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U.S. Supreme Court Expands Rights of Patent Owners to Recover Lost Foreign Profits

Background

On June 22, 2018, the U.S. Supreme Court in *WesternGeco LLC v. Ion GeoPhysical Corp.* determined in a 7-2 ruling that patent owners are entitled to their profits that were lost overseas under the general patent infringement damages statute, 35 U.S.C. § 284, if they prove infringement under Section 271(f)(2) of the Patent Act. Although its 10-page decision was narrow, the courts expanded the rights of certain patent owners.

Procedural Background

WesternGeco ("WesternGeco") initiated a patent infringement action under Sections 271(f)(1) and (f)(2) of the Patent Act against ION Geophysical Corporation ("ION") in the Southern District of Texas, asserting four patents related to lateral-steering technology to survey the ocean floor. In its suit, WesternGeco accused ION of manufacturing components for a competing system in the United States before shipping them to companies overseas to be assembled. Notably, WesternGeco did not license or sell its technology but rather used the technology itself to perform surveys for its clients.

Section 271 of the Patent Act covers different types of infringement within the United States. For example, Section 271(a) states that "whoever without authority, makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefore, infringes the patent." Section 271(f) is an exception to the domestic geographic limitation on infringement and provides that any party that supplies components "in or from the United States" and either actively induces (Section 271(f)(1)) or intends (Section 271(f)(2)) the components to be combined outside the United States. If infringement is proven, Section 284 is a remedial provision of the Patent Act that authorizes "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer."

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Sue Prevezer QC Named to *The Legal 500 UK* Hall of Fame 2018

Sue Prevezer QC was named to the *The Legal 500 UK* Hall of Fame in two Dispute Resolution categories: Banking Litigation and Commercial Litigation. The publication named her as one of the top litigators in the UK based on consistent praise from her clients for her work ethic and excellence. *The Legal 500* Hall of Fame recognizes those who have been at "the pinnacle of the profession," only including individuals ranked as elite leading lawyers in their respective fields for at least eight of the last ten years. Q

Leading Litigator Joins Los Angeles Office

Robert M. Schwartz has joined the firm as a partner in the Los Angeles office. Mr. Schwartz, who has been practicing for more than 30 years, is a nationally recognized leader in large-stakes and often precedent-setting cases, particularly in the entertainment and media fields. He has represented every major motion picture studio and broadcast network, film production companies, pay TV services, video game developers, record companies, along with individual producers, writers, directors, and actors. He has extensive experience and success in copyright, trademark, unfair competition, royalties and participations, First Amendment, employment, and complex business disputes. He has defended more than 75 class actions around the country. Mr. Schwartz received his J.D. from University of Southern California Law School, and his B.S. in Economics from University of California Los Angeles. Q

At trial, the jury found that WesternGeco had lost ten survey contracts as result of ION's infringement and awarded WesternGeco $12.5 million in royalties and $93.4 million in lost profits. The district court subsequently rejected ION's argument in its motion to set aside the verdict that Section 271(f) precludes patent owners from recovering extraterritorial damages. *WesternGeco LLC v. ION Geophysical Corp.*, 953 F. Supp. 2d 731, 755-56 (S.D. Tex. 2013). ION appealed and a panel majority in the Court of Appeals for the Federal Circuit reversed the $93.4 million award for lost profits based on a prior Federal Circuit decision in *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348 (Fed. Cir. 2013), which held that Section 271(a) precluded recovery of damages from lost foreign profits. *WesternGeco LLC v. ION Geophysical Corp.*, 791 F.3d 1340, 1349-52 (Fed. Cir. 2015). The Supreme Court granted *certiorari*, vacated, and remanded for further consideration in light of the recently-decided *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (June 13, 2016). The same panel majority in the Federal Circuit again reversed the award of lost foreign profits, and the Supreme Court granted *certiorari* once more.

Different Theories for Awarding Foreign Lost Profits

WesternGeco argued that it should be able to recover its lost foreign profits, albeit under different legal theories. WesternGeco's main theory was that the plain text of Sections 271(f) and 284 combined entitled it to recover its lost foreign profits. "Congress specifically focused on the precise quantum of domestic conduct (supply components in or from the United States) and requisite intent (that the components be combined abroad in a manner that would constitute infringement if it occurred domestically)" in Section 271(f). Brief of Petitioner at 21. As a result of the domestic infringement, Section 284 entitled WesternGeco to full compensation for damages caused by the infringement. *Id.* at 21-22. The fact that the combination and lost sales occurred abroad should not prevent the patent owner from being made whole for ION's domestic misconduct under Section 271(f)(2). *Id.* at 21-26.

More specifically, WesternGeco made three arguments as to why the plain text of Sections 271(f) and 284 allowed foreign profits to be recovered. First, the presumption against extraterritoriality, a general presumption that federal statutes do not apply abroad absent "clear, affirmative" congressional intent to do so, *id.* at 28 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)), is inapplicable given the focus of Section 271(f) on domestic conduct that constitutes part of the infringement. *Id.* at 27, 33 (distinguishing "a statute providing a private cause of action will reach foreign conduct or engender diplomatic friction relative to a statute that can be enforced only by the federal government"). The parties did not dispute that ION supplied the components from the United States with the intent to combine the components abroad; the only remaining dispute was whether WesternGeco was entitled to its lost foreign profits. *Id.* at 22-23. Because WesternGeco's claims were focused on the unlawful domestic conduct rather than the unlawful foreign conduct, it contended that the presumption against extraterritoriality was irrelevant here. *Id.* at 27, 29-30, 34 (characterizing the Federal Circuit's application of the presumption here to be "simply pounding a square peg into a round hole")

Second, even if the presumption against extraterritoriality applied to Section 271(f), WesternGeco argued that it was still entitled to its lost foreign profits because "Congress enacted §271(f) with *transnational* considerations firmly in mind and prohibited specific domestic conduct if and only if subsequent foreign combinations of components were intended." *Id.* at 34 (emphasis in original). WesternGeco also argued that the Congress enacted Section 271(f) to close the loophole created by *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972), which further supported WesternGeco's position that Congress intended patent owners to recover lost foreign profits under Section 271(f). Brief of Petitioner at 36-39. For context, the Supreme Court in *Deepsouth* had ruled that patent owners could not recover foreign lost profits under Section 271(a) from a manufacturer that shipped components overseas to be assembled because there was no domestic direct infringement. *Id.* at 36. WesternGeco pointed out that the Congress could have chosen to close the loophole created by *Deepsouth* by making the foreign combination unlawful, to which the presumption would apply, but instead chose to create an exception under Section 271(f) to render the domestic supply of components with the intent of foreign combination a form of infringement. *Id.* at 36-37. Thus, "any extraterritorial effect of § 271(f) was fully intended." *Id.* at 27.

Finally, WesternGeco contended that the presumption against extraterritoriality is not properly applied to damages provisions because Congress is not required to specify that damages are recoverable for extraterritorial conduct in damages provisions. *Id.* at 40-41 ("This Court requires clarity, not redundancy, to overcome the presumption"); *see also id.* at 54

("Expecting a specific indication in § 284 that Congress intended damages to extend to foreign lost profits is to look for the wrong thing in the wrong place."). In support, WesternGeco pointed to several instances in which the Supreme Court and other federal courts have awarded lost foreign profits due to domestic violations. *Id.* at 41-46. Rather than using extraterritoriality to limit damages, WesternGeco argued that the doctrine of proximate causation and related doctrines can "keep damages awards within their proper scope." *Id.* at 52-53.

The United States, for its part, filed an amicus brief in support of the Petitioner, rejecting the Federal Circuit's "categorical rule precluding an award of patent-infringement damages for profits that would have been earned outside the United States." Brief of the United States at 15. The United States stepped through the two-step framework "for identifying impermissible extraterritorial applications of federal statutes" that the Supreme Court had refined in its 2016 *RJR Nabisco* decision, where it is first determined whether the presumption against extraterritorial application of U.S. law has been rebutted by "a clear, affirmative indication" that the statute should be applied extraterritorially and if so, then whether the "extraterritorial application of the statute is permissible." *Id.* at 24 (citation and quotation marks omitted). But if the presumption has not been rebutted, the Court will determine "whether the case involves a domestic application of the statue by looking at the statute's focus." *Id.* (citation and quotation marks omitted).

Applying the two-step framework here, the United States found that the presumption against extraterritoriality applied to Section 284, which did not contain any "clear, affirmative indication that [it] applies extraterritorially," *id.* at 25 (citation and quotation marks omitted). The United States determined, however, that Section 284 "does not regulate conduct abroad" and is limited to territorial applications in order to ensure that "a U.S. patentee is adequately compensated for domestic infringement of its rights under U.S. law." *Id.* at 25. Notably, the United States pointed out that the foreign conduct that the Federal Circuit determined to trigger the presumption against extraterritoriality (the surveys performed by ION's customers) is not expressly referenced in Section 284 and is therefore not the focus of Section 284. *Id.* at 31. In contrast, ION's domestic supply of the components is the legal injury suffered by WesternGeco and the focus of Section 284. *Id.* at 33. As a result, the United States concluded that "Section 284's text and purpose thus reflect the provision's domestic focus, even in cases where the consequences of infringing conduct include the loss of profits that the patentee otherwise would have earned overseas." *Id.*

A total of eleven amicus briefs were filed in *WesternGeco*, nine supporting Petitioners and two supporting Respondent. Quinn Emanuel filed an *amici* brief on behalf of Fairchild Semiconductor International, Inc., The Internet Association, SAS Institute Inc., Symmetry, LLC, and Xilinx, Inc. in support of ION, arguing, *inter alia*, that the traditional presumption against extraterritoriality in U.S. patent law applies to both damages and liability, especially without a clear statement of congressional intent to the contrary. Brief of *Amici Curiae* of Fairchild Semiconductor International, Inc. at 4-7, 11-22.

Respondent Argued That Presumption Against Extraterritoriality Applied to Remedial Provision

ION unsurprisingly agreed with the Federal Circuit that the presumption against extraterritoriality applied to Section 284 and that Congress did not intend Section 284 to rebut this presumption. In support, ION relied on the absence of "clear, affirmative indication" in Section 284 that the presumption does not apply as well as the nature of damages, which ION characterized to be foreign in nature. Brief of Respondent at 12. "[A] damages provision that provides for 'adequate' compensation does not clearly and unmistakably indicate an intent to provide compensation for foreign injuries based on foreign activities." *Id.* at 20-21. ION disputed that the injury occurred domestically, asserting that injury only occurred "after foreign entities won the contracts and petitioner thereby lost a foreign stream of profits because of the foreign entities' foreign use of [the accused product]." *Id.* at 23. ION also disagreed with WesternGeco's position that the presumption against extraterritoriality did not apply to Section 271(f)(2). *Id.* at 25-32. Based on WesternGeco's position that patent owners may recover lost foreign profits, ION raised concerns of comity, warning that any act of domestic infringement would act as a springboard for worldwide patent damages to be awarded by American juries. *Id.* at 50.

The Supreme Court's 7-2 Decision in Favor of Recovery of Lost Foreign Profits

Writing for the majority, Justice Thomas appears to be receptive to the "two-step framework for deciding questions of extraterritoriality" but skipped step one and resolved the case at step two. 138 S. Ct. 2129, slip op. at 5 (June 22, 2018) (exercising discretion to not resolve issues, such as whether the presumption applies to remedial provisions may have "far-reaching effects in future cases," that would not change the outcome of the case). Justice Thomas analyzed Section 284 in tandem with Section 271(f)(2) and determined that "the conduct relevant to the statutory focus in this case is domestic." *Id.* at 6. In particular, "the focus of § 284, in a case involving infringement under § 271(f)(2), is on the act of exporting components from the United States." *Id.* at 7-8. The majority inserted a footnote near the end of its opinion making clear that its holding does not address any other doctrines that were argued before the Court. *Id.* at 9 n.3 ("In reaching this holding, we do not address the extent to which other doctrines, such as proximate cause, could limit or preclude damages in particular cases.").

Justice Gorsuch, in the dissenting opinion joined by Justice Breyer, opined that allowing lost foreign profits "would effectively allow U.S. patent owners to use American courts to extend their monopolies to foreign markets," which "would invite other countries to use their own patent laws and courts to assert control over our economy." *Id.*, dissenting slip op. at 1-2 (Gorsuch, J., dissenting). The majority, however, dismissed Justice Gorsuch's concerns, stating that "the overseas events were merely incidental to the infringement," *id.*, slip op. at 8, and criticized Justice Gorsuch for "wrongly conflat[ing] legal injury with the damages arising from that injury." *Id.* at 9.

As a result, the Supreme Court reversed and remanded the Federal Circuit's decision for further proceedings. Since then, however, the Federal Circuit has ruled that three of the asserted patents are invalid, which will affect the amount of lost foreign profits recoverable. ION, for its part, plans to seek a new damages trial based on the invalidity of the three asserted patents and further plans to argue on remand before the Federal Circuit that "WesternGeco is not entitled to lost profits because the two companies are not direct competitors, a position the Federal circuit did not rule on." *See* "Justices Say Patent Owners Can Recover Foreign Damages", *Law360* (June 22, 2018, 10:34 AM EDT), *available at* https://www.law360.com/articles/1047357. In sum, the Court's narrow ruling in *WesternGeco* expanded patent owners' rights to recover lost foreign profits for infringement under Section 271(f)(2) in certain circumstances, but recovery may still be uncertain if other damages prerequisites, such as proximate cause, are disputed. Q

NOTED WITH INTEREST

Supreme Court Holds Foreign Corporations Cannot Be Liable Under the Alien Tort Statute

On April 24, 2018, the United States Supreme Court issued its much-anticipated decision in *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386 (2018), conclusively holding that the Alien Tort Statute ("ATS") does not afford a private right of action against foreign corporations. In so holding, the Court has given foreign corporations — particularly those domiciled in nations that lack meaningful civil remedies for acts amounting to violations of international law — cause for at least temporary relief.

Previously, in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), Quinn Emanuel obtained a landmark, unanimous 9-0 decision in the Supreme Court holding that the ATS does not apply extraterritorially to so-called "foreign cubed" cases, *i.e.*, cases in which the plaintiffs, defendant, and underlying alleged conduct all occurred abroad. 569 U.S. at 124-25. In *Jesner*, the Supreme Court definitively resolved the question it left unresolved in *Kiobel*: whether corporations can *ever* be subjected to liability under the ATS by confirming that they cannot.

Enacted in the Judiciary Act of 1789, the ATS provides jurisdiction for aliens to bring civil actions for torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although the statute was rarely used prior to 1980, the ATS became a popular tool for public interest organizations seeking to bring actions on behalf of plaintiffs claiming human rights violations abroad, often at the hands of foreign governments that enjoy sovereign immunity against such suits. In *Kiobel*, the district court held that the ATS does not authorize suits against corporations and dismissed the plaintiffs' claims. 569 U.S. at 114. After the Second Circuit affirmed, the Supreme Court unanimously affirmed the Second Circuit's decision in favor of Quinn Emanuel's client on the alternate ground that the ATS does not apply extraterritorially to "foreign cubed" cases, but it did not address whether corporations may be sued under the statute outside of "foreign cubed" factual contexts. 569 U.S. at 124-25.

In *Jesner*, victims of terrorist acts attributed to

Hamas sued a major Jordanian bank, Arab Bank, PLC, in the United States District Court for the Southern District of New York. *Id.* at 1393-94. The plaintiffs alleged that Arab Bank was complicit in Hamas's actions by facilitating its funding by (i) clearing dollar-denominated transactions through the Clearing House Interbank Payments System ("CHIPS"); and (ii) laundering money for the Texas-based Holy Land Foundation for Relief and Development, a charity plaintiffs alleged was affiliated with Hamas. The plaintiffs further alleged that Arab Bank conducted both activities in part through its New York branch. 138 S. Ct. at 1394-95. Although the Second Circuit's intervening decision in *Kiobel* barring suits against corporations was affirmed by the Supreme Court on different grounds, the Second Circuit's holding that corporations are not amenable to suit under the ATS remained controlling precedent in that Circuit. Thus, the district court dismissed the *Jesner* case and the Second Circuit affirmed.

Although *Jesner* squarely presented the question of corporate ATS liability left unresolved in *Kiobel*, a five Justice majority of the Supreme Court held in an opinion by Justice Kennedy that *foreign* corporations cannot be subjected to liability under the ATS. The Court reached this conclusion because it found the ATS was designed to be modest and narrow in scope with the purpose of improving foreign relations, *id.*, and that extending the ATS to provide a remedy against foreign corporations is more appropriate for Congress than the Court. *Id.* at 1402-03. Turning to the facts of *Jesner*, the Court found that it would thus "be inappropriate for courts to extend ATS liability to foreign corporations." *Id.*

Although the Court still did not go as far as the Second Circuit did in *Kiobel* in finding that liability under the ATS was precluded for *any* corporations, the *Jesner* decision still has important ramifications:

First, the *Jesner* decision clearly relegates the issue of foreign corporate liability for violations of international law to Congress. Unless Congress amends the ATS explicitly to allow suits against foreign corporations, such suits will be barred. *See, e.g.*, *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, No. 16-7122, 2018 WL 3490072, at *1 (D.C. Cir. July 20, 2018) (affirming dismissal of ATS claims against Iranian banks alleged to have funded rocket attacks by Hezbollah); *Wildhaber v. EFV*, No. 17-CV-62542, 2018 WL 3069264, at *6 (S.D. Fla. June 21, 2018) (dismissing *pro se* plaintiff's claims against Swiss government authorities).

Second, *Jesner* suggests without deciding that, as the Second Circuit had held in *Kiobel*, international human rights norms apply solely to natural persons and not to corporations. *See Jesner*, 138 S. Ct. at 1402 (noting that the "international community" has yet to universally accept corporate liability for acts of its employees); *Kiobel*, 621 F.3d 111, 119 (2d Cir. 2010) ("From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not 'juridical' persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an 'international crime' has rested solely with the individual men and women who have perpetrated it."); *see also The Nurnberg Trial 1946 (United States v. Goering)*, 6 F.R.D. 69, 110 (1947) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.") (quoted in *Jesner*, 138 S. Ct. at 1402 and *Kiobel*, 621 F.3d at 119). Federal courts may now see an uptick in ATS litigation against corporate officers and directors in lieu of actions against the corporations themselves.

Third, human rights litigation against foreign corporations may shift to more hospitable fora, including the United Kingdom or the European Union. Similarly, advocates may attempt to allege claims under state law. *See, e.g.*, Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. Rev. 397, 483 (2018). Human rights advocates may also shift their focus to United States citizens who can sue foreign corporations under other federal laws, such as the Anti-Terrorism Act, 18 U.S.C. § 2333(a) (providing that any United States national injured by act of international terrorism can sue for treble damages in federal court).

Fourth, *Jesner* may prompt courts to eschew claims involving foreign policy concerns in other contexts. For example, a dissenting judge in the Ninth Circuit recently relied on *Jesner* to argue that courts should not imply a civil damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against a U.S. Border Patrol agent who allegedly shot and killed a Mexican youth on Mexican soil. *Rodriguez v. Swartz*, No. 15-16410, 2018 WL 3733428, at *21 (9th Cir. Aug. 7, 2018) (Smith, J., dissenting); *see also City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2018 WL 3109726, at *7 (N.D. Cal. June 25, 2018) (quoting *Jesner*'s caution that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns" in dismissing public nuisance claims against petroleum companies based on global warming); *City of New York v. BP P.L.C.*, No. 18 CIV. 182 (JFK), 2018 WL 3475470, at *2 (S.D.N.Y. July

19, 2018) (similar).

Finally, courts may rely on *Jesner* to construe the ATS and other federal statutes conservatively to avoid improperly creating or extending judicially-created private rights of action. *See, e.g.*, *Nahl v. Jaoude*, No. 15 CIV. 9755 (LGS), 2018 WL 2994391, at *5 (S.D.N.Y. June 14, 2018) (dismissing ATS claims based on alleged money laundering for Hezbollah because money laundering is not a violation of international law and citing *Jesner* for principle that "federal courts must exercise 'great caution' before recognizing new forms of liability under the ATS"); *see also Kirtman v. Helbig*, No. 4:16-CV-2839-AMQ, 2018 WL 3611344, at *5 (D.S.C. July 27, 2018) (rejecting *Bivens* cause of action based on alleged retaliation against prisoner for exercise of First Amendment rights, relying in part on Supreme Court's "'general reluctance to extend judicially created private rights of action'" as noted in *Jesner*).

Jesner thus has not only eliminated ATS claims against foreign corporations but it has also signaled a reduced role for ATS litigation in U.S. federal courts more generally. Q

PRACTICE AREA NOTES

Patent Litigation Update

Real Party in Interest Decision. On July 9, 2018, the Federal Circuit in *Applications in Internet Time, LLC v. RPX Corp*., 897 F.3d 1336 (Fed. Cir. 2018) vacated a decision by the Patent Trial and Appeals Board ("PTAB"), holding that the Board had applied an unduly restrictive test for analyzing whether an unnamed client of an IPR Petitioner was a real party in interest. In doing so, the Federal Circuit indicated that the PTAB must adopt a "flexible approach" when analyzing whether a non-party is a real party in interest, taking into account both equitable and practical considerations. *Id.* at 1351.

The PTAB Challenge. Patent owner Applications in Internet Time ("AIT") sued defendant Salesforce.com ("Salesforce") in U.S. District Court for infringement of two AIT patents. *Id.* at 1338. By statute, Salesforce had until one year ***from*** the date it was served the complaint to file *inter partes* review ("IPR") petitions challenging the patents-in-suit. 35 U.S.C. § 315(b). Instead of filing IPR petitions, Salesforce filed covered business method ("CBM") petitions with the PTAB within the one-year period. The Board denied both of these petitions (outside of the one-year period) because Salesforce had failed to establish that the patents were "covered business method patent[s]" within the meaning of the AIA. *Applications in Internet Time*, 897 F.3d at 1339.

Shortly thereafter, but still eight months after the expiration of the one-year period, third party RPX Corporation ("RPX") filed IPR petitions against AIT's patents-in-suit, identifying itself to the PTAB as the "sole real party-in-interest," and certifying that it was not barred or estopped from requesting IPR as to these two patents. *Id.* It was undisputed that Salesforce was a client of RPX, subscribing to RPX's "patent risk solution" services; that RPX and Salesforce shared a member on their respective boards of directors; and that there had been six communications between RPX and Salesforce concerning the pending AIT litigation and patents-in-suit. *Id.* at 1339-42. Arguing that accused infringer Salesforce was also a real party in interest, AIT argued that institution of the IPRs was time-barred under §315(b), because the petitions were filed more than one year after service of AIT's complaint on Salesforce. *Id.* at 1338-1339. The PTAB rejected AIT's arguments, and ultimately invalidated claims in the asserted patents. *Id.* at 1339.

The Federal Circuit Appeal. On appeal the Federal Circuit vacated PTAB's final decision, finding that the PTAB had relied on an erroneous understanding of the term "real party in interest" in finding that the IPR petitions were not time-barred. *Id.* Section 315(b), titled "Patent Owner's Action," provides that an IPR "may not be instituted if the petition requesting the proceeding is filed more than one year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent." *Id.* at 1346. Historically, the PTAB has determined that a person or entity is a real party in interest if it has, or could have, *exercised control over the proceedings*. *Id.* at 1342-43. After reviewing the legislative history of the code section, the court determined that "Congress intended that the term 'real party in interest' have its expansive common-law meaning," and would include those "who, from a 'practical and equitable' standpoint, will benefit" from the proceeding:

> Determining whether a non-party is a "real party in interest" demands a flexible approach that takes into account both equitable and practical considerations, with an eye toward determining

whether the non-party is a clear beneficiary that has a preexisting, established relationship with the petitioner.

Id. at 1349-51.

The court noted that this more holistic approach is consistent with the approach set forth in the PTAB's own Trial Practice Guide, and explained that the two questions lying at the heart of this "fact-dependent" inquiry are whether a non-party "desires review of the patent" and whether a petition has been filed at a nonparty's "behest." *Id.* at 1342.

The Federal Circuit determined that the PTAB's consideration of the evidence was "impermissibly shallow," disregarding Salesforce's relationship with RPX and the nature of RPX as an entity, *i.e.*, a for-profit company whose clients pay for its portfolio of "patent risk solutions." *Id.* at 1351-52. Because the PTAB disregarded facts "which, taken together, imply that RPX can and does file IPRs to serve its clients' financial interests, and that a key reason clients pay RPX is to benefit from this practice in the event they are sued by an NPE," the court vacated the decision, remanding the case for further proceedings consistent with its holding. *Id.* 1351-52, 1358.

Factors and Facts Relevant for Identifying a Real Party in Interest. Following the *Applications in Internet Time* decision, petitioners and patent owners should consider the following factors in evaluating whether a non-party may be deemed a real party in interest: (1) the non-party's control over a petitioner's participation in a proceeding; (2) the non-party's funding of the proceeding; (3) the non-party's direction of the proceeding; and (4) the nature of the petitioner's business. *Id.* at 1342–43. Moreover, the specific facts set forth in the decision provide additional guidance. For example, the Federal Circuit noted the following facts tended to show that Salesforce could potentially be a real party in interest to RPX's IPR petitions: (1) Salesforce was time-barred from challenging these patents; (2) RPX publicly stated its goal to file IPRs where its clients have been sued by non-practicing entities; (3) RPX admitted it was highly unlikely that any party other than RPX would challenge these patents; (4) RPX could not identify any client other than Salesforce that might be at risk of infringement claims arising out these patents; (5) RPX stated publicly that its "interests are 100% aligned with those of [its] clients;" (6) Salesforce renewed its membership with RPX just prior to the filing of the IPR petition; and (7) Salesforce and RPX shared a common member on their boards of directors. *Id.* at 1340-43, 1353. Additionally, the Federal Circuit rejected Salesforce's argument that RPX didn't have any contractual obligation to file the IPRs. *Id.* at 1354. "[A] nonparty to an IPR can be a real party in interest even without entering into an express or implied agreement with the petitioner to file an IPR petition." *Id.*

With respect to the fourth factor concerning the nature of the petitioner's business, the Federal Circuit found statements made by RPX, which indicated that its "interests are 100% aligned with those of [its] clients," relevant to show that the petitioner's business purpose was to benefit the non-party. *Id.* at 1357. The Federal Circuit also noted that the mere fact that a petitioner has an independent interest in pursuing an IPR is insufficient to prevent a non-party from being named a real party in interest. *Id.* at 1353.

Future Outlook of Successive Litigation and Patent Proceedings. The Federal Circuit's ruling in *Applications in Internet Time* is likely to expand the scope of discovery in PTAB proceedings, as patent owners explore relationships between petitioners and non-parties. Under the court's expanded real party in interest framework, non-litigants intending to file petitions with the PTAB will need to evaluate carefully the impact a petition may have on the petitioner's clients and members, especially when those non-parties are currently being sued in infringement litigation involving the challenged patent.

White Collar Litigation Update

Information Advantage – Challenges by Foreign Nationals and Companies to Navigate U.S. Criminal Prosecutions While Subject to the Fugitive Disentitlement Doctrine. Non-U.S. individuals and companies face an initial critical question when summoned to face criminal charges in U.S. courts: should they immediately surrender to the U.S. government's authority, or fight to gain more information, protect assets from seizure, and/or potentially challenge extradition? With little access to relevant information at the outset, and often with a limited understanding of applicable U.S. laws, the individual or company involved should attempt to gain as much information as possible about the strength of the government's case before proceeding.

A typical defendant has at its disposal several methods to gather information, including various forms of discovery, a written bail demand that may trigger disclosures, or the ability to conduct its own internal investigation. These processes are severely hampered by the "fugitive disentitlement doctrine," however, which limits the recourse available to defendants who remain beyond the reach of the U.S. courts.

The nearly 150-year old fugitive disentitlement doctrine was initially created by an appellate court to "dismiss an appeal or writ in a criminal matter when the party seeking relief becomes a fugitive." *Degen v. United States*, 517 U.S. 820, 823 (1996) (citing *Ortega-Rodriguez v. United States,* 507 U.S. 234, 239 (1993)); and *Smith v. United States,* 94 U.S. 97, 24 (1876)). The doctrine developed to respond to two concerns – first, that a decision by a U.S. appellate court would be unenforceable against the fugitive because of due process concerns; and second, that a "fugitive" from justice should not be able to avail himself or herself of the benefits of the same system he or she is seeking to avoid. Over time, the doctrine has expanded beyond criminal cases to civil cases including, in particular, those involving foreign defendants.

Once a court concludes that a party is a fugitive, the doctrine permits a court to deny that party's request to make *any* use of the judicial system. The doctrine promotes the federal courts' power "to protect their proceedings and judgments in the course of discharging their traditional responsibilities" and promote the "dignity of the judiciary." *Degen,* 517 U.S. at 823.

Contrary to the popular understanding of a "fugitive" as a defendant who, after being charged with a crime, hides or flees the jurisdiction to avoid imprisonment, the doctrine also applies to non-U.S. citizens who are considered "fugitives" because of their failure to surrender to U.S. authorities upon learning of the charges against them. *See, e.g.*, *United States v. Nabepanha*, 200 F.R.D. 480, 482 (S.D. Fla. 2001) (noting the "critical element" is "knowledge of a pending charge" and that a defendant's knowledge "can be inferred from his failure to surrender to authorities once he learns of the charges while outside of the jurisdiction"). Failing to surrender does not mean, of course, that a non-U.S. national can count on safely remaining beyond the United States' jurisdiction. The U.S. Department of Justice ("DOJ") may commence extradition proceedings against a foreign national if that individual's home country is a party to an extradition treaty with the United States. It can also pursue an INTERPOL Red Notice requesting that participating countries arrest the named individual for possible extradition to the United States, which effectively prevents the foreign national from traveling.

Once triggered, the fugitive disentitlement doctrine limits a foreign defendant's defensive and information-gathering options in three important ways. First, the doctrine can defeat a foreign defendant's motion to dismiss the indictment, a typical first parry for a foreign national facing charges. Courts have routinely refused to entertain motions to dismiss brought by foreign nationals based on the fugitive disentitlement doctrine alone. *See, e.g.*, *United States v. Kashamu*, 656 F. Supp. 2d 863, 868 (N.D. Ill. 2009) (denying motion to dismiss under fugitive disentitlement doctrine); *United States v. Stanzione*, 391 F. Supp. 1201, 1202 (S.D.N.Y. 1975) (same).

Second, the doctrine can prevent the foreign national defendant from obtaining discovery into the charges, another common and important strategy pursued by defendants. U.S. courts consistently deny such requests when the foreign national is considered a fugitive. *Nabepanha*, 200 F.R.D. at 482-84 (denying a discovery request by defendant who moved to Israel prior to his indictment and who refused to return to the United States for trial); *see also S.E.C. v. Roman*, 1996 WL 34146, *2 (S.D.N.Y. Jan. 30, 1996) (holding that plaintiffs were barred from obtaining discovery while they were fugitives because "one who has removed himself from the jurisdiction of the courts has no claim upon them which would require the delivery of the files of the United States government to his hiding place"). In a recent and high-profile example, the U.S. District Court for the District of Columbia restricted access into the government investigative file by absent foreign entities in the Special Counsel's investigation into alleged Russian involvement in the 2016 U.S. election. *See United States v. Concord Mgmt. & Consulting LLC*, Case No. 1:18-cr-00032-DLF, Dkt. No. 42 at 3-4 (D.D.C. June 29, 2018) (ordering that "all sensitive discovery materials must be stored in a U.S. office of [defendant's counsel's firm] and shall not be disclosed, transported, or transmitted outside of the United States").

Third, the doctrine also has been extended to bar foreign nationals who are alleged fugitives from contesting the seizure of their assets. The Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") codified the fugitive disentitlement statute, allowing courts to prohibit fugitives from contesting forfeiture claims. 28 U.S.C. § 2466.

Given these procedural impediments to those deemed fugitives, it is important to understand the applicable law relevant to the doctrine. The U.S. Courts of Appeals are currently split over the issue of the requisite intent "to avoid criminal prosecution" that triggers application of the doctrine. The D.C. Circuit has adopted the most favorable position to foreign nationals, holding that the government must prove "that avoiding prosecution is the reason [an alleged fugitive] has failed to enter the United States." *United States v. 6,976,934.65, Plus Interest Deposited into Royal Bank of Scot. Int'l, Account No. 2029-56141070, Held in Name of Soulbury Ltd.* ("*Soulbury*"), 554 F.3d 123, 132 (D.C. Cir. 2009). The Second Circuit has rejected the D.C. Circuit's approach, concluding that "[t]o the extent that the D.C. Circuit's opinion in [*Soulbury*] was intended to mean that when a claimant declines to enter or reenter the United States the government is required to prove that avoidance of criminal prosecution is his *sole* purpose, we respectfully disagree." *United States v. Technodyne LLC*, 753 F.3d 368, 384-85 (2d Cir. 2014) (emphasis added). The Second Circuit ruled that the correct standard is instead "specific intent" to avoid prosecution, a lower threshold. *Id.* "[S]pecific intent need not be the actor's sole, or even primary, purpose." *Id*. Rather, in the Second Circuit, individuals can be deemed fugitives under § 2466 so long as "*any* of their motivations for declining to reenter the United States was avoidance of criminal prosecution." *Id.* at 386.

The Fifth and Ninth Circuits have adopted yet a third standard by requiring that intent to avoid prosecution be proven by a totality of the circumstances. *See United States v. 2005 Pilatus Aircraft, Bearing Tail No. N679PE*, 838 F.3d 662, 664 (5th Cir. 2016) (approving fugitive disentitlement of a defendant who suddenly avoided any travel following his criminal indictment, after previously taking more than 100 trips to the United States); *United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1056-57 (9th Cir. 2013) (claimant's changed travel plans coupled with statements that he remained in Canada due to the criminal matter demonstrated that totality of the circumstances showed he deliberately remained away from the United States to avoid criminal prosecution).

Given the impediments posed by the fugitive disentitlement doctrine, a foreign national may determine it best to travel to the United States to challenge criminal proceedings, but that strategy comes with serious risks of its own. Upon arrival, he or she faces arrest and may be detained pending trial or required to post a significant bond. The foreign national could also be forced to remain in the United States for a significant time prior to trial. These competing considerations complicate the defense strategy for foreign individuals facing U.S.-based criminal prosecutions and require careful analysis.

Insurance Litigation Update

Impact of Sixth Circuit Ruling Against Traveler's for Losses Resulting from Email Phishing. In an era where cybersecurity is top-of-mind for many businesses, employee education, active monitoring of electronic systems, and early detection of suspicious emails are all key to preventing a cyberattack. However, even the best-prepared company can have a slip-up, allowing a cyberattack or phishing email fraud. The fallout from a successful cyberattack is complex and difficult to manage. A recent decision from the Sixth Circuit provides companies with some guidance on an essential component to manage: ensuring that the company's insurance policies cover the damage caused by such an attack.

Factual Background. American Tooling Center, Inc. ("ATC") is a tool and die manufacturer that produces stamping dies for the Michigan automotive industry. ACT outsources some of its manufacturing to Shanghai YiFeng Automotive Die Manufacture Co., Ltd. ("YiFeng"). In the spring of 2015, an ATC employee sent a routine email to YiFeng, asking YiFeng to provide ATC with all outstanding invoices. Unfortunately, the email from ATC to YiFeng was intercepted by an unidentified third party. The third party then began impersonating YiFeng and exchanged a series of emails with ATC regarding the outstanding invoices. In April 2015, ATC wired in excess of $800,000 to what it believed to be a bank account for YiFeng. Later, when YiFeng inquired with ATC about the status of the outstanding payments, ATC realized that it had wired the money to a fraudster.

ATC sought recovery from Travelers Casualty and Surety Company of America ("Travelers"), arguing that the incident was covered under the "Computer Fraud" provision in ATC's policy. Travelers denied the claim. ATC sued Travelers in the Eastern District of Michigan for breach of contract. Both parties filed for summary judgment and the district court judge granted summary judgment in favor of Travelers. ATC appealed.

On July 13, the Sixth Circuit, in the first published opinion in favor of a policy holder on this topic, reversed and remanded the district court's decision, finding that the fraud-based loss was covered under the policy. *Am. Tooling Center, Inc. v. Travelers Cas. & Surety Co.*, 895 F.3d 455 (6th Cir. 2018). In reaching its decision, the Sixth Circuit provided a detailed analysis of the relevant policy language and how it was applicable to the damage suffered by ATC.

Key Points from the Court's Opinion. ATC's claim was based on a policy provision that provided for coverage in the event of a "Computer Fraud." The policy stated that Travelers "will pay [ATC] for [ATC's] direct loss of, or direct loss from damage to, Money, Securities and Other Property directly caused by Computer Fraud."

Travelers' lead argument for denying coverage was that the loss suffered by ATC was not a "direct loss" and, therefore, not covered under the policy. Travelers claimed that because ATC actually owed money to YiFeng for its services, ATC suffered no direct loss when it paid the money to the fraudster in the Spring of 2015. Only after ATC realized it was defrauded—

(continued on page 11)

ICSID Arbitration Victory: First Award Rejecting Achmea on Intra-EU BIT Case

The firm achieved a ground-breaking victory for UP (formerly Cheque Dejeuner) in an ICSID arbitration against Hungary. In this case, an international arbitral tribunal ruled for the first time that the *Achmea* decision rendered by the European Court of Justice (ECJ) cannot defeat the jurisdiction of a tribunal constituted under an intra-EU bilateral investment treaty (BIT).

In March 2018, the ECJ rendered a decision in the *Achmea* case that rocked the global arbitration community. The ECJ ruled that an arbitration clause in an intra-EU BIT was incompatible with EU law and suggested that all arbitral tribunals constituted on the basis of such BITs should decline jurisdiction. Quinn Emanuel was the first to comment on the *Achmea* decision. *See* https://bit.ly/2Anhj7y.

The whole arbitration community has debated at innumerable conferences and seminars what the impact of the *Achmea* decision would be on existing and future intra-EU BIT arbitrations, with no clear answer emerging. In the meantime, the European Commission has sought to pressure EU Member States to terminate existing intra-EU BITs and applied to submit amicus briefs in support of the *Achmea* decision in all pending intra-EU cases - including our client's case against Hungary.

Quinn Emanuel obtained its first victory in September when the Arbitral Tribunal refused the European Commission leave to submit an amicus brief. Then, on October 9, the Tribunal rendered an Award rejecting Hungary's jurisdictional objection. In so doing, it became the first tribunal to decide that the *Achmea* decision does not apply to an ICSID arbitration based on an intra-EU BIT. The Tribunal found that, because its jurisdiction arose under a multilateral public international law treaty, the 1965 ICSID Convention, the dispute was placed in a public international law context, and not in a national or regional context. On the merits, the Tribunal agreed with Quinn Emanuel's arguments that Hungary's tax reforms were intended to create a monopoly and exclude our client from the meal voucher market, dispossessing our client of the greatest part and the economic heart of its investment. The Tribunal added that this amounted to an unlawful indirect expropriation and therefore a violation of the intra-EU BIT and awarded our client damages with interest and most of its legal costs.

This case is not only a significant win because it is the first case in which an international arbitral tribunal ruled that the *Achmea* decision has no impact whatsoever on an ICSID arbitration based on an intra-EU BIT, but it also endorses the principle that a state may not withdraw its consent to arbitration under international law simply by invoking its domestic or regional law.

Vacatur Victory – $139.8 Million Patent Infringement Judgment Zapped on Appeal

On July 3, 2018, the firm persuaded the Federal Circuit to unanimously vacate a $139.8 million patent infringement judgment against our client Fairchild Semiconductor, a subsidiary of ON Semiconductor. Fairchild manufactures power supply controller chips, which are integrated circuits used in chargers for electronic devices. These chips transform alternating current electricity, which comes from an AC outlet, into direct current electricity, which is needed to power electronic devices, such as cell phones.

Fairchild's rival, Power Integrations, accused it of infringing two patents related to switching regulation in power supply controller chips. After a jury trial, the Northern District of California entered a $139.8 million judgment against Fairchild for infringing both patents. Fairchild retained Quinn Emanuel to represent it on appeal to the Federal Circuit.

Power Integrations had obtained its sizeable judgment through a damages model that relied on application of the "entire market value rule." That rule allows a patentee to recover a royalty measured against the entirety of the defendant's revenue for the accused product if the patentee can prove that the patented feature is the basis for consumer demand for the defendant's product. Where that showing is not made, the damages for patent infringement must be apportioned to reflect only the value of the patented feature. Power Integrations argued that its patented frequency reduction feature, which it contended allowed for significant power savings, drove consumer demand for Fairchild's power supply controller chips.

On appeal, the Federal Circuit accepted Quinn Emanuel's argument that the record was devoid of substantial evidence that the patented frequency reduction was the basis for demand for Fairchild's products. The court agreed that the Fairchild products had other valuable features, in particular a "jittering" feature that Power Integrations had alleged in another lawsuit infringed its patents and had substantial value. Power Integrations failed to prove that these other features did not affect consumer demand for Fairchild's products. The Federal Circuit therefore vacated the entire nine-figure judgment.

The decision represents not only a significant win for Fairchild in its patent war with Power Integrations, but is also the latest in a series of important Federal Circuit damages decisions narrowing the entire market value rule. It strongly reinforces for future cases the principle that patent damages should not exceed the value of the patent's inventive contribution, and that apportionment is the rule and entire market value the exception. Q

PRACTICE AREA NOTES (cont.)

when YiFeng inquired about outstanding payments and was required to pay the real YiFeng—was ATC damaged as a result of the required "double payment." In support for this argument, Travelers cited to other Sixth Circuit opinions in which the court held that the definition of "direct" meant "immediate." Here, the Sixth Circuit distinguished its prior cited definition of direct, which related specifically to cases interpreting language in unique employee-fidelity bonds. Moreover, the court held that the losses suffered by ATC were direct losses because ATC "immediately lost its money when it transferred the approximately $834,000 to the impersonator; there was no intervening event." *Am. Tooling Center, Inc.*, 895 F. 3d at 460-61.

Next, Travelers argued that the fraud was not a "Computer Fraud" as defined under the policy because a computer had to have caused the fraudulent loss, not just have facilitated the loss. The policy defined "Computer Fraud" as "[t]he use of any computer to fraudulently cause a transfer of Money, Securities or Other Property from in the Premises or Financial Institution Premises: (1) to a person (other than a Messenger) outside the Premises or Financial Institution Premises; or (2) to a place outside the Premises or Financial Institution Premises." The Sixth Circuit rejected this argument, stating: "Travelers' attempt to limit the definition of 'Computer Fraud' to hacking and similar behaviors in which a nefarious party somehow gains access to and/or controls the insured's computer is not well founded" and that if Travelers wished to limit the policy to such a narrow definition, it easily could have done so. *Id.* at 462.

Finally, Travelers argued that, regardless of the policy's coverage, some exclusion provisions applied. Specifically, Travelers said that coverage was excluded because: (i) ATC had transferred money to the fraudster, believing it to be YiFeng, in exchange for goods ATC received from YiFeng; and (ii) ATC's employees had input "Electronic Data" (*i.e.*, manually inputting the fraudulent bank account wire information) into the system prior to the wire transfer. The policy did contain an exclusion for any loss or damage caused directly or indirectly from the input of Electronic Data into the insured's computer system and defined Electronic Data as "facts or information converted to a form: (1) usable in a Computer System; (2) that does not provide instructions or directions to a Computer System; or (3) that is stored on electronic processing media for use by a Computer Program." *Id.* at 464-65. The Sixth Circuit held these exceptions were not applicable, finding ATC did not surrender the money to the fraudster in exchange for a good or service and the act of inputting the fraudulent bank account wire information did not qualify as inputting Electronic Data as defined in the policy, because the input qualified as an "instruction or direction" to the Computer System.

Conclusion. Given the increasing threat of cyberattacks, ensuring that a company has proper insurance coverage in the event of an attack has become all the more important. The Sixth Circuit's opinion ruling against Travelers highlights the importance of a Computer Fraud provision and also provides helpful insight regarding both the key language and phrases that are likely broad enough to cover the wide variety of cyberattacks that may occur and the arguments policy holders need to be prepared to address from their insurers.

The modern threat of cyberattacks will also likely continue to be a hot topic in the insurance litigation space for the foreseeable future. In August, pharmaceutical company Merck & Co, Inc. ("Merck") filed suit in the Superior Court of New Jersey asserting claims for breach of contract and declaratory judgment against a number of insurers and reinsurers who had denied Merck coverage for the damage it suffered as a result of a network interruption caused by a malware infection in June 2017. *Merck & Co., Inc. v. Ace American Insurance Co.*, No. UNN-L-002682-18 (N.J. Sup. Ct.). Although at its earliest stages, the Merck lawsuit is potentially another matter for companies to watch for instructive guidance on key policy language related to cyberattacks. Q

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