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## U.S. District Judge Alan Albright Grants First Two Section 101 Motions

Since his appointment in 2018, U.S. District Judge Alan Albright of the Western District of Texas has become one of the Nation's most influential judges for patent litigation. Last December, he granted his first two motions under Section 101 of the Patent Act after denying many such motions during his first three years on the bench. Those rulings give crucial insights into how Judge Albright will approach Section 101 issues in future cases.

### Judge Albright's Busy Patent Docket

In his short time on the bench, Judge Albright, who sits in Waco, Texas, has attracted the largest patent docket in the country. In 2021, Judge Albright had 931 patent cases pending in his court (up from 792 in 2020), far exceeding the second most active judge in the country, who had 329 cases. Fully one-fifth of new patent-infringement actions are filed in Waco.

A variety of factors have contributed to Judge

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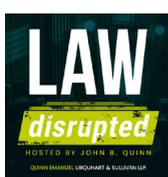
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## Firm Opens Office in Riyadh, Saudi Arabia

Quinn Emanuel is pleased to announce that it has entered into an association with the Alrubayyi & Attorneys law firm in Riyadh. The newly associated firm is run by one of the top litigators in Saudi Arabia, Nasser Alrubayyi, who has joined Quinn Emanuel as a partner. Nasser represents and defends international and domestic corporations in a wide array of litigation and arbitration cases in the construction, telecommunications, securities, tax, insurance, and real estate sectors. 

## Firm Launches "Law, Disrupted" Podcast



The firm is proud to announce the release of the thought-provoking podcast "Law, disrupted" hosted by founding partner John B. Quinn. Join John with market leaders and innovators as they discuss legal issues concerning the newest technologies, innovations, and current events—and ask, what's next? New episodes of "Law, disrupted" are released bi-weekly, and can be streamed on Apple, Spotify, or wherever you listen to podcasts. Listen and learn more at <https://www.law-disrupted.fm/>. 

## Financial Regulator Katherine Lemire Joins New York Office



Katherine A. Lemire has joined the firm as a partner based in New York City. An accomplished financial services enforcement attorney and former federal prosecutor, Katherine served most recently as Executive Deputy Superintendent of the New York State Department of Financial Services (DFS), leading the Consumer Protection and Financial Enforcement Division. In that role, she oversaw enforcement actions brought against international banks, the insurance industry, and cryptocurrency businesses, as well as money transmitters, mortgage servicers, student lenders, and other financial service providers. She was also a member of DFS's virtual currency licensing committee. 

Albright's outsized docket. In the 2017 decision in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017), the Supreme Court construed the patent-venue statute, 28 U.S.C. § 1400(b), to make it more difficult for patent-infringement plaintiffs to bring suit in the Eastern District of Texas, a traditional hotbed of patent litigation, because few large technology companies have significant presences there. In contrast, the Western District of Texas includes the business hub of Austin, a growing metropolis that hosts many major technology companies, and it is therefore easier to secure venue in the district under *TC Heartland*. In addition, Judge Albright has instituted a number of rules that encourage parties asserting patent-infringement claims to file in Waco, a mid-sized city 100 miles north of Austin, where they are guaranteed to have their cases assigned to him. For example, his rules delay discovery until after the *Markman* hearing and impose certain procedures designed to resolve disputes more quickly. Judge Albright has also been notably reluctant to grant motions to transfer venue, at times provoking writs of mandamus from the Federal Circuit. And as particularly relevant here, until December 2021, Judge Albright had never granted a defendant's motion under Section 101 of the Patent Act arguing that the patent claims were directed to ineligible subject matter.

### Section 101 and *Alice*

Section 101 identifies patent-eligible subject matter as any "new and useful process, machine, manufacture, or composition of matter, or any new useful improvement thereof." 35 U.S.C. § 101. The Supreme Court has long construed the provision to mean that "laws of nature, natural phenomena, and abstract ideas are not patentable." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216 (2014). But it has proved challenging to apply that limitation in practice. In its 2014 decision in *Alice*, the Supreme Court established a two-part test for determining whether a patent's subject matter is ineligible. The first step requires a court to determine whether a patent claim is "directed to one of [the] patent-ineligible concepts" held that a claim falls outside of Section 101. *Id.* at 217. If not, the patent satisfies Section 101. But if the claim is directed to one of those concepts, the court must then determine at *Alice*'s second step whether the claim elements contain an "inventive concept" sufficient to "transform the nature of the claim into a patent-eligible application." *Id.* Such an inventive concept must amount to "an element or combination of elements" that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the ineligible concept itself." *Id.* at 217–18.

In the eight years since *Alice*, parties and lower courts have often struggled with how to apply its standard, particularly in the context of software patents. Retired Federal Circuit Chief Judge Paul Michel has expressed concern that "recent cases are unclear, inconsistent with one another and confusing," and that he himself "cannot reconcile the cases" despite having served on the Federal Circuit for 22 years. Testimony of Hon. Paul R. Michel Before the Subcommittee on Intellectual Property of the S. Comm. on the Judiciary, 116th Cong. 2 (June 4, 2019).

Given the difficulty of applying the *Alice* standard and the substantial number of plaintiffs filing suit in Waco, Judge Albright's approach to Section 101 is a critical question for patent enforcement. Until last December, Judge Albright was viewed as highly skeptical of Section 101 arguments, at least at any early stage of a case. He had denied every Section 101 motion to dismiss filed in his court. He has explained that he sees the *Markman* hearing and fact development as integral to resolving a Section 101 argument in the typical case. *E.g., Kajeet, Inc. v. Trend Micro, Inc.*, No. 6:21-cv-00389-ADA, 2021 Dkt. 45 at 9-10 (W.D. Tex. Jan. 14, 2022). In his view, claim construction can significantly affect a Section 101 analysis, and the lack of fact discovery can make it difficult to determine whether the claims contain an "inventive concept," which often depends on what a person of ordinary skill in the art would perceive as well-understood, routine, and conventional. *Id.* at 10.

### *USC IP v. Facebook*

On December 6 of last year, Judge Albright granted his first dispositive motion under Section 101—a motion for summary judgment rather than a motion to dismiss—and issued an opinion two weeks later setting out the legal basis for his ruling. In *USC IP Partnership, L.P. v. Facebook, Inc.*, No. 6:20-CV-00555-ADA, 2021 WL 6690275 (W.D. Tex. Dec. 20, 2021), the patent claims disclosed a system for collecting and analyzing a webpage-user's "intent data" to predict the user's navigation during browsing. *Id.* at \*3. The defendant, the social-media giant Facebook, contended that the claims were directed to the abstract idea of collecting and analyzing data about users' intent. *Id.* at \*4.

Judge Albright agreed. At *Alice*'s first step, he held that the patent was "directed to the abstract idea of 'collecting, analyzing and using intent data,'" which "is a longstanding problem that existed long before the advent of computers and is not unique to the Internet." *Id.* at \*5. The patent claims, he further explained, were not directed to improving "the functionality of the computer or network platform itself." *Id.* (internal

quotation marks omitted). Turning to *Alice*'s step two, Judge Albright found that the claims did not “contain anything significantly more than the abstract idea itself,” because the claims required nothing more than “off-the-shelf, conventional computer, network and display technology for gathering, sending and presenting the desired information.” *Id.* at \*6. (internal quotation marks omitted). The software component of the claims was “a purely functional ‘black box’ implemented using standard cloud platforms from well-known vendors like Google, Microsoft, and Amazon.” *Id.* He accordingly granted Facebook’s motion for summary judgment.

### ***Health Discovery Corporation v. Intel Corp.***

A few weeks later, Judge Albright issued a second order under Section 101—this time granting a defendant’s motion to dismiss, albeit after the *Markman* hearing. In *Health Discovery Corp. v. Intel Corp.*, No. 6:20-CV-666-ADA, 2021 WL 6116891 (W.D. Tex. Dec. 27, 2021), the four asserted patents related to the ability of so-called “learning machines” to identify patterns in datasets that best enable the classification of data, a process known as “Recursive Feature Elimination.” *Id.* at \*1. The defendant, Intel Corporation, argued that the suit should be dismissed because the patent claims were directed only to an abstract mathematical analysis.

After an extensive discussion of the challenge of applying the Federal Circuit’s seemingly inconsistent post-*Alice* precedents, Judge Albright agreed with Intel’s position, observing that although “accused infringers invoking § 101 in a Rule 12(b)(6) motion face an uphill scramble . . . Intel has been able to surmount these procedural obstacles.” *Id.* at \*4, \*11. At step one of *Alice*, Judge Albright viewed the claims as “merely produc[ing] data with improved quality relative to that produced by conventional mathematical models,” and so “merely improv[ing] or enhanc[ing] an abstract idea.” *Id.* at \*11 (internal quotation marks omitted). At step two, Judge Albright held that the complaint had “fail[ed] to allege an inventive concept.” *Id.* at \*12. Apart from what he regarded as the abstract idea of improving a mathematical model, the patent claims did not entail any further concept “capable of moving the claims out of the realm of abstract ideas.” *Id.* (internal quotation marks omitted). It was not sufficient, he explained, that “some asserted claims are limited to a particular field of invention or input data, like ‘gene expression data’ or ‘biologic data.’” *Id.* Nor did “requir[ing] a generic computer to perform” the mathematical process salvage the claims. *Id.*

Significantly, Judge Albright dismissed the plaintiff’s claims *without* prejudice, echoing the views of Eastern District of Texas Judge Rodney Gilstrap that “[t]

here is a wide gulf between a Defendant affirmatively showing by clear and convincing evidence that claims are ineligible under both steps of the *Alice* inquiry and a Plaintiff failing to plead adequate facts addressing the analytical steps called for in *Alice*.” *Id.* at \*12–\*13 (quoting *Mad Dogg Ath., Inc. v. Peloton Interactive, Inc.*, No. 2:20-CV-00382-JRG, 2021 WL 4206175, at \*7 (E.D. Tex. Sept. 15, 2021)).

### **Conclusion**

Judge Albright’s rulings under Section 101 provide useful insight into his approach to Section 101 arguments on a number of issues. First, he remains unlikely to grant a Section 101 motion until after the *Markman* hearing and the close of fact discovery. Second, if he grants a motion to dismiss under Section 101, the dismissal is likely to be without prejudice. Third, in conducting the substantive *Alice* analysis for software patents, Judge Albright has focused on whether the patent claims solve problems “rooted in computer technology,” *USC IP*, 2021 WL 6690275, at \*5, or otherwise involve an improvement to the functionality of the computer systems or processes themselves. As a result, so-called “black box” patents that fail to recite steps that software must perform to accomplish the specified results are vulnerable to invalidation. Finally, Judge Albright has recognized “the difficulty in applying *Alice* with any consistency” and the “inconsistency riddling § 101 jurisprudence.” *Health Discovery Corp.*, 2021 WL 6116891, at \*10. For that reason, he has made clear that in individual cases he will take his cues from Federal Circuit precedents “analyzing patents most like those under review.” *Id.* 

## Construction Litigation Update

### *Recent Cases on the Duties and Roles of Expert Witnesses in Litigation in the United Kingdom and Australia – The Importance of Remaining Independent*

The firm's update expands further on the roles and duties of expert witnesses in litigation – a subject which is of considerable importance for construction litigation as many construction disputes turn on technical questions and, hence, the evidence of experts in the relevant technical fields. In its June 2021 update, the firm discussed the importance of experts avoiding conflicts of interest by reference to the English Court of Appeal's decision in *Secretariat Consulting & Ors v A Company* ("*Secretariat*"). In that case, the Court of Appeal dismissed an appeal made by Secretariat (a global provider of expert services) which restrained it from acting in an arbitration on the basis that Secretariat was conflicted. In this update, the firm focuses on two cases in England and Australia on the duty of expert witnesses to remain independent and avoid partisanship.

### *Blurring of the Lines – Maintaining Independence Whilst Being Part of the Litigation Team*

Expert witnesses play an ever-increasing role in modern litigation, particularly in construction and engineering disputes. Only a few decades ago, the typical expert witness would have been a practicing professional who, on occasion, might be asked to provide an independent opinion on particular matters on which a court or tribunal required assistance in order to arrive at a decision. However, the prevalence of expert evidence in construction litigation and other litigation involving technical questions, and the importance of expert evidence to the outcome of such litigation, has led to the establishment of firms dedicated solely to the provision of expert witness services to clients.

The courts recognize that party-appointed experts play an important role in the conduct of litigation. In *Secretariat*, the Court of Appeal stated that "*the professional expert witness will be viewed, and rightly so, as part of the client's litigation team.*" In construction and engineering disputes, it is usual for parties to appoint independent experts to advise on technical, quantum and delay issues. Such experts owe duties to their clients, such as an obligation to avoid conflicts of interest and to maintain confidentiality. Legal practitioners typically rely on experts to assist them in identifying the relevant issues and preparing their clients' claims in a manner which is consistent with the expert's independent view. Those same experts are ordinarily then retained to give evidence before the court or arbitral tribunal. Obviously,

a client will generally expect that the evidence of its experts will assist in the conduct of its case, subject, of course, to the qualification that an independent expert cannot be expected to offer anything other than their independent view.

In England and Australia, expert witnesses owe their primary duties to the court or arbitral tribunal. Experts are typically bound by particular rules of conduct when preparing reports and giving evidence, such as the Civil Procedure Rules ("**CPR**") (for court proceedings in England and Wales), the Expert Witness Code of Conduct, which forms part of the Uniform Civil Procedure Rules (for court proceedings in most Australian states) or the IBA Rules on the Taking of Evidence in International Arbitration. The obligations owed by experts will depend on the terms of the conduct rules by which they are bound. However, typically, experts are required to make reasonable enquiries, disclose and produce all relevant documents which they rely upon and provide a declaration that their opinion is their independent view and is consistent with the documents and other evidence which they have seen. Experts are also ordinarily expected (and directed) to meet and prepare joint expert reports with counterparts engaged by the other side, conduct themselves transparently, make appropriate concessions and provide impartial evidence (even where it would harm their instructing party's case). Accordingly, an expert's principal obligation is to assist the decision maker, and not operate as an advocate for its instructing party's case (*i.e.*, a "hired gun"). Unfortunately, many experts seemingly fail to recognize this important distinction. For example, in a 2019 survey, 41% of expert witnesses surveyed said that they had come across an expert that they considered to be a "hired gun" (Annual Expert Witness Survey Report 2019; Bond Salon and The Times).

The consequences of expert partisanship can be severe and could include the exclusion of the expert's evidence in its entirety or their evidence being afforded little weight. As such, it is important for legal practitioners and experts to recognize that the role of an expert gives rise to potentially conflicting duties and obligations and to ensure that the expert maintains independence in the eyes of the decision maker. This is illustrated (in the context of English and Australian law) in the two judicial decisions discussed below.

### *An English Illustration - Dana UK Axle Ltd v Freudenberg FST GmbH [2021] EWHC 1413 (TCC) ("Dana")*

*Dana* arose out of a claim that the Respondent had supplied the Claimant with defective automotive parts.

The Respondent retained three experts to produce expert reports in respect of engineering and scientific issues. However, the expert reports failed to comply with the Guidance for the Instruction of Experts in Civil Claims 2014 (the “**Guidance**”), which is referred to in CPR Practice Direction 35, because they:

- did not detail the instruction materials the experts received;
- showed that the experts had visited the Respondent’s factories without informing the Claimant’s experts and without disclosing information collected during the visits; and
- did not identify the documents on which the experts relied in support of their opinions and analyses.

The Respondent was permitted by the Court to rely on the three expert reports, provided that it filed and served revised expert reports which were amended to comply with the CPR and the Guidance. However, despite the Respondent filing amended reports, the Claimant maintained that the Respondent’s expert reports failed to comply with the CPR and the Guidance, and made an application that the Court exclude all of the expert reports relied upon by the Respondent in their entirety. This application was successful, and the Technology and Construction Court agreed to exclude all three reports. The Court specifically found that:

- A significant amount of information had been provided to the experts over a long period of time that had never been disclosed to the Claimant or otherwise identified. The Court considered this to be a serious breach of an essential requirement to ensure that the Court can understand what information and instructions were provided to each side’s experts.
- Site visits had been undertaken over and above what was detailed in the reports. The Court only discovered this during the course of the hearing. This was considered by the Court to be “*entirely unacceptable.*”
- In respect of two of the expert reports, the experts had given opinions without identifying the information relied upon.
- There was a free-flow exchange of information between the Respondent’s experts and its in-house technical specialists, apparently with no, or very little, oversight from its solicitors. The experts had been privy to information that was not shared with the Claimant’s experts.

- That flow of information continued during the period between the joint expert meetings and the signing of the experts’ joint statement, despite the Claimant’s solicitors raising concerns about it.
- Two of the Respondent’s experts made site visits without informing the Claimant’s experts and without giving them a chance to access and consider the same information.
- The analyses and opinions of the Respondent’s experts appeared to have been directly influenced by the Defendant.

In other words, this was a case where the Respondent’s experts were no longer just part of “the client’s litigation team”, but were acting in a one-sided manner which advanced their client’s case but breached their independent duties to the Court.

### ***An Example of the Position in Australia - Fulmer v Thompson [2017] QSC 119 (“Fulmer”)***

*Fulmer* involved a claim brought relating to an oral agreement concerning the purchase of a used vehicle sales business. The agreement was said to crystallize once a profit target was met. The Plaintiff claimed that the profit target had been met, which the Defendants had acknowledged in 2010. However, the Defendants subsequently denied that the profit target had been met and refused to issue shares in the business to the Plaintiff. The Defendants also issued a counterclaim seeking indemnification for trading losses that they alleged they had occurred.

The Court allowed the parties to rely on accounting expert evidence during the hearing to assist in determining whether the profit target had, in fact, been met. The Third Defendant (who owned the business that was the subject of the dispute) engaged an accountant (“Mr H”) who had been responsible for the provision of accounting services to the Defendants on an ongoing basis. As to this, the Court acknowledged that there “*may be benefits and disadvantages in enlisting a professional person with pre-existing involvement as a witness to relevant matters in a case to testify as an expert witness.*” The Court then noted that “*the most obvious disadvantage is the risk that a pre-existing professional allegiance to a party may compromise the degree of independence and objectivity with which the expert approaches the task, resulting in evidence so tainted by partisanship as to lack credibility and reliability.*”

However, during the course of the trial, it emerged that Mr H had actively engaged with the Defendants’ solicitor, including on how to shape financial calculations in order to avoid liability to the Plaintiff. Furthermore, it was accepted that Mr H had been the

accountant for the Defendants when they admitted that the profit target had been met in 2010. The Court also found that the trading losses that were alleged by the Defendant (which were the subject of its counterclaim) had been “*belatedly certified*” by Mr H. The Court, accordingly, determined that Mr H did “*not have the starting advantage of credible objectivity.*”

In addition to these issues, Mr H’s expert report failed to include a proper analysis of his process and findings, failed to identify clearly the supporting source material, did not include any relevant source financial records and referred to various information and calculations which were not supported by witness or documentary evidence. As such, the Court said that Mr H’s report “*appeared to be founded on a mirage of hearsay figures unaccompanied by any meaningful attempt to identify and prove the relevant source documents.*” The Court, accordingly, agreed with the Plaintiff that the profit target had been met in 2010 and dismissed the Defendants’ counterclaim.

It is understandable why the Defendants in this case had included as part of their “litigation team” an individual who had expertise in accounting issues and personal knowledge of the particular issues in dispute. However, it is also clear that the Defendants and their solicitor failed to take appropriate steps to ensure that Mr H provided evidence which was independent and of assistance to the Court.

## Artificial Intelligence Update

### Legal Challenges Regarding “Deepfakes”

A documentary about the life of Anthony Bourdain made headlines this summer when it was revealed that several lines in the movie, which sounded like they were spoken by the late chef, were actually generated by artificial intelligence. Although the ethics of using such “deepfake” technology to mimic Bourdain’s voice has received great scrutiny, deepfakes have become a common feature in entertainment. The emergence of this technology has challenged the firm assumptions about what is real and what is not, but it also presents a unique legal challenge: how to balance the First Amendment’s protections of expressive speech against an individual’s right of publicity.

The right of publicity evolved from the right of privacy. An individual has both a personal right to be left alone, as well as a right to benefit from the commercial exploitation of his or her name and likeness. Case law recognizes, however, that the scope of the right of publicity must be balanced against societal interests in free expression. To find that balance, courts have applied the “transformative use” test, which looks at five factors to assess whether the “work in question adds

significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013).

Under this test, courts consider five factors: (i) whether the celebrity likeness is a “raw material” from which the work is synthesized, or the sum and substance of the work itself; (ii) whether the work is primarily the artist’s own expression; (iii) whether the “literal and imitative or the creative elements predominate” in the work; (iv) whether the “marketability and economic value” of the work derive primarily from the fame of the celebrity depicted; and (v) whether the artist’s skill is subordinated to the overall goal of achieving a portrait of the celebrity. *Id.* (citing *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001)).

Unlike many traditional forms of artistic expression, however, deepfakes are valued precisely because they so closely mimic the person being depicted. Thus, the “transformative use” test will likely depend on how broadly the courts construe the “work” of the artist. If, for example, these factors are applied to only those sound bites that used artificial intelligence to recreate Bourdain’s voice, a court may well conclude that the work is merely imitative and lacks the creative elements to be transformed into something more. However, if these factors are applied to the documentary as a whole, the opposite conclusion may be reached.

Courts may also consider whether the “transformative use” test is the right standard to apply where the goal of the artist is to imitate, rather than transform, a person’s likeness. Courts may instead look to whether the work is a “parody” and thus falls within the “fair use” defense to a copyright action. As parody requires “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994), this standard may better allow for the close replication of a person’s voice or appearance. Alternatively, courts may look to the “likelihood of confusion” test applied to trademark infringement cases, and consider whether a parodic work is “merely amusing, not confusing.” *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

The similarity of the deepfake with the original may create liability for the creator in other ways. Where the deepfake contains defamatory content, portrays an individual in a false light, or causes emotional distress, for example, courts may turn to those areas of tort law for guidance. This is particularly true if the deepfake is used to attribute a statement to an individual who did

not say or agree with the statement made.

Another issue raised by such deepfakes is the right of a deceased celebrity to enforce his right of publicity. On this question, courts may be guided by prior decisions finding that the right of publicity is a property right that, upon the death of an individual descends “like any other intangible property right.” *Presley’s Est. v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981). A party seeking to enforce the deceased’s right of publicity must therefore demonstrate that it inherited that property right. Where different descendants inherit different pieces of the estate, this may not be a straight-forward issue, and estate planners will be well served by specifying who inherits the right of publicity.

Additionally, this question of inheritance will lead to questions for artists seeking permission to use the deceased’s name and likeness as to who is authorized to provide such consent. Clear documentation will thus alleviate disputes over this right. For example, the documentary’s filmmaker claims to have received consent from Bourdain’s estate, but Bourdain’s wife has denied providing such consent.

While many questions remain unanswered, one thing is clear: The use of deepfake technology is here to stay. Courts will soon be faced with balancing the First Amendment and private property interests around, as well as liability arising from, the use and misuse of this cutting-edge technology. 

## VICTORIES

### Successful Settlement Follows Two-Week Jury Trial in New York Commercial Division

Quinn Emanuel recently achieved a successful settlement for clients MBIA Inc. and MBIA Insurance Corp. following a two-week jury trial in a case in which plaintiffs sought \$140 million on claims for fraud and promissory estoppel.

Quinn Emanuel’s clients served as a credit enhancer and investor for two collateralized loan obligation (or “CLO”) investment funds created and managed by Lynn Tilton—a CLO fund manager—and her fund management enterprise, Patriarch Partners. At the center of the case was Tilton’s claim that a senior MBIA executive made oral promises that MBIA would consent to extending the maturity date of one of the funds if Tilton spent over \$100 million to buy out a non-consenting noteholder. MBIA, on the other hand, contended the parties never made any such deal, and Tilton bought out a difficult noteholder entirely of her own volition. When Tilton’s investment funds defaulted, MBIA did what it was supposed to do—it paid out almost a billion dollars on its insurance obligations and exercised its rights to mitigate its losses. Tilton, on the other hand, blamed MBIA for her investment losses on funds that she herself managed, and sued MBIA for fraud.

MBIA litigated against Tilton for six years before hiring Quinn Emanuel to try the case. A trial-tested Quinn Emanuel team quickly jumped in and put on a two-week trial against a squadron of Gibson Dunn attorneys who had been steeped in the case for six years. But this is exactly the type of challenge Quinn Emanuel thrives on. Looking at the case with fresh eyes, the firm quickly identified key emails from Tilton herself that

conveyed a very different version of events than what she was seeking to present, identified critical witnesses who would refute Tilton’s story, and mastered complex arguments on the proper measure of damages under New York law.

In opening arguments, Tilton’s counsel presented the case as a true “he-said-she-said” in which Tilton would never have spent \$100 million on notes that would be “worthless” without a promised extension of maturity from MBIA which it ultimately refused to provide. But on cross-examination, the firm surprised Tilton with smoking-gun emails, and Tilton was forced to admit that her own attorneys had misunderstood the notes’ seniority on default, leading her to believe the notes were much more valuable than they actually were regardless of any extension. The firm then got Tilton’s damages expert to admit that he had not analyzed damages by the measure that the jury would be required to apply. Finally, in its case in chief, the firm called Tilton’s own financial advisor and elicited testimony that entirely contradicted Tilton’s version of events. Five minutes before the jury was set to hear closing arguments, Tilton tapped out. Quinn Emanuel secured a confidential settlement on behalf of the clients which dismissed Tilton’s case in its entirety. 

**business litigation report**

**quinn emanuel urquhart & sullivan, llp**

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