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The Particularity Hurdle in Trade Secret Litigation

Plaintiffs face a Goldilocks problem when identifying trade secrets for litigation. If the allegations are too broad, plaintiffs risk dismissal or deadlock at discovery. If the allegations are too narrow, plaintiffs forego damages justly owed. The problem is exacerbated by the fact that each case has a different judge making a decision based on oftentimes ambiguous standards with unpredictable outcomes. This article observes patterns and trends across jurisdictions pertinent to the standards for identifying trade secrets with particularity at pleading and discovery. This article further addresses an increasingly popular method for meeting that challenge—expert testimony. By utilizing technical experts to help articulate trade secrets, plaintiffs can put their best foot forward toward capturing their full claim. Defendants can use experts to their advantage by presenting testimony on how the technology was well within the bounds of public knowledge.

Across Jurisdictions, Plaintiffs Face Uncertainty When Identifying Trade Secrets at the Outset of Litigation.

Every claim for misappropriation of trade secrets must begin by defining the categories of protected information. Alleging that a trade secret exists is the first burden the plaintiff must carry. Under Federal Rule of Civil Procedure 8, this means that "[i]nformation alleged to be a misappropriated trade secret must be identified with enough specificity *to*

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Samantha Gillespie Named Among "Top 100 Female Lawyers" by Latinvex

New York Partner Samantha Gillespie was named by Latinvex as one of the 2024 "Top 100 Female Lawyers" in the FCPA & Fraud category. Samantha was selected for this accolade based on her significant experience in cross-border disputes, including representing Santos Laguna, a Mexican premier league football club in litigation against The Walt Disney Company and a former affiliate of Twenty-First Century Fox; advising Oro Negro, a Mexican oil and gas company, and its U.S. shareholders in a complex, cross-border, billion-dollar dispute arising from Oro Negro's bankruptcy; and representing Caliplay, an affiliate of Grupo Caliente, one of the largest online casino and sports betting companies in Latin America.

IP STARS (Managing IP) Recognizes Five Quinn Emanuel Attorneys as 'Rising Stars'

Andreas Hahne, Andreas Duensing, Felix Trumpke, Mike Doman, Jr., and Patrick Stafford have been named 2024 'Rising Stars' by IP STARS (Managing IP). This publication highlights top up-and-coming intellectual property practitioners who have made significant contributions to the success of their firms and clients.

Quinn Emanuel Ranked in 14 Categories by the Legal 500 UK 2025 Guide

The Legal 500 UK 2025 ranked Quinn Emanuel in 14 categories of the "Clients Guide to the Best Law firms, Top Lawyers, Attorney, Advocates, Solicitors and Barristers." The firm received recognition in International Arbitration, Commercial Litigation: Premium, and Fraud: Civil, among others.

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place a defendant on notice of the bases for the claim being made against it." *Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 906 (3d Cir. 2021) (emphasis added). On its face, this is not a high bar. *See, e.g.*, *Packaging Corp. v. Croner*, 419 F. Supp. 3d 1059, 1066 (N.D. Ill. 2020) ("[Under the DTSA,] plaintiffs must only plead the existence of trade secrets in broad strokes."). Nevertheless, individual courts' analysis of this "fact-specific question … decided on a case-by-case basis," *Syntel Sterling Best Shores Mauritius Ltd. v. The Trizetto Grp.*, 68 F.4th 792, 801 (2d Cir. 2023), varies widely, and trade secret plaintiffs face a complex landscape when deciding how to approach this threshold issue.

For starters, not all jurisdictions apply the same particularity standard. For example, Delaware courts still adhere to pre-*Iqbal* "liberal notice pleading standards" and purport to apply that liberal standard in trade secret cases. *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (finding alleged "unique set of marketing strategies and processes" sufficiently particular to survive a motion to dismiss). At the other end of the spectrum, the Massachusetts Uniform Trade Secrets Act imposes a "heightened pleading standard" for plaintiffs alleging under the statute. *Welter v. Med. Pro. Mut. Ins. Co.*, 2023 WL 2988627, at *16, n.15 (D. Mass. Feb. 23, 2023) (citing Mass. Gen. Laws ch. 93, § 42D(b)). In general, federal district courts appear to be trending toward stricter requirements for trade secret plaintiffs. The requirements, however, are not necessarily characterized by either consistency or clarity, even within the same jurisdiction. Compare *Zurich Am. Life Ins. Co. v. Nagel*, 538 F. Supp. 3d 396, 404 (S.D.N.Y. 2021) (trade secrets not sufficiently identified despite their alleged embodiment in specific emails and attachments), with *Pauwels v. Deloitte LLP*, 2020 WL 818742, at *4 (S.D.N.Y. Feb. 19, 2020) (trade secrets sufficiently identified when allegedly embodied in one or more of an indefinite number of spreadsheets).

Establishing Particular Trade Secrets is Often a Prerequisite to Discovery.

Past the motion to dismiss, fights over the sufficiency of trade secret identifications can occur in the context of discovery. Though theoretically raising the same question, the discovery posture entails different considerations that can result in a different (usually higher) standard for particularity at discovery versus dismissal. Leading the charge in this regard is California, where the Code of Civil Procedure § 2019.210 requires that, "before commencing discovery," plaintiffs "identify the trade secret with reasonable particularity." Note that this does not mean plaintiffs must satisfy this requirement to avoid dismissal, only to obtain discovery. *Truong v. Philhower*, 2020 WL 3481427, at *10 (Cal. Ct. App. June 26, 2020). A similar, discovery-only requirement appears in Delaware state and federal common law, although recent decisions make that application less certain. *See Leucadia, Inc. v. Applied Extrusion Technologies*, 755 F. Supp. 635, 637 (D. Del. 1991) (denying defendant's Rule 12 motion and granting motion to postpone discovery in the same order) (citing Delaware cases); *You Map, Inc. v. Snap Inc.*, 2021 WL 3171838, at *9, n.10 (D. Del. July 27, 2021), *report and recommendation adopted*, 2022 WL 4377031 (D. Del. Sept. 22, 2022). *But see HID Global Corp. v. Vector Flow, Inc.*, C.A. No. 21-1769-VAC-JLH (D. Del. May 31, 2022) ("I agree with plaintiffs [that] discovery sequencing [doesn't] apply to plaintiff's federal trade secrets case.").

Apart from any specific legal requirement, many district courts have embraced their "broad discretion [under Federal Rule 26(d)]" to decide, on a case-by-case basis, what level of particularity a given plaintiff must reach before obtaining discovery. *DeRubeis v. Witten Techs., Inc.*, 244 F.R.D. 676, 678-81 (N.D. Ga. 2007). Under this approach, courts equitably weigh plaintiffs' general right to discovery against defendants' right not to be subject to "fishing expedition[s]" based on unbounded claims. *See Vesta Corp. v. Amdocs Mgmt. Ltd.*, 147 F. Supp. 3d 1147, 1153-56 (D. Or. 2015) (citing *DeRubeis*); *Group14 Techs., Inc. v. Nexeon Ltd.*, (W.D. Wash. Mar. 26, 2024) (same); *see also Blockchain Innovation, LLC v. Franklin Res.*, 2023 WL 4045234, at *3 (N.D. Cal. June 15, 2023) ("[A] federal court undoubtedly has the discretion to require the disclosure of [plaintiff's] trade secrets before allowing trade secret-related discovery to proceed."). Despite their discretionary aspect, these cases highlight how a plaintiff's showing of its good faith effort to identify its trade secrets reasonably under the circumstances can go a long way in terms of alleviating courts' fairness concerns. *See, e.g.*, *ACI Worldwide Corp. v. Mastercard Techs., LLC*, 2015 WL 429974, at *2 (D. Neb. Feb. 2, 2015) ("Plaintiff has seemingly gone to great lengths to address Defendants' continuing concerns.").

Pleading Trade Secrets With Particularity

While the standard for particularity varies widely among courts and postures, the basic idea remains fairly consistent: a plaintiff must take care to include allegations that distinguish its technology from the pool of general knowledge. This means not only establishing what "it" is but how it "derive[s] independent economic value, actual or potential, *from not being generally known* by or readily accessible to the public." DTSA 18 U.S.C. § 1839(3). This is especially true where an alleged trade secret contains non-secret elements, such as in the case of a "process," which is often going to be made up of "steps" which are, in and of themselves, not secret. There, it is the connective tissue between the steps which

constitutes the actual secret, and accordingly, courts often require plaintiffs to spell out "the steps in the process and explain … how those steps make [the] method or process unique." *See, e.g.*, *Carlisle Interconnect Techs. Inc. v. Foresight Finishing LLC*, 2023 WL 2528324 (D. Ariz. Mar. 15, 2023) (denying plaintiffs' motion).

It is easier to establish the existence of a trade secret where the information at issue is traceable and unique, for example, when it is known by as few people as possible, or embodied in a single document, or practiced in a single non-public location. *See, e.g.*, *Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 907 (3d Cir. 2021) (plaintiff sufficiently identified trade secrets with a "very precise example … pointing to a particular document … disclosed … under a confidentiality agreement, and it specified the contents of that document as containing trade secrets."); *Dur-A-Flex, Inc. v. Dy*, 349 Conn. 513, 582, 321 A.3d 295 (2024) (undisputed evidence that at-issue formula "can't be found anywhere except at [the plaintiff's factory]"). It is worth noting that "uniqueness" does not necessarily equate to value. For example, "obsolete information cannot form the basis for a trade secret claim because the information has no economic value." *Fox Sports Net North v. Minnesota Twins*, 319 F.3d 329, 336 (8th Cir. 2003). Nevertheless, these clear-cut bounds (or a lack of them) make it easier for courts to assess a trade-secret identification prior to discovery.

Where the case involves more abstract or technical subject matter that is potentially available outside of the organization, the court will have a harder time discerning what is and is not generally known in the particular industry. *See, e.g.*, *Imax Corp. v. Cinema Techs., Inc.,* 152 F.3d 1161, 1167 (9th Cir. 1998) ("We further note that because Imax's trade secrets claim involves a sophisticated and highly complex projector system, it is unlikely that the district court or any trier of fact would have expertise in discerning exactly which of the projector system's many 'dimensions and tolerances' were trade secrets."). This is where experts on both sides can have an enormous impact on the case, even before the parties have incurred the considerable time and expense inevitable in discovery.

Experts Have a Key Role at the Outset of Trade Secret Litigation.

With courts' casting greater scrutiny on the identification of at-issue trade secrets, both plaintiffs and defendants should consider retaining a knowledgeable expert with strong communication skills early in the case. While parties often delay the expert search process in other contexts in order to limit costs, doing so in the trade secret context could put them at a lasting disadvantage. As we have seen, trade secret cases can rise and fall on the specificity of the allegations in the complaint or trade secret statement. While these documents are drafted by lawyers with judges as the intended audience, both groups lack the technical expertise necessary "to explain why each secret is not a matter of public knowledge." *Merck Sharp & Dohme Corp. v. Pfizer Inc.*, 2021 WL 2646943, at *3 (E.D. Pa. June 28, 2021). Consequently, both sides of a trade secret dispute may need to work closely with subject matter experts to define the boundaries of the trade secrets.

For plaintiffs' attorneys considering how to best deploy expert knowledge early in a case, there is a delicate balance between failing to make out a particularized trade secret claim and providing so much detail as to limit the potential scope of the claims and related damages before discovery. As an initial matter, there is no requirement, even under California's stringent identification regime, that trade secret statements be supported by an expert declaration. *See Loop AI Labs Inc. v. Gatti*, 195 F. Supp. 3d 1107, 1113 (N.D. Cal. 2016). And, as many courts have noted, "[t]rade secret plaintiffs rarely provide a precise and complete identification of the alleged trade secrets at issue without a court order requiring them to do so," which "is a strategy, not an accident." *See, e.g.*, *Masimo Corp. v. Apple Inc.*, 2022 WL 1599841, at *2 (C.D. Cal. Apr. 28, 2022). Nonetheless, a recent discovery decision in a case based on DTSA misappropriation claims gives a sense of the fine detail plaintiffs must be able to explain in clear language in order for their trade secret claims to pass muster at the outset of litigation.

For instance, if the allegedly misappropriate[d] trade secret is executable object code, plaintiff must name the executable files and identify what about their functionality is alleged to be a trade secret. If plaintiff alleges misappropriation of source code, it must identify the specific lines of code or programs claimed to be a trade secret by, for example, printing out the code on paper with numbered lines and identifying the allegedly misappropriated lines by page and line number or by highlighting the code alleged to be secret, avoiding the improper inclusion of non-secret auto-generated code, open source material, or basic code mandated by the programming language or type of program within its trade secret identification. If plaintiff contends that algorithms or formulas existing within code are trade secrets, it must identify the mathematical information and the precise combination of functions that comprise the algorithms at issue. If plaintiff contends that higher-level architecture of the software is a trade secret, it must detail the combination of the specific algorithms employed. If plaintiff alleges trade secret data structures, the nature of those structures must be defined with particularity. *Torsh, Inc. v. Audio Enhancement, Inc.*, 2023 WL 7688583, at *8 (E.D. La. Nov. 15, 2023). While a sworn expert affidavit

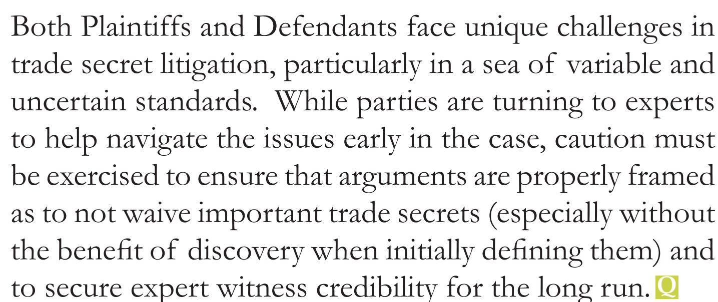
is not required to bolster such descriptions, attorneys should consider working with experts on the front end to ensure the accuracy of their trade secret statements, and their ability to proactively articulate the significance of the protected material.

On the other side of these disputes are defendants, who are frequently the first party to inject expert testimony into a threshold dispute about trade secret identification. They have a strong incentive to do so; the lack of expert testimony rebutting a plaintiff's trade secret assertions can be fatal to a defendant's motion for a protective order. *See, e.g.*, *Yoe v. Crescent Sock Co.*, 2017 WL 11479991, at *6 (E.D. Tenn. May 25, 2017) (granting discovery and denying motion for a protective order where defendant offered "no expert disclosure of its own to supplement its position that the descriptions [plaintiff] has presented thus far in discovery do not describe the alleged trade secrets with reasonable particularity"); *Pinkerton Tobacco v. Kretek Int'l*, 2021 WL 4928024, at *3 (C.D. Cal. July 14, 2021) (noting a lack of expert analysis "identifying whether industry participants would consider this to be a vague or overbroad disclosure" meant the court had no grounds to deny the requested discovery). On the other hand, defendants can limit or entirely bar discovery on certain topics by offering expert opinion on, among other issues, the scope of information in the public domain. For example in *Chung v. Intellectsoft Grp. Corp.*, 2024 WL 813445 (N.D. Cal. Feb. 12, 2024), defendants presented an expert rebuttal to plaintiff's interrogatory responses identifying trade secrets to establish "matters of general knowledge or common practice among software application developers" and limit plaintiff's claims accordingly. *Id.* at *7. However, there are also potential pitfalls for both sides when presenting experts early in the case. The expert who fails to impress the court in the fight over the threshold question may do lasting damage to their credibility.

Under certain circumstances, the risk may be greater for the defense side. Given the mere plausibility and relevance standards that govern the early stages of litigation, grey areas can benefit the plaintiff in many cases, and the credibility of defense experts may be collateral damage. For example, numerous California courts have granted discovery on the basis that at least one expert (predictably, usually plaintiff's) had "declare[d] that they [were] capable of understanding the designation and of distinguishing the alleged trade secrets from information already known to persons in the field." *Phoenix Techs., Ltd. v. DeviceVM, Inc.*, 2010 WL 8590525, at *4 (N.D. Cal. Mar. 17, 2010) (quoting *Advanced Modular*, 132 Cal. App. 4th at 836).

At the same time, plaintiffs cannot rely on experts to embroider otherwise threadbare trade secret assertions. In *Group14 Techs., Inc. v. Nexeon Ltd.*, 2024 WL 1283530, (W.D. Wash. Mar. 26, 2024), plaintiff claimed trade secret protection over "negative know-how" embodied in slides recounting various projects that were "explored" in the course of developing composition materials useful in electrical energy storage applications. *Id.* at *7. Denying the plaintiff's motion to compel, the court chided the plaintiff's expert for "go[ing] beyond" what the slide actually said, effectively reading in trade secrets for which there was no evidence of transmission. *Id.*

Conclusion



Both Plaintiffs and Defendants face unique challenges in trade secret litigation, particularly in a sea of variable and uncertain standards. While parties are turning to experts to help navigate the issues early in the case, caution must be exercised to ensure that arguments are properly framed as to not waive important trade secrets (especially without the benefit of discovery when initially defining them) and to secure expert witness credibility for the long run. Q

NOTED WITH INTEREST

Right to Jury Trial for Some SEC Actions

In *SEC v. Jarkesy,* the Supreme Court held that a defendant in a securities fraud action involving civil penalties is entitled to a jury trial. The Court found that the public rights doctrine does not apply such that Congress cannot legislate away the defendant's right to a jury trial. Accordingly, the SEC may no longer be able to exercise the discretion granted by the Dodd Frank Act to litigate such cases through its in-house tribunal. Instead, those subject to SEC fraud actions have a right to defend themselves in an Article III court before independent judges who will apply the Rules of Evidence.

The majority framed the question at issue narrowly: namely, "whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." But the rationale underlying that holding shows the majority had serious concerns with administrative agencies supplanting Article III courts and serving as the prosecutor, judge and jury, at least in actions (like fraud). The Court advocated for limited application of the public rights exception, but the

Court did not define the precise contours of the exception or what constitutes a public right, leaving some ambiguity in its application going forward. The majority's rationale, if broadly applied, could have serious consequences for other in-agency enforcement proceedings.

The SEC instituted an administrative proceeding against Jarkesy in March 2013. The SEC issued its decision in October 2014 and found that Jarkesy had violated the anti-fraud provisions. Jarkesy appealed to the Commission, and the Commission issued a decision in 2020, affirming the prior finding. Jarkesy then appealed to the Fifth Circuit, which vacated the Commission's final order. The Fifth Circuit found that Jarkesy had a Seventh Amendment right to a jury trial and identified two other constitutional infirmities. The Supreme Court only addressed the Seventh Amendment question.

Chief Justice Roberts delivered the opinion of the Court. The majority's analysis started with the Seventh Amendment question, asking whether the Seventh Amendment applies to the SEC provisions at issue. The Court found in the affirmative, explaining that "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury." *Jarkesy* Slip Op. at 6. The majority further determined that the civil penalties the SEC sought are "a type of remedy at common law that could only be enforced in courts of law." *Id.* at 11. "That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims." *Id.*

Both the majority decision and concurrence emphasized the critical import of the right to trial by jury in U.S. jurisprudence. Both liken today's administrative tribunals to the vice admiralty courts imposed on the colonists. In those courts, colonists were subject trial without jury for wide ranging offenses. The majority went so far as to state that "when the English continued to try Americans without juries, the Founders cited the practice as a justification for severing our ties to England." *Jarkesy* Slip Op. at 7-8.

Having concluded that the Seventh Amendment applies, the Court turned to the public rights exception. Under the public rights exception, Congress may "assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Jarkesy* Slip Op. at 13. However, Congress may not remove "matters concerning private rights" from Article III courts. *Id.* at 14. The question, as framed by the majority, is whether the antifraud suit against Jarkesy is a public right or a private right.

The Court invoked the 1989 *Granfinanciera, S. A. v. Nordberg,* decision as "effectively decid[ing] this case" in terms of the public rights doctrine. *Jarkesy* Slip Op. at 20. According to the Court, "what matters is the substance of the action, not where Congress has assigned it." *Id.* at 21. Specifically, "'[t]raditional legal claims' must be decided by courts, 'whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.'" *Id.* at 19. Further, "[i]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights." *Id.* at 14. As noted in the Seventh Amendment analysis, the Court found that antifraud provisions are akin to common law fraud, and the SEC seeks a civil penalty. Thus, the Court concluded that this action involves a "matter[] of private rather than public right." *Id.* at 21.

The Supreme Court sought to apply the public rights doctrine narrowly, explaining that "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Article III courts." *Jarkesy* Slip Op. at 18. The Court declined to provide a bright line rule for application of the public rights doctrine, nothing that it would not "definitively explain[]" the distinction between public and private rights. *Id.* at 17. The majority and concurrence recognized certain categories traditionally classified as public rights, with the concurrence summarizing them as follows: "public rights are a narrow class defined and limited by history" and traditionally have "included the collection of revenue, customs enforcement, immigration, and the grant of public benefits." *Id.* at 13.

The Court rejected the SEC's argument that this case concerns a public right because the federal government is party to the litigation, wherease in *Granfinanciera* (which involved a bankruptcy proceeding), the government was not. The Court explained that "we have never held that 'the presence of the United States as a proper party to the proceeding is . . . sufficient' by itself to trigger the" public rights exception. *Jarkesy* Slip Op. at 27. According to the Court, "what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Id.* at 22. And the substance of the litigation against Jarksey is akin to "common law fraud," with a remedy "available only in law courts." *Id.* The Court thus concluded that "[t] his is a common law suit in all but name." *Id.*

The SEC and the dissent relied heavily on the Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n.* The *Atlas Roofing* case involved OSHA regulations concerning workplace safety. Congress granted the Occupational Safety and Health Review Commission authority to investigate OSHA violations and levy fines, and in *Atlas Roofing* the Supreme Court held that this scheme did not violate the Seventh Amendment. The Court in *Jarksey* distinguished *Atlas Roofing* on the grounds that the OSHA regulations did "not borrow its cause of action from the common

law" and rather "resembled a detailed building code." *Jarkesy* Slip Op. at 23. The Court explained that "Atlas Roofing concluded that Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law," and thus "[t]he case therefore does not control here." *Id.* at 25.

The majority in *Jarksey* declined to overrule *Atlas Roofing*. It did, however, severely criticize *Atlas Roofing*, stating that it "represents a departure from our legal traditions" that has been "ignored" or criticized. *Jarkesy* Slip Op. at 25 n.4. The Court also criticized the public rights exception set forth in *Atlas Roofing* as "circular" and stated in a footnote that "the author of *Atlas Roofing* certainly thought that *Granfinanciera* may have" overruled it. *Id.* at 26, 23 n.3. Q

PRACTICE AREA NOTES

Crisis Law and Strategy Update

Strategies for Early Stage Defenses Against False Advertising Lawsuits Targeting Health and Wellness Companies

In recent years, and especially after the release of the 2018 and 2019 films *The Devil We Know* and *Dark Waters* regarding the case against the chemical manufacturing corporation DuPont, litigation involving "forever chemicals" has proliferated. A cottage industry of lawsuits now centers on false advertising claims against companies that market themselves as natural products, targeting existing (as well as new and upcoming) brands in the popular health and wellness space – a trillion-dollar industry. These lawsuits target a multitude of brands that line grocery store shelves with any sort of "all natural" or "plant based" products and claim that they use manmade "forever chemicals" known as PFAS (per- and polyfluoroalkyl) substances they allege are toxic, even at low levels, to human health.

For instance, in the last few months, class action complaints have been filed against Coterie Baby Inc., an eco-friendly diaper company, and Risewell, an eco-friendly toothpaste company, alleging that each deceptively marketed products as "PFAS-free" *See Saedi v. Coterie Baby, Inc.*(S.D.N.Y. No. 1:24-cv-03893; *Watkins et al v. RiseWell LLC*, (N.D. Cal. No. 5:24-cv-03529). Plaintiffs' firms have also targeted such Fortune 500 companies as Unilever, alleging it falsely branded hydration electrolyte drinks as preservative free *See Meza-Soliven et al v. The Liv Group, Inc. et al,* (S.D., Cal, No. 3:24-cv-00019-TWR-DDL).

Although these lawsuits are oftentimes premised on the thinnest of allegations, regardless of their merit, the impact on defendant companies is felt far beyond the courtroom. Any defense must include a strategy and approach that works in both the court of law and court of public opinion. The defendant companies must consider a multi-faceted approach with the judge, customers, and regulators, including the Food and Drug Administration, which is why early resolution of such matters is critical. Based on our significant experience with complex problems involving litigation, government investigations, and crisis management, we have developed a suite of strategies to protect consumer products companies' businesses and reputations. We work with scientific experts, public relations consultants, and other experts to help companies navigate through these complicated issues. When a company is hit with these types of lawsuits, winning early-stage strategies include the following:

Identify Routes to Challenge the Complaint at the Pleading Stage

Many false advertising complaints in the "PFAS" space fail even to allege which chemicals are purportedly contained in the product, nor do many of the complaints attempt to quantify an individual chemical based on how much PFAS is contained in the product. Forever chemicals are part of a class of chemicals that numbers well into ten thousand, and many of these chemicals remain useful, approved, and regulated. Indeed, there is mixed literature on whether these forever chemicals actually have the health impacts plaintiffs assert. Often plaintiffs file generic "PFAS" complaints and lump any and all chemicals in their pleading without specificity, paving the way for a motion to dismiss for failure to state a claim upon which relief can be granted. It is also important to assess the advertising and marketing statements made by the defendant. Is the company making broad-based claims they are "100% all natural," "chemical free" or "toxin free"? Typically, companies do not make such unequivocal absolute statements. Motions to dismiss have often had success in arguing that no reasonable consumer could be misled by this advertising, especially where statements are less than absolute.

For instance, in 2022 two courts dismissed lawsuits against The Kraft Heinz Co. in false-advertising class actions where plaintiffs alleged that Kraft misled consumers about its Bagel Bites Pizza Snacks by failing to include a disclosure on the label that the product is made with supposed imitation mozzarella cheese. On May 6, 2022, the Western District of Wisconsin dismissed one case, with prejudice, for failure to state a claim. On August 3, 2022, the Northern District of Illinois

dismissed, with prejudice, another, saying the complaint did not allege that the products don't contain real cheese or tomato sauce, only that the front label does not also include the additives. *See Lemke v. Kraft Heinz Foods Co.* (Case No. 3:21-cv-00278, W.D. Wis.); *Jackson v. Kraft Heinz Foods Co.* (Case No. 1:21-cv-05219, N.D. Ill.). Although the action was not at the pleading stage, the Second Circuit in May 2024 affirmed summary judgment for defendant food manufacturer KIND in a false advertising class action challenging its' "all natural" marketing claims. The Plaintiffs alleged that they were misled by the phrase "all natural" on the labeling of snack bar products. The Defendant moved for summary judgment, arguing that Plaintiffs had failed to carry their burden to present admissible evidence establishing how the challenged "All Natural" statement would mislead reasonable consumers acting reasonably and the district court agreed. (*Bustamante, et al. v. KIND, LLC*, 2024 WL 1917155 (2d Cir. May 2, 2024)).

Make Yourself an Unattractive Target

Many of these "PFAS" lawsuits are handled by the same cohort of plaintiffs' law firms who file so many class action cases that they become overextended dealing with hundreds of cases at once. A defendant should aim to make itself as unattractive a target as possible, so that when the plaintiffs' firm is looking at their portfolio of cases and doing necessary triaging, they make the decision that the case is not worth the battle. Quinn Emanuel's well-known reputation as the "most feared" law firm and nearly 90 percent trial success rate aids in this effort, helping make our clients unattractive targets. We lay out for plaintiffs' attorneys early on how things will play out should they proceed, but ensure they understand that our clients may consider very modest early-stage settlements. If opposing counsel is not ready to assess the reasonable value of their lawsuit, we will file aggressive pleadings seeking to dispose of the case at the motion to dismiss or summary judgment stages.

If Considering Early Settlement, Look Down the Road

Some companies, especially new and upcoming startups, want to resolve the case through settlement quickly and quietly, but it is pivotal that any settlement negotiations be made on a class-wide basis and not solely for the individual named plaintiff. For example, in August 2024, Breyers Ice Cream settled a recently filed lawsuit for $8.85 million on a class-wide basis over claims that the Defendants' labelling of their Natural Vanilla ice cream gave consumers the impression the ice cream contained vanilla flavor derived only from the vanilla plant, and not from non-vanilla plant sources. Under the terms of the Breyers settlement, class members can receive $1 per purchased product. (*McKinley, et al. v. Conopco, Inc., et al.*, Index No. 805260/2024E). Similarly, this summer the company Earth Rated agreed to pay $825,000 to resolve a false advertising class action lawsuit against it alleging its dog poop bags were falsely advertised as compostable to mislead purchasers. Under the terms of the Earth Rated class action settlement, class members can receive $2 per purchased product. (*Natale, et al. v. 9199-4467 Quebec Inc. d/b/a Earth Rated Case*, 2:21-cv-06775-JS-SIL).

Settlement with the named plaintiff alone does nothing to prevent another customer from coming in and suing. If a class-wide settlement cannot be achieved, an individual settlement should be for no more than the cost of preparing a motion to dismiss because, again, nothing prevents another plaintiff from involving the company in further litigation. A desire to get rid of the case quickly and at a low cost must be balanced against the possibility of future suits of the same kind.

Get Us on Your Side

Quinn Emanuel has successfully defended companies in PFAS-related litigation, including on behalf of footwear brand Wolverine Worldwide. Our firm is national litigation counsel for all of Red Bull's product liability cases and has dealt directly with its FDA issues, toxicology issues, and other scientific issues. Our firm has also served as national coordinating counsel for Colgate, including managing a nationwide docket of over two hundred talcum powder cases, where we tried five cases to verdict and obtained defense verdicts in four of the five. We have also represented lip balm manufacturer EOS in eleven class action cases and related FDA inquiries and Right Guard/Henkels in litigation related to alleged harmful contaminants in its spray deodorant. Just last year, we secured a dismissal on behalf of McCormick after the plaintiffs alleged the company's spices contained heavy metals. We have a proven track record of guiding companies to early-stage successes when they are faced with lawsuits involving forever chemicals.

Data Privacy & Cyber Security

49ers Case May Hint at Defensive Playbook for CCPA Data Breach Class Actions

Among litigators, one of the best known features of the California Consumer Protection Act ("CCPA"), is the statutory damages provision, under which damages for California consumers whose data was obtained in ransomware attacks and other incidents can range from $150 to $750 per individual. Given the size of many data incidents, which can involve information belonging to tens of thousands or hundreds of thousands of consumers, the statutory damages can quickly reach high numbers. As a result, businesses who experience a data breach that impacts California consumers are routinely sued in proposed class actions brought under the CCPA.

For businesses looking for a way to fend off these sorts of class actions seeking statutory CCPA damages, the CCPA's notice and cure provision provides one of the few apparent offramps. Under this provision, set forth in California Civil Code Sectoin 1798.150(b), a consumer planning to file a suit seeking statutory damages must give the defendant business 30 days advance written notice. If the plaintiff does not notify the alleged violator before filing, the action may be subject to dismissal. Under the statute, in the "event a cure is possible," a business may cure within 30 days, and provide the plaintiff a written notice of the cure and a guarantee that no other violation will occur.

In the years since the CCPA took effect in 2020, there has been only limited caselaw discussing this notice-and-cure provision, however, and very little caselaw from courts in California.

That changed slightly this summer when, in a decision issued on August 15, 2024 in a proposed class action filed against the San Francisco 49ers over a data incident, U.S. District Judge James Donato of the Northern District of California provided some guidance about how the CCPA notice and cure "offramp" provision would work.

Judge Donato's Motion to Dismiss ruling, in *In Re San Francisco 49ers Data Breach Litigation*, Case No. 3:22-cv-051, came in consolidated proposed class actions brought by individuals who allege they are employees of other NFL teams and/or franchises who provided their personal information to the 49ers. The litigation arises from a February 2022 data incident that reportedly compromised information the team held in its database for nearly 21,000 individuals. The plaintiffs, who allege they received data breach notices the team sent out after it was the victim of a ransomware attack in 2022, claimed they were injured by (among other things) spending time researching the incident, reviewing financial accounts and other information, and experiencing diminished value of their personal information.

After Judge Donato denied a motion for preliminary approval of a proposed settlement in July 2023, the case moved forward this year to the motion to dismiss phase, during which the 49ers argued, among other things, that the plaintiffs had failed to comply properly with the CCPA's notice-and-cure provision. Specifically, the 49ers argued that one of the named plaintiffs had filed his complaint the same day that he had mailed a letter to the 49ers alleging a breach of the CCPA, and that another named plaintiff had filed her complaint just four days after sending her letter to the 49ers. The team also argued that Plaintiffs' notices failed to perfect a CCPA claim because the notices did not comply with the CCPA's requirement that they "identify[ ] the specific provisions of [the CCPA] the consumer alleges have been or are being violated." Cal. Civ. Code § 1798.150(b).

In response to these arguments, Judge Donato allowed the proposed class's CCPA claims to go forward, but questioned whether plaintiffs could recover statutory damages under the CCPA based on the timing of the notice-and-cure letters. He went on to note that in light of the untimely CCPA notice-and-cure letters, "[w]hether plaintiffs may recover statutory damages under the CCPA remains in question. The CCPA requires a 30-day notice-and-cure procedure prior to initiating an action." Order re Mot. to Dismiss (Dkt. No. 58), *In re San Francisco 49ers Data Breach Litig.*, Case 3:22-cv-05138-JD, at 5 (Aug. 15, 2024). Judge Donato also noted that Plaintiffs did not address this issue, and directed the parties to confer on an agreement with respect to the date of mailing and whether that forecloses statutory damages.

Judge Donato's decision also addressed other common questions that arise in proposed class actions of this type: he questioned, for example, whether the plaintiffs' UCL claim was appropriately brought, given the 49ers' contention that the relevant conduct happened outside California, noting the 49ers may "challenge it on summary judgment." Order re Mot. to Dismiss (Dkt. No. 58), *In re San Francisco 49ers Data Breach Litig.*, Case 3:22-cv-05138-JD, at 5 (Aug. 15, 2024). Judge Donato also dismissed the Plaintiffs' Georgia Unfair and Deceptive Trade Practices Claim, although he gave the plaintiffs leave to amend; he reasoned that the complaint failed to allege which of the 49ers practices were purportedly deceptive. Judge Donato also dismissed the Plaintiffs' negligence per se claim, reasoning that it is not a standalone claim.

As it happens, less than two months after Judge Donato's ruling on the Motion to Dismiss, the parties filed a notice indicating they held additional settlement discussions after the ruling and that a renewed settlement had been reached. It appears unlikely, therefore, that Judge Donato will issue further guidance on the issue of the notice-and-cure or the other claims he discussed in his ruling.

Given the sheer volume of CCPA class actions, it may not be long before another court issues additional guidance about this potential CCPA offramp. In the meantime, businesses facing potential CCPA liability from data incidents would do well to keep in mind Judge Donato's decision in the 49ers matter. Data incident plaintiffs may be in a rush to be "first to file," but this rush could cause issues for their CCPA claims.

Product Liability Litigation Update

2024 Report Confirms Nuclear Verdict Trends in Product Liability Cases

Data shows that "nuclear," "thermonuclear," and "mega nuclear" verdicts are becoming a greater risk for product liability defendants with each passing year. The growing potential for such a verdict makes it more difficult to

resolve claims fairly by disincentivizing defendants who might otherwise be interested in trying their product liability case given its merits and by encouraging disproportionally high settlements. Here, we review data compiled by the U.S. Chamber of Commerce Institute for Legal Reform ("ILR") concerning the rise of nuclear verdicts over the past decade in product liability cases, including an updated trends report ILR published just this year.

A "nuclear verdict" is generally thought to be one that is unexpectedly high and shockingly so. In terms of a monetary value, legal experts have defined "nuclear" verdicts as those exceeding $10 million, "thermonuclear" as those *far* exceeding $10 million, and "mega nuclear" as verdicts exceeding $100 million. Although evaluating compensation for personal injury or wrongful death is complex, verdicts surpassing tens of millions of dollars, and particularly those in the hundreds of millions or even billions of dollars, are often outside the realm of what can reasonably be called "compensatory."

Nuclear verdicts are most common in the context of product liability, automobile accident, medical malpractice, and other professional liability claims. Such verdicts sow incalculable additive risk into our jury trials, decreasing defendants' appetites to try meritorious cases and increasing appetites to agree to exploitative nuclear settlements. Given these and other damaging consequences, ILR has taken a close look at nuclear verdict trends, causes, and solutions: first, ILR's September 2022 report analyzed cases between January 2010 and December 2019, and now, as of May 2024, an updated report ILR report includes data from January 2013 through December 2022.

In ILR's 2022 study, the authors considered 1,376 verdicts surpassing $10 million in state and federal courts between 2010 and 2019. The results showed that, among these, the median verdict rose from $19.3 million in 2010 to $24.6 million in 2019, a 27.5% increase. Product liability cases had the second-highest median reported nuclear verdict between 2010 and 2019 ($23 million), surpassed only by intentional tort cases ($29 million). For product liability cases, the median reported nuclear verdict shift over the 10-year period between 2010 and 2019 was particularly steep: up 53.2% from $23 million in 2010 to $35.1 million in 2019. The study also determined that the risk of a "mega nuclear verdict" was greatest in the product liability area.

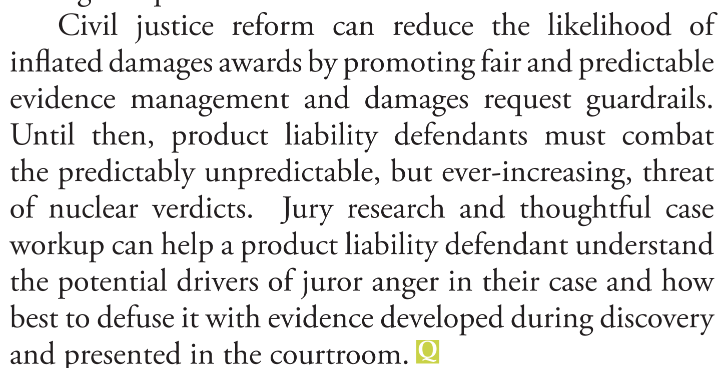
Although verdicts exceeding $1 billion were primarily comprised of punitive damage awards, the authors noted that three-quarters of reported nuclear verdicts they examined did not include a punitive damage award. When punitive damages were not in play, plaintiffs' attorneys were able to argue for jackpot non-economic damages awards by seeking, for example, highly subjective pain and suffering damages.

State courts produced the vast majority of nuclear verdicts: nine out of every ten reported nuclear verdicts were in state courts. A small handful of states were responsible for 63% of nuclear verdicts during the 10-year period: California, Florida, New York, Texas, Pennsylvania, and Illinois.

In ILR's 2024 study, the authors examined 1,288 nuclear verdicts between January 2013 and December 2022. The findings confirmed the results of the 2022 study: product liability cases had a $25 million median for their nuclear verdicts, just behind intentional tort cases at $28.6 million. The median nuclear verdict in product liability cases peaked at $36 million in 2022, the last year of data studied, showing a 50% rise over the prior ten years The authors noted that multiple nuclear verdicts were identified in talcum powder product, herbicide, earplug, asbestos, and tobacco cases.

Tactics inside and outside of the courtroom are primary drivers of the observed increase in product liability nuclear verdicts. Inside the courtroom, inciting juror anger can be a more potent tool than defense efforts to evoke juror sympathy, and can lead to exorbitant verdicts. Plaintiffs' lawyers drum up award requests untethered to their case's economics with the "reptile theory," instilling fear and anger in jurors by demonizing the defendant and preying on feelings of corporate distrust and vulnerability; these can lead jurors to lash out at the defendant with an artificially high damages award.

Outside the courtroom, the plaintiffs' bar has had success normalizing nuclear verdicts through television and social media advertising. With highly visible and proliferated advertising of nuclear verdicts, jurors have become desensitized to what used to be thought of as unreasonable damages requests. Believing such verdicts are awarded with regularity, and without the same visibility into defense wins, low-damages verdicts, and appellate outcomes slashing nuclear sums, jurors are more willing to listen when plaintiffs' lawyers present a nuclear damages request in the courtroom.



Civil justice reform can reduce the likelihood of inflated damages awards by promoting fair and predictable evidence management and damages request guardrails. Until then, product liability defendants must combat the predictably unpredictable, but ever-increasing, threat of nuclear verdicts. Jury research and thoughtful case workup can help a product liability defendant understand the potential drivers of juror anger in their case and how best to defuse it with evidence developed during discovery and presented in the courtroom.

Court Dismisses Madoff Trustee's $100 Million Clawback Claim

Quinn Emanuel recently obtained a dismissal for our client, a sovereign wealth fund, of the Bernard Madoff Trustee's effort to claw back a distribution of $100,000,000 that the client had received. The claim relates to the infamous Madoff Ponzi scheme, the largest, and perhaps most litigious, Ponzi scheme in history with hundreds of cases for billions of dollars still ongoing more than 15 years after the disclosure of the Madoff fraud.

In the early 2000s, investors were clamoring to invest with Bernie Madoff's Investment Securities firm, which reported outsized gains year after year regardless of overall market performance. Offshore "feeder funds" were formed to take those investments and then invest substantially all of their assets with the Madoff investment fund. Many sophisticated investors all over the world, such as our client, invested in Fairfield Sentry, the largest of the Madoff feeder funds. In 2005, as part of its normal asset reallocation practice, the client withdrew $200 million and, in 2006, it withdrew another $100 million. The client had significant "gains" on those investments but had no idea that those gains were actually the result of Madoff's Ponzi scheme. No one had any idea that fraud was occurring until the financial crisis of 2008, when Madoff confessed to his two sons who then turned him in to the FBI. The disclosure of the fraud led to insolvency proceedings for the Madoff fund in New York and for Fairfield in the British Virgin Islands.

Along with hundreds of other sophisticated investors who had redeemed Fairfield investments in the normal course, our client was sued by the Fairfield Liquidators in 2010 and the Madoff Trustee in 2011, each seeking recovery of the $300 million our client had invested in and redeemed from Fairfield. Quinn Emanuel was hired to defend these claims. We succeeded along with our co-Defendants in having the Bankruptcy Court dismiss the Liquidators' claims. That dismissal is currently on appeal with the Second Circuit. Together with members of a defense group, we also obtained a dismissal in the Madoff case until the Second Circuit reversed dismissal of these cases in 2021. The Trustee then filed an amended complaint against our client, and we moved to dismiss on a number of grounds, including sovereign immunity. The bankruptcy court denied every motion to dismiss filed by the hundreds of Defendants, including our client.

We appealed to the District Court on the unique issue of sovereign immunity. The bankruptcy court had found that the commercial activity exception applied because the impact of the redemption request was felt in New York at Madoff's fund. On appeal, Judge Andrew Carter disagreed and made by a foreign sovereign to a fund located in the BVI does not cause commercial activity in the US. But since the foreign sovereign had directed that Fairfield send the 2005 redemption to a bank account in New York, Judge Carter found that that action was sufficient for the commercial activity exception to sovereign immunity. But the Trustee made no allegations about where the 2006 $100 million was directed. In his initial decision, Judge Carter reversed the bankruptcy court but remanded for the Trustee to take discovery as to where the $100 million withdrawal was directed. We sought reconsideration on this last point, contending the Trustee had waived its right to take jurisdictional discovery. Judge Carter agreed. He directed the bankruptcy court to dismiss this claim. The Trustee did not appeal, and the bankruptcy court subsequently entered an order terminating the claim for $100 million.

The Quinn Emanuel team, consisting primarily of three attorneys, outlawyered a large team from the Trustee that had been working on these cases non-stop for more than 15 years and who the courts view as the "good guys."

Preliminary Injunction Enforces Non-Compete in Colorado, Where Non-Competes Are Presumptively Void

On September 5, 2024, a Denver District Court Judge granted Quinn Emanuel client Ingersoll Rand's motion for preliminary injunction, barring the former CEO of an Ingersoll Rand subsidiary from working for competitor Avantor, Inc. for the duration of his non-compete.

This case arose from Ingersoll Rand's June 2024 acquisition of ILC Dover, a life sciences company, for $2.3 billion. The purpose of the deal was to bolster Ingersoll Rand's life sciences capabilities, and Ingersoll Rand intended that ILC Dover's CEO, Corey Walker, would run the combined Ingersoll Rand-ILC Dover life sciences business after the acquisition. To that end, Ingersoll Rand spent months prior to deal-closing providing Mr. Walker with its proprietary and confidential information that would allow him to run their combined post-acquisition life sciences business.

To Ingersoll Rand's surprise, just two weeks after the deal closed, Mr. Walker abruptly resigned from Ingersoll Rand and announced that he was joining competitor Avantor as President of its $4.7 billion Laboratory Solutions business. Ingersoll Rand knew it was critical to enforce the non-compete to protect its most valuable assets—the company's confidential information and customer relationships. Enter Quinn Emanuel.

Within days, we filed for a temporary and restraining order in Colorado pursuant to Mr. Walker's employment agreement's venue clause. We sought to enforce Mr. Walker's non-compete, which stated, in pertinent part,

that Mr. Walker would not be employed "in a Prohibited Capacity" by a business that competes with the part of the business of Ingersoll Rand in which Mr. Walker worked at any time during the last twelve months of his employment with Ingersoll Rand, which, for avoidance of doubt, included Avantor. The facts and law were not entirely on our side, however, as Colorado law renders most non-competes presumptively void unless they fall into certain narrow exceptions.

Despite these challenges, we obtained a temporary restraining order and, over the course of two months, litigated a full case, including document discovery, written discovery, discovery hearings, several depositions, and hundreds of pages of briefing. At the preliminary injunction hearing, the Quinn Emanuel trial team put on four witnesses in one court day.

Days later, the District Court found decisively for our client Ingersoll Rand, enforcing the non-compete and writing that Mr. Walker "did not wait for the ink to dry on his employment agreement with Ingersoll Rand before he started speaking to Avantor," and while he was deep in negotiations to take a top role at a competitor, "he made no effort whatsoever to limit the amount of information he was exposed to." The District Court also noted that it found the testimony of the witnesses to be credible—except for Mr. Walker's.

The case is *Ingersoll Rand Inc., et al. v. Corey Walker, et al.*, No. 2024CV31985, in the Second Judicial District of Colorado. Q

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business litigation report
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- We are a business litigation firm of more than 1,000 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of August 2024, we have tried over 2,500 cases, winning 86% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $80 billion in judgments and settlements.
- We have won eight 9-figure jury verdicts and five 10-figure jury verdicts.
- We have also obtained fifty-one 9-figure settlements and twenty 10-figure settlements.

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