickly disrupted that status quo, and secured the opportunity to reopen the bidding—without imposing a significant delay on the sale process or requiring lengthy discovery into the Debtor's auction process. To do so, Quinn Emanuel highlighted the unfairness of the Debtor's bidding process and the resulting failure to maximize value for stakeholders. Indeed, TTAM made clear that its final offer would far exceed the supposedly winning bid from Regeneron. After a hearing before the court, Quinn Emanuel helped TTAM secure a final bidding round that leveled the playing field between TTAM and Regeneron. Ultimately, this litigation strategy resulted in TTAM being named the successful bidder with its US$305 million bid, but this was only half the battle.

Overcoming Objections Implicating Novel Issues of State Law

Soon after its success in the auction phase, however, TTAM faced mounting objections to the sale including those from nearly all fifty states-offering arguments of novel issues of state law arising from dozens of different laws purportedly governing the sale of genetic material, along with a slew of other objections. TTAM had committed to retain the Debtor's privacy policies, implement additional consumer privacy protections, and broadly advertise the sale to existing customers alongside an unequivocal opportunity to opt-out of the transfer. Moreover, TTAM committed

to largely retaining the 23andMe's operational structure, including the existing employees, and implementing an independent consumer privacy advisory board to ensure compliance with the myriad of state privacy laws. Even so, objecting states argued that various state laws prohibit the sale or transfer of genetic data without express consumer consent and urged the court to require the Debtor and TTAM to adopt an "opt-in" approach. Likewise, the court-appointed Consumer Privacy Ombudsman urged for an opt-in requirement in his report.

Alongside Skadden, Quinn Emanuel implemented a winning litigation and deal strategy involving the transfer of 23andMe's data to a wholly owned, non-debtor subsidiary and the sale of that subsidiary to TTAM. This structure permitted the Debtor to transfer the interest in the assets to TTAM in a manner that was entirely consistent with the Debtor's robust pre-chapter 11 privacy policies and with applicable state law regarding the transfer of genetic material.

Despite no applicable precedent regarding the transfer of genetic material in chapter 11 or otherwise, TTAM successfully overcame all objections. After a two-day evidentiary hearing and multiple rounds of briefing, Judge Walsh entered an opinion overruling the states' objections and a separate order approving the proposed sale. Judge Walsh adopted TTAM's argument that the deal structure did not involve a transfer of genetic material to a third-party, which would be regulated by certain states' laws; rather, the sale as contemplated would involve a transfer of assets to non-debtor affiliate of 23andMe (not a third party) and the acquisition of that affiliate by TTAM. The sale effectively permitted the operations of 23andMe to continue under new ownership, featuring the familiar leadership of Ms. Wojcicki.

In securing TTAM's unprecedented success in the face of novel challenges, Quinn Emanuel ensured that Ms. Wojcicki will regain control over the genetic database she had built with consumer participation over decades; consumers are empowered to access to their personal genetic information and opt into participating in lifesaving research; and, crucially, researchers from qualifying institutions across the globe will continue to have access to the unparalleled dataset to facilitate groundbreaking research that will impact generations to come.

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