September 2016

quinn emanuel

quinn emanuel urquhart & sullivan, llp | business litigation report

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

False Claims Act Developments Significantly Impact a Broad Range of Industries Doing Business with the U.S. Government

No other area of government enforcement or civil liability has experienced anything quite like the three dramatic developments in initiation, penalties and standards for False Claims Act cases over the last twelve months. FY 2015 reporting data revealed a major shift in the way False Claims Act cases are initiated and rewarded. In the same period, Congress mandated an exponential increase in False Claims Act penalties. Finally, the Supreme Court issued a decision that resulted in a sweeping change to the False Claims Act liability standard. The one-two-three seismic combination will leave every industry doing business with the U.S. government adjusting to the new landscape. Healthcare and pharmaceuticals, defense and government contractors, financial institutions, the education and insurance sectors, non-profits and grantees, and any other industry that contracts with or receives grants from the federal government will be impacted.

Whistleblower Driven Awards Increase as Percentage of False Claims Act Recoveries

The False Claims Act has, for several years now, been a major source of revenue for the U.S. government, with settlements and judgments over the last five years totaling $21 billion. The monetary total recovered in False Claims Act settlements and judgments in fiscal year 2015, which concluded September 30, 2015, was almost exactly on pace with fiscal year 2014's $3.5 billion, but the 2015 number was remarkable for the portion of the total initiated and conducted solely by whistleblowers. Fully 32%, or $1.1 billion, of the $3.4 billion recovered in fiscal year 2015 was in "qui tam" (whistleblower) cases where the government declined to intervene. That exceeds the total for whistleblower-originated, government-declined cases *in all prior years combined.*

To give that statistic some perspective, in 1986, whistleblowers initiated just 8% (30 of 373) of False

(continued on page 2)

INSIDE

Second Circuit Rejects Massive Class Action Settlement and Affirms Importance of Adequate Representation and Due Process Rights for Absent Class Members
Page 4

Practice Area Updates:

EU Litigation Update
Page 6

Cyber Security & Data Protection Litigation Update
Page 8

D.C. Circuit Victory for Indian Point Nuclear Plant and Other Victories
Page 10

Stephen Jagusch QC and Stephen Hauss Recognized at *The American Lawyer* Transatlantic Legal Awards
Page 11

White Collar Rising Star and Former UK Prosecutor Robert Amaee Joins the London Office
Page 11

Quinn Emanuel Opens Office in Shanghai Led by White Collar Specialist Samuel Williamson

The firm has officially opened its office in Shanghai, led by white collar specialist Samuel G. Williamson. Mr. Williamson advises large Chinese private and state-owned entities and major multi-national corporations regarding complex litigation issues that arise in the U.S., China, other Asian venues, and arbitration centers around the world. He speaks both Mandarin and Japanese and is the only Chinese-speaking former U.S. prosecutor practicing at an international firm in China. He is supported by a team of seven associates, several of whom are Chinese nationals with degrees from top Chinese law schools, and all of whom are fluent in Chinese.

The Shanghai office does government enforcement and compliance work relating to Asia generally, with a focus on China. This includes cases involving corruption, improper anti-competitive behavior (such as antitrust/cartel issues and commercial bribery), securities and accounting fraud, and economic espionage/trade secrets. In addition to government enforcement, the Shanghai team brings experience with private plaintiff litigation in these areas and has assisted both multi-national and Chinese companies in dealing with international litigation risk and international arbitration matters involving Asian parties. With the addition of the Shanghai location, the firm now offers clients the highest quality representation in white collar defense and general business litigation matters on the ground in China. Shanghai is Quinn Emanuel's fourth Asia-Pacific location, with other offices in Tokyo, Hong Kong, and Sydney. Q

Attorney Advertising

Claims Act cases filed. In 2015, whistleblowers accounted for a staggering 86% (632 of 737) of the caseload. But it's the monetary success of the 2015 whistleblowers that is the real sea change. 2015 marks the fifth straight year in which whistleblowers filed more than 700 new False Claims Act cases, but in 2015 the recoveries attributable to such cases accounted for a staggering 32% of the total—over three times the previous high of 9% attributable to whistleblower-originated, government-declined cases. That jump, from less than ten percent to roughly thirty percent, may be an anomaly, or it may be a sign of times to come. Either way, the perception of potential financial success (and an accurate perception, at that) will likely embolden both whistleblowers and regulators.

Congress and DOJ Double Potential False Claims Act Penalties

The second development that seems likely to incentivize more False Claims Act cases was legislative. In late 2015, Congress passed a law increasing the per-claim penalties available in False Claims Act cases. The Bipartisan Budget Act, and specifically, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, went into effect in November 2015 and required the Department of Justice to increase civil penalties to account for inflation by August of 2016. Accordingly, the Department of Justice recently announced that the False Claims Act's civil per-claim penalty range will almost double, from a previous penalty range of $5,500 to $11,000 per false claim, to a minimum penalty of $10,781 and a maximum penalty of $21,563.

This penalty increase impacts different industries very differently and disproportionately. For example, for a Department of Defense services contractor on a one-year contract consisting of twelve monthly invoices, the per claim penalty increase may not represent a significant portion of a potential damages award. But for entities, like healthcare providers, who often have thousands of claims at issue in a single case, this increase will mean the penalties assessed alone may now far exceed the actual damages. Such penalties in some cases could even violate the Eighth Amendment's prohibition on excessive fines, creating an additional avenue for appellate challenge in 2016. *See, e.g., United States v. Mackby*, 261 F.3d 821, 829-32 (9th Cir. 2001) (Eighth Amendment excessive fines rule applies to False Claims Act civil penalties).

Supreme Court Announces New Standard for False Claims Act Liability

The third, and potentially even more significant change impacting False Claims Act litigants came this June, when, in the last weeks of its term, the U.S. Supreme Court issued a sweeping restatement of the standard for False Claims Act liability. By unanimous holding, *Universal Health Services v. United States ex rel. Escobar* resolves a long-simmering Circuit split over when imperfect performance of a government contract qualifies as a fraud deserving of the punitive remedies of the False Claims Act. With its holding, the Court facially adopts the broadest definition of fraud that any lower court had suggested, finding fraud by omission in certain circumstances where a contractor requests payment despite knowing noncompliance with a statute, regulation, or contract term, and explicitly rejecting the idea that liability should be limited to only those circumstances where the noncompliance violates an express condition of payment in the government contract.

Several Circuits had previously limited what is known as "implied certification" fraud in the False Claims Act context to just those express condition noncompliance scenarios. At least one Circuit had entirely rejected implied certification theories of fraud liability, requiring instead an express falsehood in the claim to trigger the False Claims Act's treble damages liability. *Escobar* rejects both those formulations, endorses the concept of implied certification fraud in False Claims Act cases, puts forward a new viability standard for implied certification fraud, and elaborates on what establishes materiality in the False Claims Act context.

New Standard for False Claims Act Implied Certification Liability

The *Escobar* opinion focuses on when fraud by omission should be actionable, emphasizes that not every violation of a statute, regulation, or contractual requirement will result in False Claims Act liability, and sets forth the two conditions necessary for implied certification liability to attach, as follows. First, the claim itself must make "specific representations about the goods or services provided." (As discussed in more detail below, in the healthcare fraud context, this condition is likely to be routinely satisfied by standard Medicare and Medicaid billing forms. In other procurement and invoicing contexts, and in industries without elaborate systems of specific and descriptive billing codes, this first condition may ultimately prove to be more of a hurdle.) Second, the organization's failure to disclose noncompliance with "material" requirements must equate to "misleading half-truths." The two conditions are interrelated, in that fraud liability logically attaches because the defendant's

failure to disclose its noncompliance is what renders the specific representation in the claim misleading.

The facts of *Escobar* offer helpful insight into the parameters of the new standard. The case was brought by whistleblower parents of Yurushka Rivera, a deceased teenaged beneficiary of Massachusetts' Medicaid program. Yarushka died after an adverse reaction to a medication prescribed by what the opinion describes as a "purported doctor." The subsequent qui tam false claim action was based on the allegation that Arbour Counseling Services, a mental health center performing Medicaid services and a subsidiary of defendant United Health, allegedly failed to disclose serious violations of regulations pertaining to staff qualifications while seeking Medicaid reimbursement for counseling services. In connection with its Medicaid reimbursement claims, Arbour submitted invoices containing specific payment codes and including National Provider Identification numbers associated with specific Arbour employees, corresponding to specific job titles. In one example, an employee who treated Yarushka registered for an NPI number associated with "social worker, clinical" despite lacking the credential and licensing requirements for that designation.

In this context, the Court found fraud by omission, and set forth the new standard accordingly. Arbour's failure to disclose its lack of compliance with regulations pertaining to staff qualifications is what rendered the specific representations on the invoice, namely, the payment codes and NPI numbers, misleading. The new False Claims Act implied certification liability standard articulated in the case holding follows that formula:

> False Claims Act liability attaches when the (1) defendant submits a claim for payment that makes specific representations about the goods or services, and (2) defendant's failure to disclose noncompliance with a statutory, regulatory, or contractual requirement renders those specific representations misleading.

The requirement of the first condition, that the claim itself must do more than merely request payment, but instead also make specific representations about the goods or services provided, is an important one, and one that has been overlooked in much of the post-*Escobar* commentary. The specificity of the representations included in the payment codes and NPI numbers were a key aspect of the reasoning in *Escobar*. The Court described how the payment codes on the invoices corresponded to specific counseling services, such as individual therapy, family therapy, preventive medication counseling, and other types of treatment, and how the NPI numbers on the invoices corresponded to specific job titles reflecting credentials and licenses. The Court held that "these representations were clearly misleading in context."

Indeed, by contrast, going forward under the Court's new standard, a claim that is a mere demand for payment, containing no additional specific representations, does not fit within the reasoning behind recognizing a fraud by omission theory of false claims liability, *i.e.*, the omission must render a specific representation misleading. It will be especially important that courts applying the *Escobar* two-condition test recognize and rigorously enforce the specificity requirement of the first condition, because that (and the materiality standard explained below) is what will prevent every statutory, regulatory or contract violation from transmutating into an adequately pled false claim. It is also the only way the new liability standard comports with general particularity requirements for pleading fraud. If the Court had not included the first condition, and had instead put forward a formula for implied certification liability wherein a general demand for payment were enough, then allegations following that formula—without a specific representation to refer back to and measure as misleading-half-truth-or-not in the context of the omission—would routinely fail to satisfy the particularity requirements for pleading fraud.

Establishing Materiality in False Claims Act Cases

In addition to the new two-condition test for implied certification (or fraud by omission) liability, *Escobar* also offers new guidance for how the materiality requirement should be enforced in a False Claims Act context. Reasserting that a misrepresentation about compliance with a particular statutory, regulatory or contractual requirement is only actionable under the False Claims Act if it is material to the government's decision whether to pay a claim, *Escobar* first emphasizes that the materiality standard is a demanding one, then emphasizes that even the Government's decision to expressly pre-identify a provision as a condition of payment is "not automatically dispositive" of the provision's materiality to the payment decision. A demanding standard, indeed.

Departing from Circuit precedent, the *Escobar* Court ruled that materiality is not established by showing that the defendant knew the government could refuse to pay if it knew of the nonconformity. The Court referred instead to longstanding statutory, Restatement, and common law understandings of materiality that look to the effect on the likely or actual

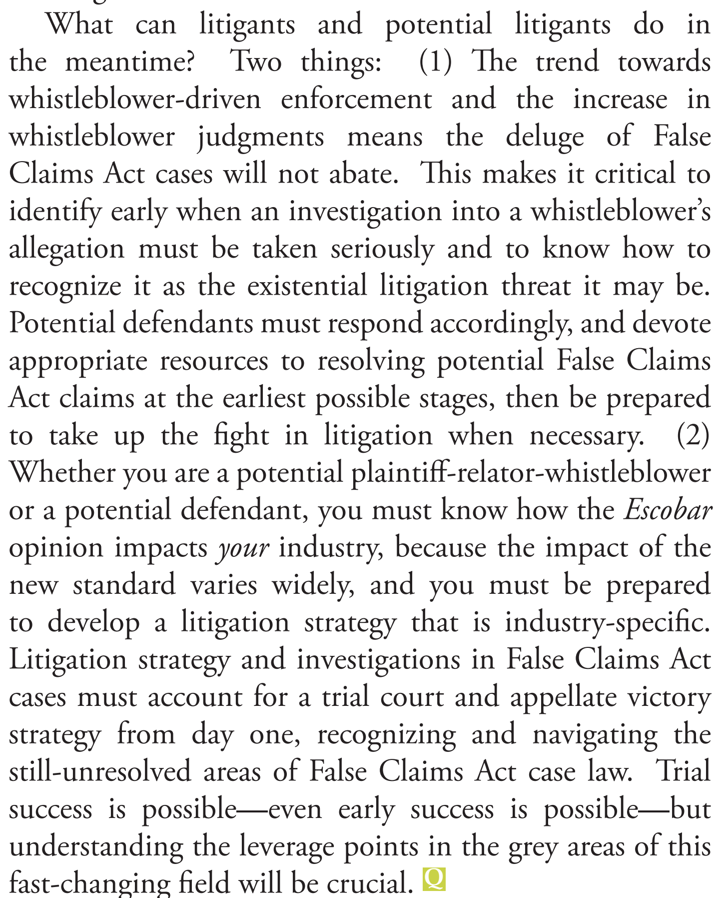
behavior of the recipient of the misrepresentation. To prove or refute materiality, litigants in false claim cases should now point, for example, to whether or not the government paid the claims at issue or similar claims in full—despite knowledge of non-compliance. Importantly, *Escobar* notes that it is not sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Thus, that the government might be entitled to refuse to pay and that the defendant knows so will no longer carry the day on materiality. This development will no doubt serve as the basis for robust argument between litigants going forward, especially concerning at what stage of the proceedings a court can resolve materiality in light of the Court's explicit rejection, at footnote six of the *Escobar* opinion, of the assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment.

Takeaways

Three developments in the last twelve months have now vastly altered the landscape for False Claims Act litigation. Fiscal year 2015 saw a dramatic shift in favor of monetary success for whistleblowers, even in cases where the government does not intervene. Congress added to the ever-mounting potential costs for defendants facing False Claims Act liability by mandating an inflation-related increase in the available civil penalty range, a mandate that the Department of Justice took up by doubling False Claims Act penalties. And lastly, after months of conferencing and reconferencing multiple possible False Claims Act implied certification cases last term, in its final weeks, the Supreme Court took on the Circuit split on implied certification/fraud by omission and articulated a new, two-condition standard for False Claims Act liability, along with some guidance for enforcement of the statute's rigorous materiality requirement.

Undoubtedly, going forward, there will still be uncertainty over what constitutes a false claim, and likely some appellate litigation over what amounts to a "specific representation" in a claim for purposes of satisfying the first condition of *Escobar's* implied certification liability standard. And, there will almost certainly be divergent opinions and continued disputes over the meaning of materiality, and over when it can be conclusively deemed wanting in a false claims case.

What can litigants and potential litigants do in the meantime? Two things: (1) The trend towards whistleblower-driven enforcement and the increase in whistleblower judgments means the deluge of False Claims Act cases will not abate. This makes it critical to identify early when an investigation into a whistleblower's allegation must be taken seriously and to know how to recognize it as the existential litigation threat it may be. Potential defendants must respond accordingly, and devote appropriate resources to resolving potential False Claims Act claims at the earliest possible stages, then be prepared to take up the fight in litigation when necessary. (2) Whether you are a potential plaintiff-relator-whistleblower or a potential defendant, you must know how the *Escobar* opinion impacts *your* industry, because the impact of the new standard varies widely, and you must be prepared to develop a litigation strategy that is industry-specific. Litigation strategy and investigations in False Claims Act cases must account for a trial court and appellate victory strategy from day one, recognizing and navigating the still-unresolved areas of False Claims Act case law. Trial success is possible—even early success is possible—but understanding the leverage points in the grey areas of this fast-changing field will be crucial. Q



NOTED WITH INTEREST

Second Circuit Rejects Massive Class Action Settlement and Affirms Importance of Adequate Representation and Due Process Rights for Absent Class Members

The Second Circuit Court of Appeals recently considered whether the largest negotiated cash settlement in a class action antitrust case satisfied the Federal Rules of Civil Procedure and constitutional due process concerns and determined, in a rare decision, that the answer was "no." In a nod to the rights of absent class members, the Court unanimously overturned a multi-billion dollar settlement relating to credit card swipe fees, reopening litigation in a case that had been pending for nearly a decade. *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* ("*Interchange Fee Antitrust Litig.*"), Case No. 12-4671, 827 F.3d 223 (2d Cir. June 30, 2016). The Court's decision, in which Quinn Emanuel represented a merchant who objected to the settlement, affirms long-standing principles of due process and the principle that global peace in complex commercial litigation cannot come at the expense of procedural and substantive fairness to absent class members.

In 2005, several class action suits were filed against Visa and MasterCard, and their member banks, alleging that Visa and MasterCard charged supracompetitive credit card fees and imposed rules that suppressed competition over the routing networks used to process the credit card transactions between the merchants, the acquirer bank, and the issuer bank. The cases were consolidated before Judge Gleeson in the Eastern District of New York. After several years of litigation, while motions for summary judgment and class certification were pending, the parties reached a preliminary settlement. The district court ultimately approved the settlement, which created two nation-wide classes, covering nearly 12 million merchants: one class was approved for injunctive relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, and another damages class was approved pursuant to Rule 23(b)(3). *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). The Rule 23(b)(3) class comprised merchants that accepted Visa or MasterCard-branded credit cards from January 1, 2004 to November 28, 2012, and was entitled to receive damages from a fund of up to $7.25 billion (before deductions were made for opt-out plaintiffs). The Rule 23(b)(2) class, which included all existing and future businesses, was entitled to injunctive relief consisting of rule changes to Visa and MasterCard's rules, including, most significantly, the right to surcharge where allowed by state law and by other networks. Importantly, although merchants could opt-out of the damages class, merchants could *not* opt-out of the injunction class. Significantly, the injunction class settlement also involved a complete release of any future claims arising from or relating to interchange rules, interchange fees, merchant fees, or many of the rules at issue in the litigation, including rules related to payment card acceptance, surcharging, and anti-steering rules. *Interchange Fee Antitrust Litig.*, 827 F.3d at 230 (describing terms of release).

A coalition of merchants objected to the settlement because the class did not meet the requirements under Rule 23 of the Federal Rules of Civil Procedure for class certification and violated class members' Due Process rights by extinguishing class members' individualized claims for money damages without providing opt-out rights. Specifically, merchants argued that the injunction class lacked the required cohesion of interest required by the Federal Rules, and that certain class members did not receive adequate representation. Objectors also argued that the district court exceeded its authority by settling future claims that were beyond the scope of the litigation and not yet ripe.

The class plaintiffs, in supporting the settlement, argued that the court should consider the adequacy of the settlement as a whole, including the damages class, which was the largest cash relief in an antitrust class action settlement and the third largest class action settlement. The class plaintiffs also argued that the injunctive relief provided by the settlement provided valuable relief because the right to surcharge, in certain instances, allowed merchants to educate consumers on the cost of accepting credit cards, steer consumers to less-expensive routing methods, and pass along interchange fees. Because the injunction offered meaningful relief, class plaintiffs argued, the release was reasonable and lawful. Visa, MasterCard, and the other defendants also argued that the settlement was fair and that the release was permissible.

The Second Circuit rejected those arguments, holding that certain members in the injunction class were inadequately represented in violation of Fed. R. Civ. P. 24(a)(4) and that the settlement violated class members' Due Process rights. Writing in concurrence, Judge Leval noted that "[t]his is not a settlement; it is a confiscation." *Interchange Fee Antitrust Litig.*, 827 F.3d at 241 (Leval, J., concurring).

The Second Circuit noted that adequacy of representation must be "determined independently of the general fairness review of the settlement," *id.* at 232 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)), and that the "focus of the Rule 23(a) inquiry remains on 'inequality and potential inequity at the precertification stage.'" *Id.* (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999)). The Second Circuit found that a class including both present and future claimants created conflicts that required "structural protection," that could not be overcome even through the settlement "'was the product of an intense, protected, adversarial mediation involving multiple parties,' including 'highly respected and capable' mediators and associational plaintiffs." *Id.* at 232-35.

The Second Circuit noted that the members' inability to opt-out further exacerbated the problem of inadequate representation, *id.* at 234, and violated the Due Process rights of any class member that could not take advantage of the injunctive relief, such as those merchants that (i) accepted payment cards with a most-favored nation provision that prohibited surcharging, such as American Express, (ii) operated in a state that prohibited surcharging, or (iii) came into existence after July 20, 2021 and could neither obtain the benefit of surcharging nor bring suit against Visa or MasterCard. *Id.* at 236-40.

Although the settlement resolved over a decade of litigation, the "benefits of litigation peace do not outweigh class members' due process right to adequate representation," *id.* at 240, and global peace cannot be obtained at the expense of absent class members' rights. The case is now back in the district court. Q

EU Litigation Update

Brexit, Jurisdiction, and Choice of Law: Plus Ça Change? For lawyers schooled in the idioms of Brexit, there is, in addition to the so-called "four freedoms" (for the free movement of goods, services, people and capital throughout the Member States of the European Union), a fifth freedom to consider: the free movement of judgments. Has the United Kingdom's vote to leave the EU put that freedom at risk? As the rules applicable in Member States to choice of law questions in contract and tort are also harmonized at the EU level, one of the few certainties of Brexit is that the UK's private international law framework faces the prospect of far reaching change in the months and years to come. Or does it?

Although perhaps not often discussed outside the corridors of London's leading law firms and barristers' chambers, one of the main achievements of the EU single market is that judgments of the English courts in civil and commercial matters may be enforced in all of the EU's 28 Member States as though they were judgments of the host state's court system. This occurs pursuant to a harmonized set of jurisdictional rules applied by courts from Dublin to Bucharest which was first established in 1968 (the so-called "Brussels Regime").

As originally drafted, the Treaty of Rome, which founded the then European Economic Community in 1957, did not enable the European institutions to legislate in civil justice matters. The rules of the Brussels Regime were therefore contained in a stand-alone treaty between the EEC Member States called the Brussels Convention. The UK acceded to the Brussels Convention in 1978, incorporated it into its domestic law in 1982, and began applying it in 1987. After the EU gained the power to legislate in civil justice under the 1997 Treaty of Amsterdam, the Brussels Convention was replaced by Regulation 2001/44/EC (the "Brussels Regulation"). In 2012, the Brussels Regulation was itself amended and replaced by Regulation 2012/1215/EU (the "Recast Brussels Regulation").

From the UK's perspective, while the Brussels Regulation and the Recast Brussels Regulation made some significant changes to their respective predecessors, the Brussels Regime's core function—to allocate jurisdiction in any case where it applies exclusively to the courts of a single, identified EU Member State, and to provide for the automatic recognition and enforcement of any judgment or order given by such courts throughout the EU—has remained unchanged for the last 30 years. However, when the UK leaves the EU, the UK's membership in the Brussels Regime will cease, and the enforceability of an English judgment in the continuing EU will be governed by the rules for recognizing and enforcing foreign judgments under each EU Member State's national laws.

The Brussels Regime has been criticized in some quarters for the rigidity and inflexibility of its approach. It is also said to work injustice in particular cases and, perhaps surprisingly in view of the importance its framers placed on certainty and predictability of outcomes, has given rise to a remarkable amount of litigation over jurisdictional issues. Overall, however, the consensus view is that the English legal system has benefited from being part of it. This is because it has assisted English lawyers in advising international parties on their interests in the EU, and in turn on their disputes, wherever those parties might be from. In doing so, English lawyers have also been buttressed by knowing that the traditional priority given by the common law to party autonomy with respect to freely expressed contractual choices of governing law would, by reason of European regulation, also be respected by the courts of other Member States. This is so even where the legal systems of those States might previously have required host State law to apply.

As with the Brussels Regime, the then EEC's harmonized rules on contractual choices of law were originally contained in a stand-alone treaty signed in 1980 called the Rome Convention. In 2008, the Rome Convention was replaced by Regulation 2008/593/EC (the "Rome I Regulation"). Pursuant to Regulation 2007/864/EC (the "Rome II Regulation"), the scope of harmonization at the EU level was expanded to include common choice of law rules across the Member States for tortious obligations as well.

As commercial parties and their lawyers adjust to the realities of Brexit, there will be some constants from which they will be able to draw comfort. Of these, one practical point is that, whatever the changes to the jurisdiction and choice of law frameworks in the longer term, there will be no immediate changes to those frameworks in the short term. This is because, until the UK actually leaves the EU, it remains subject to, and continues to benefit from, EU law. More importantly, the substantive rules of English private law, which contracting parties find highly attractive, will also not be affected by the UK's vote to leave. Since the EU rules for choice of law under the Rome I and Rome II Regulations will remain in force in the continuing EU, and as the fundamental approach of the English courts towards choice of law issues is unlikely to change much, it is likely that the

rights and obligations of parties who contract under English law will continue to be respected and given effect by courts in England and the continuing EU as and when the UK's exit from the EU takes effect, even if the (currently European) derivation of those rules alters.

As regards the future enforceability of English judgments in the continuing EU, the picture is complex, but the range of possible outcomes upon any UK exit is tolerably clear. For example, if the exiting UK wants to remain part of the existing EU jurisdictional scheme, it could apply to join the Lugano Convention, which effectively incorporates the EEA and EFTA Member States (currently, Norway, Switzerland, Liechtenstein and Iceland) into the EU for jurisdictional and mutual recognition and enforcement purposes. In the unlikely event that the government deemed that undesirable (or possibly, if the continuing EU vetoed the UK's accession), the UK may be able to replicate many of the benefits by acceding unilaterally to the Hague Convention on Choice of Court Agreements (the "Hague Convention"). This treaty, which entered into force on October 1, 2015 as between all EU Member States (except Denmark) and Mexico, prescribes rules regarding the validity and effect of jurisdiction agreements, and the subsequent recognition and enforcement of a judgment given by a court of a contracting state designated by such an agreement. Accordingly, if the UK joined the Lugano or Hague Conventions, judgments given by the English courts pursuant to a choice of court agreement would remain entitled to recognition and enforcement across the continuing EU. In what may be something of a "win-win" in that event, English courts may also regain the flexibility they enjoyed at common law to do justice in individual cases by declining jurisdiction on *forum non conveniens* grounds and, where appropriate, to issue anti-suit injunctions to restrain vexatious or oppressive foreign proceedings, both of which are prohibited under the Brussels Regime. For new transactions, or in the case of transactions where a dispute has not arisen, yet another alternative would be for parties to agree to arbitrate their disputes, thereby avoiding any uncertainty. This is because the recognition and enforcement of arbitral awards will remain subject to the tried and tested rules prescribed by the New York Convention, to which all EU Member States are party. The ultimate fall back would be to revert to a system where the recognition and enforcement of EU court judgments in England, and of English court judgments in the EU, would be governed solely by the common law and by the national laws of each Member State. This would surely add time, cost and uncertainty to the enforcement process, and may mean that obtaining an English judgment for enforcement in the continuing EU becomes much less attractive in the future. An extreme outcome of this kind is probably unlikely, however. This is because legal services are valuable not only to their many and varied global users, but also, importantly, to the UK economy. It is therefore likely that the government formed by the new Prime Minister, the Rt Hon Theresa May MP, will want to find a way to avoid throwing the legal baby out with the bathwater.

As regards choice of law, as stated above, the consensus view is that the outcomes in most cases are also unlikely to change substantially. Nevertheless, unless the government takes steps to preserve the status quo upon the UK's exit, departure from the EU may mean that choice of law issues in contract will go back to being governed by common law rules which last applied before 1991, when the Rome Convention entered into force in the UK. As the Rome II Regulation entered into force in 2009, choice of law issues in tort have only been governed by EU law for the last 7 years. It follows that the pre-existing rules (prescribed by the Private International Law (Miscellaneous Provisions) Act 1995), will be more familiar to the current generation of practicing lawyers. One disadvantage may be that the ability of parties under the Rome II Regulation to choose the law that governs any tortious obligations which arise would be lost, however. English law will also default to the rule that the governing law of the tort is the law of the place where the events giving rise to the tort occurred (under the Rome II Regulation, the default rule is that a tort is governed by the law of the place where the damage is suffered). But, as the damage caused by a tort will usually be suffered where the events constituting the tort occur, this is again unlikely to make much difference in most cases.

For commercial parties entering into transactions during the twilight period of the UK's membership of the EU, the key question will be to consider what the forum selection and choice of law provisions in a given contract are trying to achieve. If enforceability throughout the continuing EU is important, an exclusive (as opposed to a non-exclusive) choice of English court jurisdiction should suffice to guarantee that outcome, given the likelihood that the UK will accede to the Hague Convention. Tactically, an exclusive choice of English court jurisdiction may also assist if, post-Brexit, it becomes necessary to seek anti-suit relief from the English courts to halt abusive parallel proceedings in a slower-moving EU

jurisdiction (the so-called "Italian torpedo"). Where continuing enforceability is an absolute priority, however, agreeing to arbitrate disputes is likely to be the safest course.

As to choice of law, parties are probably best advised to continue with their pre-existing approaches. Nevertheless, depending on the context, they may wish to negotiate provisions, such as material adverse change clauses, which would entitle them, e.g., to accelerate a loan or to terminate an ongoing obligation to perform, if the UK's exit from the EU makes the contract unworkable, or otherwise caused the balance of risk and reward under the contract to change substantially.

In both jurisdiction and choice of law, then, Brexit will almost certainly lead to changes to the rules, but the overall nature of the game, and the outcomes to which it leads, should remain similar. These changes may create some uncertainty and, in some cases, may also create opportunities for disputes lawyers and their clients. However, the importance of the legal services sector to the UK should mean that, in this field at least, the government will want to maintain continuity. The upshot is that commercial parties can probably plan on the basis that English court judgments, and contractual choices of English law, will continue to be recognized and enforced in the continuing EU. They would however be well advised to consider the issues that may arise and, when concluding new contracts, address or mitigate any Brexit-related contingencies expressly.

After Brexit: What Is the Fate of the Unitary Patent Court? One of the many questions Brexit raises is that of the future of the Unitary Patent ("UP") and the associated Unitary Patent Court ("UPC"). Even though the Unitary Patent Agreement ("UPCA") is not part of the EU legal regime but—like the European Patent Convention—a separate international treaty between countries, it will still be heavily affected by Brexit and the uncertainties arising during the transition period which will last for at least two years.

In order to enter into force, the UPCA needs to be ratified by 13 Member States including the three Member States in which the most European Patents had effect in 2012. This is Germany, France and the UK, with Italy being next in row. Thus, as long as the UK has not lost its member status, its ratification is required for the UPC to assume its tasks. Ratification by the UK was originally expected by the end of 2016 but there are severe doubts whether there still is a political will to do so after the vote. If the UK does not ratify the UPCA, the Agreement cannot enter into force until the UK loses its status as a Member State and Italy replaces the UK as the third mandatory signatory. After that point, ratification by the UK will not be possible anymore, because pursuant to Art. 84 UPCA accession is only open to EU Member States.

In a case where the UK ratifies the UPCA while still being a Member State, the question of what will happen once it loses that status arises. The limitation in Art. 84 UPCA was included after the European Court of Justice ("ECJ") held that the supremacy of EU law has to be guaranteed which requires, in particular, that the ECJ must retain the competence under Art. 267 TFEU to issue binding preliminary rulings on questions of EU law. While there might be legal means to secure the supremacy of EU law also vis-à-vis non-EU members, any solution would above all depend upon the willingness of the UK to remain to a certain extent subjected to EU law and the rulings of the ECJ under Art. 267 TFEU after leaving the EU.

In conclusion, Brexit does not mark the end of the Unitary Patent project, but certainly it is a setback. In light of the many unresolved issues and eventually necessary amendments to the legal framework, it currently seems highly unlikely that the UPC will open its doors and those of its London branch anywhere in the near future.

Cyber Security & Data Protection Update

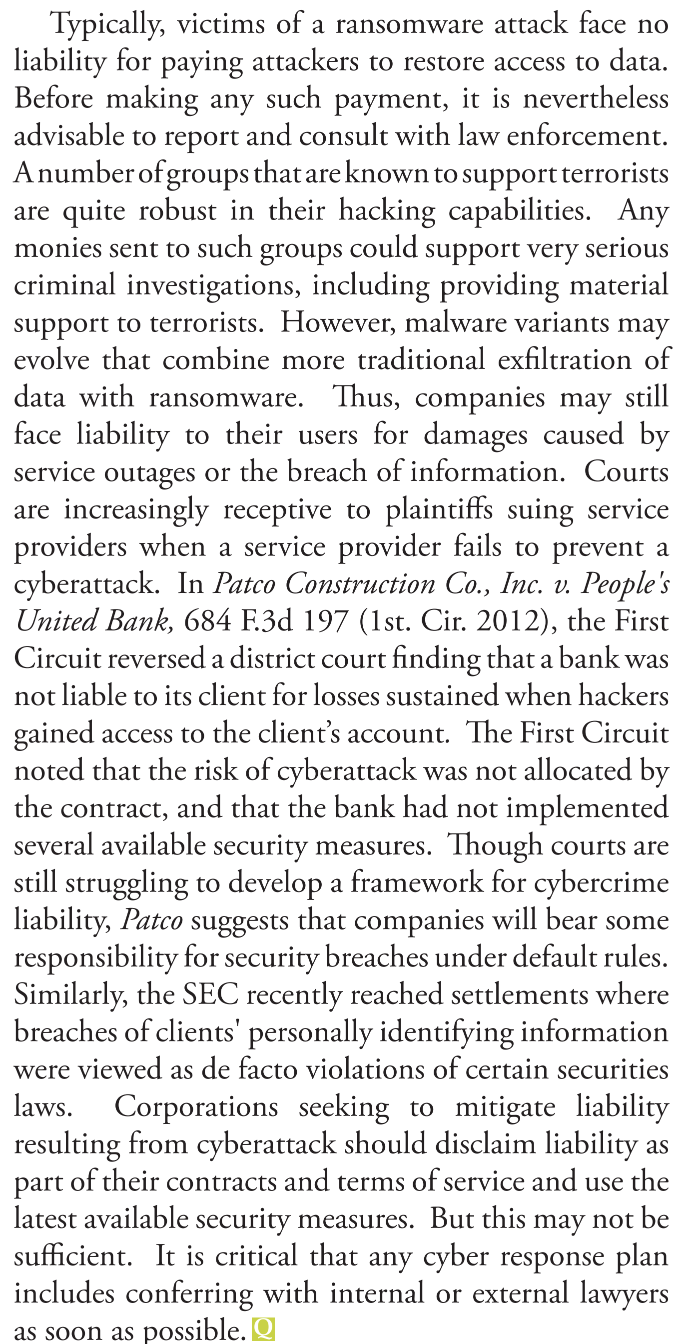
Ransomware: Extortion for the Digital Age. As 2015 drew to a close, security analysts predicted that 2016 would be "the year of ransomware." *See* http://www.infosecurity-magazine.com/opinions/will-2016-be-ransomware/#.VlMlHya8bTw.twitter. Ransomware is not a new concept. Early versions appeared in 1989 and the first modern ransomware attack was reported in 2005. However, ransomware attacks represented only a small sliver of overall malicious intrusions until 2013, when ransomware attacks increased by 200% in just one year. Since then, ransomware attacks represent increasing shares of all attacks. In the first quarter of 2016 alone, ransomware attacks are up 30% over the last quarter of 2015; one 2016 survey found that 40% of responding business had been the victim of a ransomware attack in the past 12 months, and 20% of those businesses had to cease operations until the ransomware had been removed. *See* http://www.kaspersky.com/about/news/virus/2016/Ransom-Aware; *see also* https://www.scribd.com/document/320027570/Malwarebytes.

All ransomware uses the same basic attack model; the software infects the targeted computer and locks users out of their data. Once lockout is complete,

the software displays a notification explaining that the user will be unable to access their data until the user pays the attacker a ransom. Typically, modern ransomware asks for payment using a cryptocurrency such as bitcoin, which makes payments difficult to track. Within this basic model, ransomware is diverse. Ransomware has been written for all major operating systems, including Linux and MacOS, and can target mobile devices, servers, computers, and even Internet of Things devices (devices that historically have not had network capabilities, such as lightbulbs and refrigerators, but which are now being added to networks to enable remote services). Ransomware can be designed to affect only one device, or can spread from one infected device across a whole network. Some ransomware is even designed to seek out and erase networked system backups. Though it is most commonly delivered through email phishing, ransomware is also delivered by SMS, ads on public websites, and other common malware sources.

Ransomware attacks impose different costs than the historically more common data breach attacks. By now, the costs of data breaches are well understood; companies face the costs associated with user notification, detection, response, and lost business. *See* https://nhlearningsolutions.com/Portals/0/Documents/2015-Cost-of-Data-Breach-Study.PDF. The costs associated with ransomware attacks are less well understood, but additionally include revenue lost during periods when data and systems are inaccessible, any ransom that may be paid, and potential liability to third-parties for damages caused by service outages. There are also real public safety concerns as there have been successful attacks against essential services such as hospitals and law enforcement. Successful attacks against critical infrastructure or key systems (like airline systems) could have broad reaching impacts.

Expert advice for preventing ransomware attacks mirrors advice for preventing other incursions: train employees to avoid email phishing scams; install and regularly update reputable antivirus software; restrict employees' use of company networks and vpns on their personal computers; and restrict employee access to files on a shared network to only those files they truly need access to, even when the files contain no sensitive information. In the event of a successful ransomware attack, companies that back up files frequently can restore their systems from a clean backup with minimal service interruption. *See* http://www.healthitoutcomes.com/doc/backup-recovery-system-control-ransomware-attack-0001. Companies without available backups have few response options to a serious incursion. In 2015,



the FBI recommended that most companies hit by ransomware attacks pay the attacker; though its 2016 recommendations warn that payment does not guarantee that an attacker will restore access to data and may encourage future attacks. *See* http://www.businessinsider.com/fbi-recommends-paying-ransom-for-infected-computer-2015-10; *see also* https://www.fbi.gov/news/stories/incidents-of-ransomware-on-the-rise.

Typically, victims of a ransomware attack face no liability for paying attackers to restore access to data. Before making any such payment, it is nevertheless advisable to report and consult with law enforcement. A number of groups that are known to support terrorists are quite robust in their hacking capabilities. Any monies sent to such groups could support very serious criminal investigations, including providing material support to terrorists. However, malware variants may evolve that combine more traditional exfiltration of data with ransomware. Thus, companies may still face liability to their users for damages caused by service outages or the breach of information. Courts are increasingly receptive to plaintiffs suing service providers when a service provider fails to prevent a cyberattack. In *Patco Construction Co., Inc. v. People's United Bank,* 684 F.3d 197 (1st. Cir. 2012), the First Circuit reversed a district court finding that a bank was not liable to its client for losses sustained when hackers gained access to the client's account. The First Circuit noted that the risk of cyberattack was not allocated by the contract, and that the bank had not implemented several available security measures. Though courts are still struggling to develop a framework for cybercrime liability, *Patco* suggests that companies will bear some responsibility for security breaches under default rules. Similarly, the SEC recently reached settlements where breaches of clients' personally identifying information were viewed as de facto violations of certain securities laws. Corporations seeking to mitigate liability resulting from cyberattack should disclaim liability as part of their contracts and terms of service and use the latest available security measures. But this may not be sufficient. It is critical that any cyber response plan includes conferring with internal or external lawyers as soon as possible.

VICTORIES

D.C. Circuit Victory for Indian Point Nuclear Plant

The firm secured an important victory on an expedited basis for client Entergy Corp. in the United States Court of Appeals for the D.C. Circuit involving a nuclear power plant that is integral to the electric grid for the New York metropolitan area. In June 2016, three environmental organizations filed an emergency petition for a writ of mandamus in the D.C. Circuit, seeking to compel the U.S. Nuclear Regulatory Commission ("NRC") to order a shutdown of the Indian Point 2 nuclear power plant in Buchanan, New York, which a subsidiary of Entergy Corp. owns. The case stemmed from the result of a routine inspection in early March 2016 that Indian Point 2 performed. That inspection detected that a number of bolts securing metal plates in the reactor vessel had become degraded. This is a well-known phenomenon in the industry, but the number of degraded bolts was somewhat higher than had been observed at other plants. Under NRC's supervision, Entergy (the owner and operator of Indian Point 2) replaced all of the degraded bolts, plus numerous non-degraded bolts for added safety margin. Entergy also committed to monitoring for possible signs of bolt failure during the upcoming operational cycle, such that Entergy would be able to shut the plant down safely to redress any issues. On May 24, 2016, an environmental group filed a petition with the NRC seeking an order preventing Indian Point 2 from restarting. NRC denied the request for immediate relief but did set the petition for full consideration (which remains ongoing).

Nearly a month later, three environmental groups filed an emergency petition (against NRC) for writ of mandamus in the D.C. Circuit seeking to compel NRC to order a shutdown of Indian Point 2, which had restarted that same day for its current operating cycle. A special three-judge panel was convened and issued an expedited briefing schedule requiring the NRC to file its brief in only five days' time. A Quinn Emanuel team, on Entergy's behalf, quickly filed a motion to intervene, which the Court granted the following day. The firm then filed an opposition brief and supporting fact declaration just four days later, explaining, as a factual matter, that no safety concern was presented by continued operation and, as a legal matter, that emergency relief was not warranted because NRC's to-be-issued determination on the petition would be "committed to agency discretion by law" and therefore not judicially reviewable. Two days later, the environmental groups filed a reply brief and the D.C. Circuit denied the petition the same day. The quick victory allowed the power plant to continue operating, thus securing the reliability of the New York electric grid. Quinn Emanuel continues to represent Entergy in a variety of matters related to Indian Point in state and federal court.

Victories for Bank Mutiara in SDNY and Second Circuit

The firm recently won an important victory in the Second Circuit for the former Bank Mutiara, an Indonesian bank newly emerged from receivership. A "hedge fund" called Weston had purchased for $1 a company with purported claims against Bank Mutiara. In early 2013, Weston obtained a default judgment against Bank Mutiara in Mauritius. In late 2013, Weston created a Delaware special purpose entity, transferred the judgment to that entity, and initiated an action in S.D.N.Y. to collect on the Mauritian judgment. *See Weston Cap. Advisors v. PT Bank Mutiara, Tbk*, No. 13 Civ. 6945 (PAC) (S.D.N.Y.). Weston's lawyers sought enforcement though an *ex parte* petition, which the district court inexplicably granted without giving Bank Mutiara notice or an opportunity to be heard. The court then signed turn-over orders for Bank Mutiara's assets at correspondent banks in New York. Quinn Emanuel was retained after Bank Mutiara received notice of the proceeding, and quickly convinced the district court to vacate the judgment, *see Weston Cap. Advisors, Inc. v. PT Bank Mutiara*, No. 13 Civ. 6945 (PAC), 2013 WL 6084402 (S.D.N.Y. Nov. 19, 2013), rescind its turn-over orders, and order Weston to return to Bank Mutiara the money it had improperly obtained.

Despite the court's orders, Weston has refused since November 2013 to return the approximately $3.6 million it took. In early 2014, the firm moved to hold the nominal plaintiff—the Delaware special purpose entity—in contempt, but when Weston still did not repay the funds, the firm sought and obtained permission to take discovery of Weston and its affiliates. Based on the information gleaned, the firm moved in March 2015 to hold Weston's principle, John Liegey, personally in contempt along with ten other non-party Weston entities spread around the globe, and also to impose fines on each contemnor to compel compliance. In September 2015, the district court issued an expanded contempt order imposing escalating fines of $1,000 per day until the contemnors repay the funds, with the daily fine doubling each month on each of John Liegey and the Weston entities. *Weston Cap. Advisors, Inc. v. PT Bank Mutiara*, No. 13 Civ. 6945 (PAC), 2015 WL 5246984 (S.D.N.Y. Sept. 8, 2015).

Weston appealed both the expansion of contempt to non-parties and the imposition of escalating fines to the Second Circuit. It claimed, among other things, that the court had improperly treated the various Weston entities and their founder as one entity, that the fines were disproportionately large, and that the fines were useless as Weston did not have the money to comply even if it wanted to. Oral argument was not kind to Weston, and the Second Circuit issued a decision only three weeks later rejecting these arguments and affirming the district court's order with respect to both the contempt finding and the escalating fines. *Weston Cap. Advisors, Inc. v. PT Bank Mutiara, Tbk*, No. 15-3158-CV, -- Fed. App'x --, 2016 WL 3472375 (2d Cir. June 24, 2016). The appellate court also separately dismissed as interlocutory and impermissible the appeal lodged by the Delaware special purpose entity which was the nominal plaintiff.

Weston then petitioned the Second Circuit for rehearing. In doing so, it bizarrely and untruthfully asserted that Quinn Emanuel and Bank Mutiara had participated in a money laundering scheme in an unrelated case. This, Weston claimed, constituted unclean hands and merited both rehearing and remand to the district court for supplementation of the record. The Second Circuit denied Weston's motion within two weeks, and the firm has sought sanctions against opposing counsel for its frivolous and *ad hominem* arguments.

The case and the decisions it occasioned highlight the district court's authority to enforce compliance with its orders, and will doubtless become even more relevant as cross-border, cross-jurisdictional finance and litigation become ever more common. Q

Stephen Jagusch QC and Stephen Hauss Recognized at *The American Lawyer* Transatlantic Legal Awards

Stephen Jagusch QC was named Transatlantic Arbitrator of the Year and Stephen Hauss was named a Transatlantic Rising Star at *The American Lawyer*'s Transatlantic Legal Awards. The awards, which were jointly hosted by *The American Lawyer* and the UK's *Legal Week,* honored preeminent firms and individual lawyers for their achievements in transatlantic matters. In honoring these London partners, the publications recognized the firm's market leading transatlantic presence and excellence in performance. Q

White Collar Rising Star and Former UK Prosecutor Robert Amaee Joins the London Office

Dr. Robert Amaee has joined the firm as a partner and head of the firm's white collar and corporate investigations practice in London. Previously, Dr. Amaee had been a partner at Covington & Burling, LLP. He advises clients on a range of criminal and regulatory matters, including internal investigations, voluntary and compelled disclosures to enforcement authorities, and the development of compliance programs. He also advises clients on World Bank enforcement matters and on UK Parliamentary matters, including Parliamentary Select Committee hearings. Dr. Amaee previously served as Head of Anti-Corruption, Head of Proceeds of Crime, and Head of International Assistance at the UK Serious Fraud Office (SFO), leading the investigation and prosecution of high-profile bribery and money laundering cases. In those roles, he worked closely with agencies including the Financial Conduct Authority, City of London Police, the Ministry of Justice, the U.S. Department of Justice, the U.S. Securities and Exchange Commission, and International Financial Institutions, including the World Bank. Dr. Amaee holds a Ph.D. in medical research and a B.Sc. in Life Sciences. He has been recognized by leading legal directories, including *Legal 500* and *Chambers & Partners,* as being "highly regarded for his ability to manage sensitive global investigations, money laundering and corruption work" and "a great pragmatist who can work through very difficult legal issues in a practical way and who has a clear understanding of the law." These note that "clients appreciate his approachable manner and extensive experience in the area." Q

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

PRESORTED
STANDARD
U.S. POSTAGE
PAID
PERMIT NO. 4338
INDUSTRY, CA

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 Becca Voake at 213-443-3165.

- We are a business litigation firm of more than 650 lawyers — the largest in the world devoted solely to business litigation and arbitration.
- As of September 2016, we have tried over 2,500 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 $51 billion in judgments and settlements.
- We have won five 9-figure jury verdicts.
- We have also obtained twenty-seven 9-figure settlements and fourteen 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
500 W. Madison St.,
Suite 2450
Chicago, IL 60661
+1 312-705-7400

WASHINGTON, D.C.
777 6th Street NW,
11th Floor
Washington, DC 20001
+1 202-538-8000

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

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

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

LONDON
One Fleet Place
London EC4M 7RA
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

MOSCOW
Paveletskaya Plaza
Paveletskaya Square, 2/3
115054 Moscow
Russia
+7 499 277 1000

HONG KONG
1307-1308 Two Exchange Square
8 Connaught Place
Central Hong Kong
+852 3464 5600

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

BRUSSELS
Rue Breydel 34
1040 Brussels
Belgium
+32 2 416 50 00

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

SHANGHAI
Level 20, The Center
989 Changle Rd
Shanghai 200031
+86 21 5117 5859

©2016 Quinn Emanuel Urquhart & Sullivan, LLP | To update information or unsubscribe, please email updates@quinnemanuel.com.