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

May 2020

quinn emanuel

quinn emanuel urquhart & sullivan, llp | business litigation report

los angeles | new york | san francisco | silicon valley | chicago | washington, d.c. | houston | seattle | boston | salt lake city
tokyo | london | mannheim | hamburg | munich | paris | hong kong | sydney | brussels | zurich | shanghai | perth | stuttgart

A Critical Period for Climate Change Litigation

A new wave of civil climate change lawsuits are about to enter a critical period. These suits represent a new trend to seek legal redress for harms allegedly caused by climate change and, for now, are targeted at the energy industry (though the allegations could be broadened to other sectors in the future). Plaintiffs in these cases have alleged numerous tort and commercial legal theories against energy companies to seek a variety of remedies, including money damages and so-called "abatement" plans to remediate alleged public nuisances caused by climate change. Some of the more high profile plaintiffs are states and municipalities suing energy companies based on common law tort theories. Other states and shareholders have brought actions based on securities or unfair trade practices law, alleging misrepresentations in the issuance of securities and false advertising. And other plaintiffs seek recognition of "fundamental rights" to a stable climate under federal and state constitutions. All of these cases are unfolding in multiple jurisdictions across the country, and the outcomes will have broad implications for energy companies, other industries, investors, and the government.

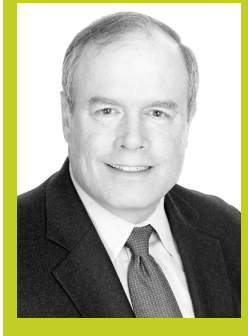
I. Climate Change Claims Based in Tort

To address harms potentially caused by climate change, some municipalities seek to use litigation to fund new infrastructure spending designed to protect their communities. The claims by these municipalities assert that the various defendants' actions led to increased emissions of greenhouse gases ("GHGs"), which have caused Earth's climate to change, the

(continued on page 2)

INSIDE

In Memory of Steven M. Edwards



The firm is deeply saddened that our dear colleague, Steven Edwards, passed away on April 8, 2020 due to complications resulting from the Coronavirus.

Steve was a superb lawyer and a wonderful human being. A graduate of the University of Virginia School of Law, Steve started his career at Cravath, Swaine and Moore, after which he started his own firm, Davis Weber & Edwards, which became the New York office of Hogan & Hartson (now Hogan Lovells), where he headed the Litigation Group in New York.

Steve was a prominent figure in the New York City legal community serving, among other things, as the President of the Federal Bar Council from 1998 to 2000, Chair of the Antitrust Section of the New York State Bar Association, President of the Federal Bar Council American Inn of Court, sitting on the Advisory Committee for Civil Rules of the United States District Courts of the Eastern and Southern Districts of New York, and having the distinction of being the founder and editor emeritus of the Federal Bar Council News.

Despite all these responsibilities, Steve was a passionate champion for social justice and served in various capacities at the National Center for Law and Economic Justice and the Pro Bono Partnership and as President of Nazareth Housing.

An avid musician, Steve was a member of the Iowa Rock and Roll Hall of Fame, a Director and Executive Committee member of WBGO Jazz Radio, and the proud author of the rock opera "Something Afoot." Steve could be found regularly jamming on his bass with his band, the Law Dogs. Q

effects of which—rising sea levels, more frequent and intense storms, etc.—have and will continue to cost state and local governments money to mitigate. For example, Oakland and San Francisco seek money to build a seawall to combat rising tides, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018); the City of New York seeks money to safeguard public utility infrastructure from storms, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018); the state of Rhode Island wants compensatory damages to pay for efforts to stormproof dams, roads, ports, water supply infrastructure, etc., *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019). Many plaintiffs also seek future abatement to prevent defendants from further fossil fuel extraction.

Plaintiffs in these tort cases have developed a number of legal theories: strict liability/negligent design or failure to warn of the adverse effects of fossil fuel combustion; trespass for causing flood waters and extreme precipitation to enter the plaintiffs' lands; impairment of public trust; and private nuisance. In addition, many plaintiffs also seek to use public nuisance theories. Public nuisance requires plaintiffs to show that defendants unreasonably interfered in a substantial way with some public right, such as public resources, safety, or health. Plaintiffs in other mass torts have also sought to use public nuisance law in a similar way, with varying results. Examples include tobacco, opioids, lead paint, pollution, and firearms litigation.

However, the current lawsuits are not the first attempt to use public nuisance law to address issues allegedly causes by climate change. In *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011), Connecticut brought public nuisance claims based in federal common law against numerous power plants whose burning of fossil fuels emitted GHGs, allegedly causing interference with the Connecticut public's rights to enjoy their lands, infrastructure, and health. In a unanimous decision authored by Justice Ginsburg, the U.S. Supreme Court held that the federal Clean Air Act (CAA) and consequent EPA regulations directly regulated the emissions of pollutants from power plants, and were thus Congress's and the Executive's solution to the issue of GHG emissions (which the Court held were potential pollutants covered under the CAA in a prior case, *Massachusetts v. EPA*). The Court ruled therefore that the CAA displaced federal common law claims against emitters of GHGs , ending Connecticut's suit.

The next year, the Ninth Circuit extended the holding of *AEP* in *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849 (9th Cir. 2012). The Alaskan Village of Kivalina brought similar claims as Connecticut, except they targeted not only GHG *emitters*, but also energy *producers and extractors—i.e.* oil and gas drillers. The Ninth Circuit held the distinction to be insignificant: "federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels." *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) (summarizing *Kivalina*).

But public nuisance theories in the new wave of climate change lawsuits seek to avoid the *AEP* holding, which did not decide whether *state-law-based* tort claims were displaced—only claims based in *federal law*. So now plaintiffs have changed tack, seeking instead to recover by pleading state-common-law claims and purporting to eschew federal common law.

Procedural Skirmishes. The cases pressing these tort theories are still developing. Thus far, the most hard-fought battles have centered on procedural questions, though some cases are heading into a period where they will potentially be adjudicated on the merits.

The primary issue, as of now, remains whether these cases belong in federal or state court. For each lawsuit brought in state court, the energy defendants have removed to federal court, arguing that what the plaintiffs *actually* are alleging are violations of federal common law, which exclusively governs transboundary pollution under *AEP*.

The main basis for removal is the corollary to the well-pleaded complaint rule governing federal question jurisdiction: the artful-pleading doctrine. This rule states that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. The artful-pleading doctrine allows judges to see through state-law claims that actually raise federal-law issues. And that is important, because the Supreme Court has already determined that the Clean Air Act displaces federal common law tort claims. But district courts have so far split on whether plaintiff-municipalities are indeed alleging federal-law claims.

Two federal district courts have found these tort claims do in fact allege federal—and not state—causes of action. In *Oakland*, the cities of Oakland and San Francisco sued BP and the other major oil companies in California state court. They asserted a single claim for public nuisance under California state law, seeking an equitable abatement fund to build a seawall to mitigate harms caused by rising sea levels and other consequences of global warming. After defendants removed to federal court, the district court denied remand, finding that plaintiffs' claims, if any, were "governed by federal common law." In *City of New York*, S.D.N.Y. soon followed with a similar ruling.

But plaintiffs have won similar remand battles in

other jurisdictions: *County of San Mateo, Rhode Island*, *Boulder v. Suncor Energy*, 405 F. Supp. 3d 947 (D. Colo. 2019), and *Mayor & City Council of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538 (D. Md. 2019). In *Baltimore*, the court remanded Baltimore's claims, rejecting the defendants' arguments that the public nuisance claim was necessarily governed by federal common law. Instead, the court gave deference to the complaint's reliance on state law and explicitly rejected the *Oakland* court's approach, which it argued was "at odds with the firmly established principle that ordinary preemption does not give rise to federal question jurisdiction." The Fourth Circuit, in *Baltimore*, was the first appellate court to address this issue and recently affirmed the District of Maryland's remand order in an opinion narrow in scope, holding federal officer removal was not warranted under the statute. 952 F.3d 452 (4th Cir. 2020). The Supreme Court could potentially resolve an important issue presented in the case regarding whether federal courts of appeals have plenary review of all removal bases once one basis is properly appealed.

The battle over whether the claims belong exclusively in federal court are hard fought and for good reason: major hurdles plague plaintiffs under federal law that may not exist under various state laws. For example, in *Oakland*, the court dismissed the claims against non-California-domiciled defendants for lack of personal jurisdiction on the basis that plaintiffs' claims did not arise out of or relate to defendants' forum-related activities. The court concluded: "It is manifest that global warming would have continued in the absence of all California-related activities of defendants." Also in *Oakland*, the court held that political question doctrine strips the court of jurisdiction over claims implicating international causation, *i.e.*, "the conduct and emissions contributing to the nuisance [that] arise *outside* the United States, although their ill effects reach *within* the United States." The court dismissed plaintiffs' claims because it found they were "foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems."

As to the four cases remanded back to state court, the next big question (pending the result of the appeals) is whether the plaintiffs' state-law claims are displaced by the CAA. This question was expressly left open by Supreme Court's holding in *AEP*, which solely held that federal common law claims were displaced. The question turns on interpretation of the CAA and CWA savings clauses and whether those provisions preserve state causes of action for climate change. The answer is still to come, but should the courts find the suits displaced, it could spell an end to common-law climate-change suits.

For those plaintiffs who obtained remand back to state courts, proceedings in some cases have already started back up in state court. For example, the defendants have already filed a motion to dismiss in *City of Baltimore*. Even so, defendants are still working to overturn the remand orders. Defendants have sought certiorari from the U.S. Supreme Court in *City Baltimore*, and we are awaiting the Ninth Circuit's decisions in *Oakland* and *San Mateo*, the Second Circuit's in *City of New York*, the First Circuit's in *Rhode Island*, and the Tenth Circuit's in *Boulder*. Given the potential for a split, the issue could ultimately reach the high court.

II. Climate Change Claims Based on Commercial Law

Another type of climate-change litigation involves states and shareholders pursuing claims for securities fraud and unfair trade practices against energy companies. A key example is a lawsuit filed by the State of New York against ExxonMobil in New York state court alleging violations of the Martin Act, a state securities law prohibiting alleged fraud and misrepresentation. *New York v. ExxonMobil*, 65 Misc. 3d 1233(A) (N.Y. Sup. Ct. 2019). New York claimed that, from December 2013 through 2016, "ExxonMobil made various material written and oral misrepresentations and omissions that tended to mislead the public" about the way it internally priced risks related to global climate change. The core of the State's theory was that ExxonMobil had allegedly told investors and the public that they would use a higher dollar figure than they actually used in practice when pricing assets and investment opportunities to account for the risks associated with climate change (thus making Exxon's financial projections seem more resilient to the effects of climate change).

Knocking back the state's claims, the state court, ruling from the bench after a trial, held that ExxonMobil had not violated the Martin Act. New York had not shown that alleged misrepresentations made in publications and investor presentations were material to a reasonable shareholder. In October 2019, Massachusetts filed suit in its state court alleging similar alleged acts against ExxonMobil. *Massachusetts v. Exxon Mobil Corporation*, No. 19-3333 (Sup. Ct. Mass. Oct. 24, 2019). Notably, Massachusetts's claims all fall under its Consumer Protection Act (which most states have some version of). Massachusetts also alleges ExxonMobil engaged in false consumer advertising not related to securities. The state argues ExxonMobil engaged in false advertisements intended to "greenwash" the company (by falsely suggesting ExxonMobil was a leader in the effort to solve climate change).

Shareholder derivative and class action suits are also cases to keep an eye on as climate change litigation continues to evolve. The first wave of cases are shareholder

derivative actions that have been initiated against the corporate directors and officers of ExxonMobil in Texas federal court. Multiple suits seek to hold officers and directors liable for misleading shareholders on the value of its reserves and impact of climate change, based on theories of breach of fiduciary duty, unjust enrichment, and the 1934 Securities Exchange Act. *See, e.g.*, Complaint, *Von Colditz v. Woods*, No. 19-cv-01067 (N.D. Tex. May 2, 2019). These cases are still at an early stage. In *Von Colditz*, for example, the court has yet to rule on the defendants motion for stay pending the board's consideration of the plaintiff's litigation demand.

III. Constitutional Rights to Stable Environment and Public Trust

A final example of climate change cases involve constitutional claims against state and federal governments asserting "fundamental rights" to a stable climate theory.

Of particular note is *Juliana v. United States*. The plaintiffs—a number of children—argue that the U.S. government authorized and subsidized the extraction of fossil fuels, the combustion of which led damaging climate change affecting plaintiffs by creating psychological harm, impairing recreational interests, exacerbating medical conditions and damaging property. In so doing, they argue the government: (i) violated the public trust; (ii) violated a fundamental constitutional right to a clean environment and stable climate; and (iii) violated children's right to equal protection. Plaintiffs seek an injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [CO2]."

A Ninth Circuit panel held that the plaintiff-children lacked Article III standing. 947 F.3d 1159 (2020). Interestingly, the court noted in *dicta* that the children had alleged injury-in-fact and causation, but held the plaintiffs failed to show the claims are redressable by an Article III court, relying on separation of powers and on the political question doctrine, as we saw in *Oakland* and *New York*. Notably, the dissent stakes out the position that the plaintiffs have a fundamental right to the perpetuity of the Republic. The dissent further argued that Article III courts may trump separation of powers in order to redress fundamental rights preserved by the Constitution—here the right to be free from the "willful dissolution of the Republic" by way of promoting catastrophic climate change. The plaintiffs have sought rehearing *en banc*, which has yet to be decided.

* * *

So where does climate change litigation go from here? A key factor appears to be whether or not the U.S. Supreme Court will be willing to accept defendants' appeals asserting that the plaintiffs' tort claims are barred by the *AEP* holding. If the Court accepts such appeals, it could potentially represent an end to "public nuisance" climate change cases. However, if the Court does not, the defendants will proceed to litigating the cases on the merits in a multi-jurisdictional manner under a variety of different state law regimes. We can also likely expect that there will be continued efforts by plaintiffs (both private and governmental) to assert securities and commercial law claims. The results of these cases will not only be critical for the energy industry, but for other U.S. industries, investors, and the government.

Quinn Emanuel Highly Ranked by *Chambers Europe* 2020

Chambers Europe 2020 recognized Quinn Emanuel as a Europe-wide market leader in the areas of Arbitration (International) and Dispute Resolution. The firm and its partners were also highly ranked in the following areas: Competition: EU (Belgium), International Arbitration (France), Intellectual Property: Patent Litigation (Germany), and Competition Law: Private Enforcement: Claimant Litigation (UK).

Latin Lawyer 250 Names Quinn Emanuel as a Leading Law Firm for Latin American Businesses

The firm's capacity in anti-corruption investigations and compliance, arbitration, and litigation helped Quinn Emanuel gain recognition as a leading law firm in Latin America. The following seven partners were also highlighted within their respective practice areas: William Burck, Michael Carlinsky, Juan Morillo, Sandra Moser, Gabriel Soledad, David Orta, and Daniel Salinas-Serrano.

U.S. Patent Office Seeks Public Comments on Patenting Artificial Intelligence Inventions

In 2016, a computer program developed by Google's DeepMind Technologies beat the world's second-highest ranking professional player at the board game Go. The program, AlphaGo, won four out of five matches against Korean player Lee Sedol in this ancient game that many believed was too complex for computer programs to master. By one estimate, there are more board configurations in Go than there are atoms in the universe. Therefore, a brute force computation of all possible moves would not work. Instead, AlphaGo utilizes an artificial intelligence (AI) algorithm called the "deep neural network" to teach itself how to get better.

The creativity of the AI revealed itself during AlphaGo's second match. The computer made a move that contemporaneous commentators characterized as a clear mistake, but which ultimately gave AlphaGo the victory. Afterwards, Lee and other players called the move "beautiful," "unique," and "creative." It is clear that the AlphaGo program reflects innovation both in its creation and in the outcomes it produces—but the question of whether and how that innovation is to be protected by intellectual property rights remains an open one today.

On August 27, 2019, the United States Patent and Trademark Office ("USPTO") published a Request for Comments on Patenting Artificial Intelligence Inventions, 84 FR 44889. The Request for Comments broadly defines AI inventions as "[i]nventions that utilize AI, as well as inventions that are developed by AI." Although the USPTO invited the public to comment on "any issues that they believe are relevant" to the topic, it also listed specific questions of interest, such as:

- Do current patent laws and regulations regarding inventorship need to be revised to take into account inventions where an entity or entities other than a natural person contributed to the conception of an invention?
- Does AI impact the level of a person of ordinary skill in the art? If so, how? For example, should assessment of the level of ordinary skill in the art reflect the capability possessed by AI?
- Are there any patent eligibility considerations unique to AI inventions?
- Are there any new forms of intellectual property protections that are needed for AI inventions, such as data protection?

Comments were due by November 8, 2019, and made available for public inspection on March 18, 2020. The majority of the publicly-available comments conclude that, at least for now, the emergence of AI technology does not justify modifying the limitations of named inventors to natural persons. For example, the American Intellectual Property Law Association (AIPLA) stated that "[o]wnership of patent rights should remain reserved for only natural or juridical persons at this time" at least in part because, for now, "there is not yet enough information available to know whether this is truly 'inventive AI.'" The AIPLA cautioned however that "if inventive AI does exist in the future, it will be necessary to consider what types of activities by AI entities would be considered as inventive contributions to the claimed invention."

In a response submitted by the U.S. chapter of the Institute of Electrical and Electronics Engineers (IEEE-USA), the organization argued that AI is hardly different than other types of "computer-implemented technologies" that have enabled humans to perform tasks more efficiently. Rather than modifying the law to specifically address AI, the IEEE-USA suggested refining existing legal standards that are difficult to apply for AI and non-AI inventions alike such as the law for subject matter eligibility. The IEEE-USA further stated that inventions to which AI may contribute should be attributed to the individuals designing the AI system, specifically, those who "created an AI's system's specifications, objectives, and input/output architectures, and who trains the AI system should be named the inventors of any inventive output of the AI system."

Finally, Tata Consultancy Services (TCS) noted a few practical hurdles that must be considered if and when AI inventors are recognized. For example, execution of an assignment of the patent right to another entity, signing a declaration by the inventor stating its belief that he or she is the true inventor, and submitting a disclosure to the USPTO listing the prior art known to the inventor would all be challenging for an AI inventor to accomplish.

The prevailing view of U.S. commentators is consistent with the approach taken by most foreign jurisdictions. For example, both the EPO and the UKIPO rejected patent applications identifying AI as a named inventor on the basis that "the designation of inventor" does not meet the requirements of the patent laws. While the USPTO has yet to issue new regulations or guidelines based on the responses it received to its Request for Comments, two applications related to those rejected by the EPO/UKIPO are believed to remain pending before the Patent Office. Q

Construction Litigation Update

New Public Procurement Laws in Saudi Arabia

In the second half of 2019, the Kingdom of Saudi Arabia (**KSA**) introduced new public procurement legislation, the *Government Tenders and Procurement Law* (**the GTPL**). It applies to all projects, contracts or appointments issued or made by government authorities, ministries, departments, public institutions and public bodies with corporate personality from 29 November 2019. It operates alongside the Implementing Regulations (**the Regulations**). The GTPL replaces the 2006 procurement law and is part of a wider reform agenda in the KSA to promote economic development and investment.

Arbitration

Of particular interest is that the GTPL allows government entities to agree to refer disputes to arbitration. Restrictions in the KSA, dating back to 1963, had prohibited government entities from having recourse to arbitration. In 2012, the KSA introduced the Arbitration Law 2012 (modelled on the widely-used UNICTRAL Model Laws), which permitted private entities to agree to resolve disputes by way of arbitration. However, it maintained the prohibition on government entities being parties to arbitrations. Whilst there were some exceptions, such as under the Mining Investment Law, these were rare.

Article 92(2) of the GTPL now provides that government entities may agree to arbitration, subject to approval of the Minister of Finance and in accordance with the Regulations. However, Article 154(2) of the Regulations provides that the arbitration dispute must be managed by a Saudi arbitration body, and that the parties to such an arbitration must adhere to the rules operated by such a body. Alongside Royal Decree 28004 of 24 January 2019 (which will remain in effect until at least January 2024), all of the established international arbitral institutions, such as the International Chamber of Commerce and the London Court of International Arbitration, are effectively precluded from managing a dispute involving a government entity. The Regulations also provide that arbitration is limited to contracts with a value in excess of SAR 100m (approximately $26m USD). Although recourse to arbitration is still not entirely unrestricted, alongside the Arbitration Law 2012 and the establishment of the Saudi Center for Commercial Arbitration in Riyadh, the changes indicate a greater acceptance of the use of arbitration to resolve disputes in the KSA.

Other Changes

Also of particular interest are the following:

- The GTPL continues the trend of promoting local businesses and SMEs. Article 9 provides that local contractors and SMEs will be afforded priority throughout the tender and procurement process. Foreign companies looking to obtain a foothold in the market may need to consider establishing a network of Saudi subcontractors and establishing a branch within the KSA.
- The GTPL also contains special provisions concerning contract termination and cost and time adjustment, which will override any inconsistent contract terms. Whilst the 2006 law contained similar provisions, some of the penalties have been increased, as set out below.
- Article 68 limits the circumstances in which the contract price may be adjusted. These can occur in circumstances where there is an increase in the price of raw materials or government charges and levies and also where the contractor seeks an increase due to events outside of its control (such as force majeure). Allowance is also made for unexpected material difficulties in the execution of the contract. The Regulations place an upper limit for increases of 20%, however contractors may apply to an administrative court if they wish to seek more. However, increases to reflect instructed changes in the scope of work are still permitted under Article 69, up to a limit of 10% of the contract value.
- Consequences of project delay are also prescribed. Article 72 limits the penalties (including liquidated damages) that can be imposed for delay at 6% of the contract value for supply contracts, and 20% for any other contracts (previously set at 10% of the contract value under the 2006 law). Article 73 provides for a similar maximum penalty of 20% for a contractor's default in executing its contractual obligations (also previously set at 10%). However, Article 74 sets out certain exceptions to these caps, and also provides that contractors may seek extensions of time. Such extensions may be granted in circumstances including scope increases, delays which are the responsibility of the government entity and delays resulting from circumstances beyond the contractor's control.
- Termination is dealt with in Articles 76 to 78. Article 76 provides that contracts may only be terminated in certain circumstances. These include a delay in commencement of the works, and the failure to obtain written consent to subcontract the works. The government entity may also terminate a

contract if doing so would be in the public interest (although the scope of this is not defined) or if termination is agreed with the contractor (Article 77).

The interplay between these provisions concerning time, cost and termination, and between these provisions and the parties' contract terms, will need to be carefully examined. Foreign contractors will need be aware of the regulatory position in the KSA before executing contracts with government entities. There have not yet been any published cases dealing with the new GTPL. The interplay between the law and contractual mechanisms may prompt contractors and suppliers to proceed with caution. Nonetheless, the GTPL should come as a welcome shift in the right direction for foreign contractors looking to invest in the massive public infrastructure programs in the KSA over the coming years.

UK Appeal Court Considers the Definition of 'Practical Completion'

A recent case in the Court of Appeal of England and Wales may be of interest. In **Mears Ltd v. Costplan Services (South East) Ltd [2019] EWCA Civ 502**, the Court of Appeal considered the definition of "practical completion", a term which appears in the vast majority of construction contracts but is often left undefined. Mears, the future tenant in a residential development, alleged that the certificate for the achievement of practical completion could not be issued because 56 rooms were over 3% smaller than shown on the drawings. The agreement stipulated that a variance over 3% was a material variation (but, notably, not a material breach of the contract). Rectification would have required demolition of the entire building.

The tenant's claim and subsequent appeal were both dismissed. In the Court of Appeal, Coulson LJ held that the relevant test for determining whether defects precluded the issuing of a practical completion certificate was whether the defects were "trifling". Whether the owner could take possession of the works and use them for their intended purpose is relevant but not a complete answer. Although the irremediable nature of the defects in this case was relevant to the measure of loss, it did not bear upon practical completion. Coulson LJ was also conscious of the practical impact of the tenant's position, which would be that the whole project would need to be demolished and rebuilt if the Court found that practical completion had not been achieved.

Employers may be wary that this judgment signals a relaxation of the threshold of practical completion. However, the unusual facts of the case are likely to have played a part in the Court's decision. Employers can also guard against similar outcomes by ensuring that their contracts provide parameters to guide and control the certifier's discretion in relation to practical completion and where performance or design threshold are express criteria for practical completion - as is common on complex resources, healthcare or infrastructure projects.

International Trade Update

Will the Non-Delegation Doctrine Be Reinvigorated?

A recurring question in American trade law is whether various statutory delegations of authority to the President to take actions against imports—such as imposing duties, fees, or quotas—violate Article I of the Constitution, which vests "all legislative Powers" in Congress, including the power "To lay and collect Taxes, Duties, Imposts and Excises." For two centuries, the Supreme Court has mostly rejected such "non-delegation" challenges to trade statutes. But in the past year, five justices have signaled a potential willingness to re-invigorate the non-delegation doctrine. A recent trade decision by the Federal Circuit will give them that opportunity.

Origins of the Non-Delegation Doctrine

The non-delegation doctrine traces its origins to trade cases dating back 200 years. In *The Brig Aurora*, 7 Cranch 382 (1813), the Supreme Court upheld a delegation to the President of the power to issue a proclamation that would revive a statutory ban on imports from Great Britain or France. Eighty years later, in *Field v. Clark*, 143 U.S. 649 (1892), the Supreme Court relied on *The Brig Aurora* to uphold a delegation to the President of the power to suspend statutory provisions that exempted foreign sugar, molasses, coffee, tea, and hides from import duties. But even as it upheld that provision, the Court emphatically declared that the principle that "Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

Then, in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), the Supreme Court relied on *Field v. Clark* to uphold a delegation to the President of the authority to raise tariffs on imported merchandise to equalize differences in production costs between foreign merchandise and domestic goods. While it reaffirmed the principle that Congress cannot delegate legislative power to the President, the Court also recognized the need for flexibility and practicality in setting duties, explaining that Congress could delegate discretion to the Executive Branch to *implement* laws that Congress enacts, especially in realms—like trade—where fine technical distinctions must be drawn and redrawn rapidly as circumstances fluctuate. *Id.* at 404–05. To

distinguish permissible delegations from impermissible ones, the Court stated that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

In the decades since *J.W. Hampton*, the Court has repeatedly drawn on the "intelligible principle" test to uphold grants of power to the President against non-delegation challenges. *E.g.*, *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 474–75 (2001) (collecting cases). Indeed, since the 1930s, no non-delegation challenge to a statute has been successful in the Supreme Court. But that may be about to change.

Shifting Sentiments at the Supreme Court

Last year, in *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court, sitting with only eight members (Justice Kavanaugh took no part in the case), again denied a non-delegation challenge, this time to a delegation to the Attorney General of the power to determine whether to impose registration requirements on sex offenders. But the "intelligible principle" test no longer mustered a majority of the Court.

Justice Kagan, writing for a plurality of four justices, invoked that test to uphold the delegation. *Id.* at 2129–30. In dissent, Justice Gorsuch, writing for himself, Chief Justice Roberts, and Justice Thomas, argued that the "intelligible principle" test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional" and that the Court should return to first principles and reinvigorate the non-delegation doctrine to more carefully police delegations of legislative power to the Executive Branch. *Id.* at 2133–42. Justice Alito concurred in the judgment to uphold the delegation, but he refused to join the plurality opinion and instead wrote that he "would support" reconsideration of the non-delegation doctrine, just as the dissenters sought. *Id.* at 2131. Then, five months after *Gundy*, Justice Kavanaugh opined that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases," especially in cases where major national policy decisions have been delegated to the Executive Branch. *Paul v. United States*, 140 S. Ct. 342 (2019).

Thus, in the past year, five justices—Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kennedy—have written or signed opinions signaling that they are open to revitalizing the nondelegation doctrine. A new trade case now presents that opportunity.

A New Challenge in the Federal Circuit

In March 2018, President Trump imposed a 25% tariff on imported steel. He did so under Section 232 of the Trade Expansion Act of 1962, which empowers the President to "adjust the imports" of an article if the Secretary of Commerce finds that the article's import into the United States threatens to impair national security. In 1976, the Supreme Court relied on the "intelligible principle" test of *J.W. Hampton* to uphold Section 232 against a non-delegation challenge after President Ford had invoked the statute to impose license fees on petroleum imports. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 538 (1976).

In 2019, a three-judge panel of the U.S. Court of International Trade held that *Algonquin* foreclosed any non-delegation challenge to President Trump's steel tariffs under Section 232. *American Institute for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335 (CIT 2019). Judge Katzmann concurred "dubitante." He felt bound by *Algonquin*, but he expressed "grave doubts" about its correctness, *id.* at 1346–47, as he viewed Section 232 as granting "virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress," *id.* at 1352. As he asked at the end of his opinion: "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the constitution, what would?" *Id.*

Earlier this year, the Federal Circuit affirmed that ruling because it considered *Algonquin* to be controlling. *American Institute for Int'l Steel, Inc. v. United States*, --- F. App'x ----, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020). It noted that, in *Gundy* and *Paul*, five members of the Supreme Court had recently expressed interest in reconsidering the non-delegation doctrine, but it recognized that "such expressions give us neither a license to disregard the currently governing precedent nor a substitute standard to apply." *Id.* at *7. The Federal Circuit's obligation was to follow the Supreme Court's holdings and leave to the Supreme Court the "prerogative of overruling its own decisions." *Id.*

To the Supreme Court

On March 25, 2020, the American Institute for International Steel petitioned the Supreme Court for a writ of certiorari. The petition asked the Court to take up the invitations in *Gundy* and *Paul* to reevaluate the non-delegation doctrine, distinguish or overrule *Algonguin*, and strike down Section 232 as unconstitutional. Three amicus briefs—by Basrai Farms, the Cato Institute, and the New Civil Liberties Alliance—support the petition. Given the non-delegation doctrine's origins in trade cases, it is fitting that a trade case may bring about its

revitalization. In the coming months, the Supreme Court will decide whether to grant certiorari and reassess the non-delegation doctrine. If it does, then there may be significant ramifications for trade law and the many statutes that grant the Executive Branch powers to impose various duties on imports.

Product Liability Litigation Update

U.S. Supreme Court Denies Certiorari in Case Against Gun Manufacturer Brought by Families of Sandy Hook Shooting Victims

In a case we previously noted in the March 2018 Business Litigation Report, the U.S. Supreme Court recently declined to hear an appeal by gun manufacturer Remington from a Connecticut Supreme Court ruling, thereby clearing the way for a lawsuit by family members of first graders and staff members killed in the Sandy Hook Elementary School shooting to move forward.

The case, *Remington Arms Co. v. Soto*, has been described as a test of whether litigation by family members of mass shooting victims could pass the motion to dismiss stage in light of the Protection of Lawful Commerce in Arms Act ("PLCAA"), codified at 15 U.S.C. §§ 7901 through 7903. The PLCAA, which was passed in 2005, provides immunity to firearm and ammunition manufacturers, distributors, and dealers from civil or administrative claims based on the "criminal or unlawful misuse of firearms products or ammunition products." 15 U.S.C. § 7901(b)(1). There are six limited exceptions to the immunity, including an exception when the manufacturer, seller, or distributor violates a state or federal statute "applicable" to the sale or marketing of firearms or ammunition (known as the "predicate" exception) and an exception for "negligent entrustment" claims. 15 U.S.C. § 7903(5)(i)-(vi).

On March 19, 2019, the Connecticut Supreme Court held in a 4-3 decision that the family members of the victims killed in the 2012 mass shooting could move forward with "one narrow legal theory" under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a, *et seq*. *Soto v. Bushmaster Firearms, Int'l, LLC*, 331 Conn. 53 (2019). Specifically, the family members could proceed with their claim that Remington "knowingly marketed, advertised, and promoted" the Bushmaster XM15-E2S semiautomatic rifle as allowing civilians "to carry out offensive military-style combat missions," in violation of CUTPA's bar on "advertisements that promote or model the unsafe or illegal use of potentially dangerous products." *Id.* at 65-66, 131-132. (The majority noted that the XM15 "is substantially similar to the standard issue M16 military service rifle used by the United States Army and other nations' armed forces, but fires only in semiautomatic mode." *Id.* at 70.)

The Connecticut Supreme Court held that the family members' claims under CUTPA fell within the predicate exception, reasoning that, among other things, the legislative history indicated that "Congress did not intend to limit the scope of the predicate exception to violations of firearms-specific laws" and that "the primary purpose of the PLCAA … is not to shield firearms sellers from liability for wrongful or illegal conduct." *Id.* at 144, 146. The Connecticut Supreme Court also held that, in light of "amendments [to CUTPA that] eliminated … [a] privity requirement," the family members did not have to show "a business relationship with" Remington in order to establish standing. *Id.* at 88-89. Moreover, the Connecticut Supreme Court held that "at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA" for damages purposes and that the "plaintiffs' wrongful advertising theory is not barred by CUTPA's statute of limitations." *Id.* at 106, 116.

In seeking U.S. Supreme Court review, Remington argued that the Connecticut decision conflicted with prior decisions from the Ninth Circuit in *Ileto v. Glock*, 565 F.3d 1126 (2009), and the Second Circuit in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2008), by holding that any statute "capable of being applied" to firearms fell within the scope of the predicate exception and therefore could be a basis of liability. *See Soto*, 331 Conn. at 119; Remington Petition for Certiorari, at 3. Remington contended the decision creates "confusion" about the predicate exception's scope. *Id.* at 4. Remington further argued that "[b]ecause all states have analogous unfair trade practices laws, the decision below threatens to unleash a flood of lawsuits nationwide that would subject lawful business practices to crippling litigation burdens." *Id.* In opposing certiorari, meanwhile, the plaintiffs argued that Remington's warning of a flood of litigation is "groundless hyperbole." Plaintiffs' Opposition to Certiorari Petition, at 2. The plaintiffs argued that the case did not merit interlocutory review by the U.S. Supreme Court and that the Connecticut Supreme Court correctly reasoned that the "most natural reading of 'applicable' in the PLCAA" includes CUTPA as applied by the Sandy Hook families in their 2014 lawsuit. *Id.* at 9, 22.

Although the U.S. Supreme Court's denial of certiorari clears the way for the family members' litigation to proceed in state court in Connecticut, the Connecticut Supreme Court majority warned that the lawsuit will still face obstacles, including the issue of causation. *Soto*, 331 Conn. at 98. The Connecticut Supreme Court underscored that plaintiffs' theory

requires their proving that "the defendants' wrongful advertising magnified the lethality of the Sandy Hook massacre by inspiring [perpetrator Adam] Lanza or causing him to select a more efficiently deadly weapon for his attack." *Id.* "Proving such a causal link at trial may prove to be a Herculean task," the majority stated. *Id.* However, the Court added, "no private party is better situated than the plaintiffs to bring the action." *Id.* at 99.

Life Sciences Update

Supreme Court Denies Certiorari in Closely Watched *Athena* Case

On January 13, 2020, after its conference on January 10, 2020, the United States Supreme Court denied certiorari in *Athena Diagnostics Inc. v. Mayo Collaborative Services, LLC*, No. 19-430--despite the unusual situation of several Federal Circuit judges requesting the Supreme Court take up the case.

In *Athena*, the patent holder sued for infringement of a patent directed to a diagnostic test that required detecting the presence of certain antibodies by contacting the sample with a radioactive-labeled protein. The district court dismissed the case, ruling the patent invalid based on 35 U.S.C. § 101 pursuant to *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), as claiming a law of nature as opposed to a patentable invention.

The Court of Appeals for the Federal Circuit affirmed the decision. *See Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 915 F.3d 743, 753-54 (Fed. Cir. 2019). And on July 3, 2019, the Federal Circuit denied Plaintiff Athena's petition for rehearing en banc. 927 F.3d 1333 (Fed. Cir. 2019). The denial of the petition, however, led to eight separate concurring and dissenting opinions from active Federal Circuit judges, an unusually large number, demonstrating significant splits of opinion regarding the patentability of diagnostic test kits, as well as express requests for either Supreme Court or Congressional clarification regarding such patentability.

Accordingly, on October 1, 2019, Athena filed a petition for writ of certiorari at the United States Supreme Court. Over ten parties submitted briefs in support of the Court taking up the case and revisiting or clarifying its precedent regarding subject matter eligibility for diagnostic testing patents. Athena's petition focused on the multiple opinions below, arguing that the Federal Circuit is divided and has called for the Court's guidance and that there were many "points of confusion" in applying the Court's precedent.

As mentioned above, despite the several opinions of Federal Circuit judges, the Court denied the petition. Following the denial, commentators have noted that the issue of patent eligibility for diagnostic test kits can be addressed in Congress by statute instead of asking the Supreme Court to clarify or amend its precedent. Indeed, Judge Hughes of the Federal Circuit (joined by Judges Prost and Taranto), as well as Judge O'Malley, called for Congress to intervene on this issue. 927 F.3d at 1337, 1373. It remains to be seen whether Congress will take up this issue, but that appears to be the next battleground for diagnostic testing patents.

VICTORIES

Victory for UPS

Quinn Emanuel recently achieved an appellate victory in the D.C. Circuit on behalf of longtime client United Parcel Service, resulting in a remand order requiring the US Postal Service to price package delivery more accurately.

This important decision by the D.C. Circuit will help make sure that the Postal Service competes fairly against the private sector when it comes to delivering e-commerce and other packages and does not use its monopoly over letter delivery to give it an advantage.

With the advent of email, the Postal Service saw its bread-and-butter of letter delivery drying up. Because it is a government agency, and not a private company, it had potential incentives to find ways to maintain its large size (as opposed to cutting costs). Around 2008, therefore, the Postal Service started focusing on competing with the private sector (UPS, FedEx) to deliver packages. Congress allowed this, but passed a law mandating that the Postal Service could not use its monopoly over letter delivery to gain an unfair advantage in package delivery. Basically, the package delivery business had to stand on its own feet and set prices at levels sufficient to cover the costs of that business. This raised the potential that the Postal Service might misclassify its costs—as being either part of the letter-mail monopoly business or as "institutional" costs of the enterprise as a whole. Congress designated a regulatory agency—the Postal Regulatory Commission—with making sure the Postal Service was accounting for the costs of delivering packages accurately.

At issue here was how the Commission set the "appropriate share" of "institutional" costs to be paid for

by the Postal Service's package-delivery business. Due to significant economies of scale and scope at the Postal Service, institutional costs make up approximately *half* of all Postal Service costs, or over $30 billion dollars. The Commission had issued an Order setting the appropriate share percentage to be less than 10% even though packages represent over 30% of Postal Service revenues. UPS argued that there were significant shortcomings in the Commission's analysis. In April of 2020, Quinn Emanuel obtained a favorable opinion from the D.C. Circuit declaring the Commission's Order arbitrary and capricious, and remanding the case to the Commission for further proceedings. The D.C. Circuit further described the Commission's interpretation of the relevant statute as "incomprehensible and, thus, unreasonable."

This case represents a significant win for UPS, because the deference doctrine announced in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) instructs courts generally to defer to agency expertise. *Chevron* deference presented a particularly uphill battle here because the agency had incorporated highly technical jargon and formulas in its Order, which at face value could be interpreted as an agency deploying specialized expertise beyond the reach of the judiciary. This case is also an important precedent for agency law generally, as it demonstrates the D.C. Circuit will in fact rein in agencies that overstep their authority and defy the statutory requirements for its decision making, even if the agency decision has the veneer of technical expertise.

RICO Victory for Express Scripts

The firm recently achieved a victory for client Express Scripts in the U.S. Court of Appeals for the Ninth Circuit, affirming the dismissal of a complaint that sought treble damages and attorneys' fees from Express Scripts and a co-defendant under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

The plaintiff, Blue Oak Medical Group, was a network of medical clinics that primarily treated workers injured on the job and obtained reimbursement from California workers' compensation insurers, including Express Scripts' co-defendant, the State Compensation Insurance Fund. Although it was fully aware that Express Scripts was State Fund's exclusive provider, Blue Oak nevertheless continued to dispense medications directly to its patients, citing purported difficulties in confirming the availability of medications at Express Scripts-network pharmacies. It then filed a complaint alleging that State Fund's routine denials of its out-of-network claims were part of a conspiracy with Express Scripts to perpetrate an alleged fraud against Blue Oak and run it out of business. After the district court dismissed Blue Oak's complaint, Express Scripts retained Quinn Emanuel to defend its initial victory in front of the Ninth Circuit.

On appeal, Quinn Emanuel sought to lay out a straightforward blueprint for affirmance. The firm argued that Blue Oak's real grievance was simply State Fund's predictable denial of its out-of-network claims in accordance with its announced policies. Even on the face of its complaint, Quinn Emanuel argued, Blue Oak was fully aware of those policies, and urged the court to also consider the authorization letters referenced in (but not attached to) the complaint, which repeatedly and conspicuously warned Blue Oak that it would not be reimbursed if it dispensed medications itself. That strategy paid off. The Court followed the straightforward roadmap laid out in the firm's brief, in a summary affirmance, holding that Blue Oak failed to allege any scheme to defraud. Adopting the firm's primary argument, the Court agreed that Blue Oak was well apprised that State Fund had entered into an exclusive and lawful pharmacy network arrangement with Express Scripts: "Under these circumstances, Blue Oak has not alleged any scheme to defraud or false statements to the effect that Blue Oak would be reimbursed for medications it provided."

The court's summary affirmance will help to protect insurers and pharmacy benefits managers like Express Scripts from similar nuisance claims that seek to transform disagreements with ordinary (and appropriate) insurance decisions into treble-damages claims under RICO. Q

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

business litigation report

quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Elizabeth Urquhart at +44 20 7653 2311.

- We are a business litigation firm of more than 800 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of May 2020, we have tried over 2,300 cases, winning 88% of them.
- When we represent defendants, our trial experience gets us better settlements or defense verdicts.
- When representing plaintiffs, our lawyers have garnered over $70 billion in judgments and settlements.
- We have won five 9-figure jury verdicts and one 10-figure jury verdict.
- We have also obtained forty-three 9-figure settlements and nineteen 10-figure settlements.

Prior results do not guarantee a similar outcome.

LOS ANGELES
865 S. Figueroa St.,
10th Floor
Los Angeles, CA 90017
+1 213-443-3000

NEW YORK
51 Madison Ave.,
22nd Floor
New York, NY 10010
+1 212-849-7000

SAN FRANCISCO
50 California St.,
22nd Floor
San Francisco, CA 94111
+1 415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr.,
5th Floor
Redwood Shores, CA 94065
+1 650-801-5000

CHICAGO
191 North Wacker Dr.,
Suite 2700
Chicago, IL 60606
+1 312-705-7400

WASHINGTON, D.C.
1300 I Street NW,
Suite 900
Washington, DC 20005
+1 202-538-8000

HOUSTON
Pennzoil Place
711 Louisiana St.,
Suite 500
Houston, TX 77002
+1 713-221-7000

SEATTLE
600 University St.,
Suite 2800
Seattle, WA 98101
+1 206-905-7000

BOSTON
111 Huntington Ave.,
Suite 520
Boston, MA 02199
+1 617-712-7100

SALT LAKE CITY
60 E. South Temple,
Suite 500
Salt Lake City, UT 84111
+1 801-515-7300

TOKYO
Hibiya U-1 Bldg., 25F
1-1-7, Uchisaiwai-cho,
Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
90 High Holborn
London WC1V 6LJ
United Kingdom
+44 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 40 89728 7000

MUNICH
Hermann-Sack-Straße 3
80331 Munich
Germany
+49 89 20608 3000

PARIS
6 rue Lamennais
75008 Paris
France
+33 1 73 44 60 00

HONG KONG
4501-03 Lippo Centre, Tower One
89 Queensway, Admiralty
Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth St.
Sydney, NSW 2000
Australia
+61 2 9146 3500

BRUSSELS
Blue Tower
Avenue Louise 326
5th Floor
1050 Brussels
Belgium
+32 2 416 50 00

ZURICH
Dufourstrasse 29
8008 Zürich
Switzerland
+41 44 253 80 00

SHANGHAI
Unit 502-503, 5th Floor, Nordic House
3 Fenyang Road, Xuhui District
Shanghai 200031
China
+86 21 3401 8600

PERTH
Level 41
108 St Georges Terrace
Perth, WA 6000
Australia
+61 8 6382 3000

STUTTGART
Büchsenstraße 10, 4th Floor
70173 Stuttgart
Germany
+49 711 1856 9000