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Supreme Court Trims Judicial Role Under Federal Arbitration Act

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., continues its ubiquitous presence on the U.S. Supreme Court's docket. Hardly a Term has gone by in recent years without at least one decision by the Court interpreting and applying the statute, and this Term is no exception; no fewer than three merits cases on the Court's docket arise under the Act.

The first of those cases to be decided, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), presented a perennial issue: who decides whether a particular dispute is subject to arbitration—a court or an arbitrator? As the Court has previously explained, contracting parties are free to delegate this "arbitrability" (or "gateway") issue itself to an arbitrator. Notwithstanding that rule, at least four federal courts of appeals—the Fourth, Fifth, Sixth, and Federal Circuits—held in recent years that courts always remain free to decide arbitrability disputes where the arguments in favor of arbitration are "wholly groundless." In contrast, two other federal courts of appeals—the Tenth and Eleventh Circuits—rejected the "wholly groundless" exception, and held that the FAA requires courts to enforce agreements to arbitrate arbitrability no matter how far-fetched the arguments in favor of arbitration.

The Supreme Court granted review in *Henry Schein* to resolve that circuit conflict, and—in the maiden opinion by Justice Brett Kavanaugh—unanimously rejected the "wholly groundless"

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INSIDE

Quinn Emanuel Urquhart & Sullivan Adds White Collar Litigator to Chicago Office

Leonid ("Lenny") Feller, a former federal prosecutor, practices white collar criminal defense and government investigations, defending corporations and individuals in federal and state criminal, civil, and regulatory proceedings. His practice includes defending claims of health care fraud, securities fraud, antitrust violations, public corruption, and environmental crimes. He is also an accomplished civil litigator, with broad trial and appellate experience in all aspects of complex commercial litigation, including multidistrict litigation, False Claims Act suits, consumer class actions, mass tort and product liability litigation, and contract disputes in federal and state courts throughout the United States. Lenny is also a lecturer at the University of Michigan Law School, where he has taught courses on federal criminal prosecution, investigation, and defense. He is the co-author of Criminal Pretrial Advocacy 3rd Ed. (West 2019) and numerous other scholarly works. Q

Bankruptcy Litigator Deborah J. Newman Joins the Firm

Deborah J. Newman has joined the firm as a partner in the New York office. Deborah has over 15 years of experience in high-impact bankruptcy and distressed debt related litigation. She has represented institutional investors, indenture trustees, official and ad hoc committees, and debtors in possession in the full range of complex litigation matters that arise in the course of Chapter 11 restructurings, cross-border insolvencies, and other bankruptcy contexts. Her experience also includes complex commercial litigations occurring in state and federal courts. *Law360* named Deborah a "Rising Star" for Bankruptcy Litigation in 2016. Deborah received her J.D. from Columbia University School of Law, and her B.A. *with honors* from University of Michigan. Q

exception. The Court ruled that agreements to arbitrate arbitrability, no less than any other kind of arbitration agreements, must be enforced according to their terms. Whether the court deems the arbitrability question hard or easy on the merits is irrelevant, and conflates the underlying arbitrability question with the distinct issue of who decides that question.

While rejecting the "wholly groundless" exception, the Supreme Court skirted the more fundamental issue: under what circumstances will courts interpret arbitration agreements to assign arbitrability disputes to an arbitrator? The "wholly groundless" exception, after all, represented at most a narrow exception to the rule that parties are free to assign arbitrability disputes to an arbitrator. Now that the Supreme Court has dispensed with that judicially-crafted "safety valve," courts will have no choice but to compel arbitration of arbitrability disputes upon interpreting an agreement to send such disputes to arbitration, so that interpretive issue looms larger than ever.

The Fifth Circuit dodged that interpretive issue in *Henry Schein* by holding that, even assuming that the parties' agreement were interpreted to require arbitration of arbitrability disputes, the arbitration demand in that case was "wholly groundless." Accordingly, after the Supreme Court rejected the "wholly groundless" exception, it remanded the case for the Fifth Circuit to address that interpretive issue in the first instance, simply reiterating its prior observation that courts "'should not assume that the parties agreed to arbitrate arbitrability unless is there *clear and unmistakable evidence* that they did so.'" 139 S. Ct. at 531 (emphasis added; quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). The Supreme Court shed no additional light on what particular contractual language will be deemed such "clear and unmistakable evidence," and it is likely that the issue will return to the Supreme Court in the near future. In the meantime, parties entering into arbitration agreements, or seeking or opposing arbitration under such agreements, would be well-advised to be aware of arguments for and against construing agreements to delegate arbitrability disputes to an arbitrator.

Background: Arbitrating Arbitrability

As the Supreme Court has emphasized in a line of cases dating back decades, the FAA reflects a liberal federal policy favoring arbitration agreements. Although arbitration is a matter of consent, not coercion, and parties cannot be forced to arbitrate—as opposed to litigate—disputes that they did not *agree* to arbitrate, the Court has construed the Act to direct that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

As a matter of law and logic, one of the issues that parties can agree to arbitrate is a dispute over *who decides* a dispute over the scope of arbitrable issues. Say, for example, that the parties agree to arbitrate disputes "arising out of or relating to" a particular contract. If one of the parties wishes to litigate a statutory claim in court, the threshold question is whether that dispute "arises out of or relates to" the contract. In determining whether the parties have delegated the resolution of that arbitrability dispute to the arbitrator, the general presumption in favor of arbitration is flipped: a court will not assume that parties intended to arbitrate arbitrability in the absence of "'clear and unmistakable'" evidence that they did so. *First Options*, 514 U.S. at 944 (brackets omitted; quoting *AT&T Techs., Inc. v. Communications Workers* 475 U.S. 643, 649 (1986)).

That is so, the Court explained, because once the parties have agreed to arbitrate *some* matters, "one can understand why the law would insist on clarity before concluding that the parties did *not* want to arbitrate a related matter." *First Options*, 514 U.S. at 945 (emphasis in original). In contrast, the question of who should decide the arbitrability question "is rather arcane," and "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* Thus, courts "hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

The Rise of the "Wholly Groundless" Exception

The default rule that, absent clear and unmistakable evidence, contracting parties are deemed to intend courts, not arbitrators, to resolve arbitrability disputes proved easier to announce than to apply. Some arbitration agreements are very explicit, specifically delegating to arbitrators the authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the arbitration agreement. But other arbitration agreements are less clear, merely providing that arbitration will take place under common arbitration rules, like those of the American Arbitration Association (AAA) or Judicial Arbitration & Mediation Services (JAMS). In referencing such common arbitration rules, the parties may, or may not, realize that those rules may give arbitrators the *power* to decide arbitrability issues. For example, Rule 7(a) of the AAA's Commercial Arbitration Rules and Mediation Procedures provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Similarly, Rule 11(b) of the JAMS Comprehensive Arbitration Rules & Procedures provides that "[j]

urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."

Many courts have concluded that a decision to adopt arbitration rules that empower arbitrators to decide arbitrability disputes, like the AAA and JAMS rules quoted above, amounts to "clear and unmistakable" evidence that the parties intended for the arbitrators to decide such disputes. *See, e.g., Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281-84 (10th Cir. 2017); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005). For some courts, the conclusion that the parties intended for the arbitrator to decide arbitrability ended the inquiry; in that event, the court could not do so. *See, e.g., Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1268-69 (11th Cir. 2017); *Belnap*, 844 F.3d at 1284-93.

Other courts, however, embraced the theory that, regardless of whether the parties intended to arbitrate arbitrability disputes, courts could resolve such disputes if the argument for arbitration was "wholly groundless." *See, e.g., Simply Wireless*, 877 F.3d at 528-29; *Douglas v. Regions Bank*, 757 F.3d 460, 462-64 (5th Cir. 2014); *Turi v. Main Street Adoption Servs. LLP*, 633 F.3d 496, 507, 511 (6th Cir. 2011); *Qualcomm*, 466 F.3d at 1373-74. These courts found it anomalous, wasteful, and potentially abusive for a party to be able to trigger arbitration with respect to a dispute plainly outside the scope of an arbitration clause.

Henry Schein

Against this backdrop of division in the lower courts, the Fifth Circuit decided *Henry Schein*. That case arose from a complaint seeking both (1) tens of millions of dollars in damages for alleged violations of federal and state antitrust law, and (2) injunctive relief. 878 F.3d 488, 491 (5th Cir. 2017). The defendant moved to compel arbitration under an agreement between the parties providing that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief …) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." *Id.* at 493 (emphasis omitted).

As the Fifth Circuit recognized, the threshold question was whether a court or an arbitrator should decide whether the lawsuit fell within the scope of the parties' arbitration agreement. The court stated that "[a] contract need not contain an express delegation clause to meet the ['clear and unmistakable'] standard" for delegating the issue to an arbitrator, and that a reference to the AAA rules generally would do the trick. *See id.* at 493. But the court then held that, in this particular provision, "the interaction between the AAA Rules and the carve-out [for actions seeking injunctive relief] is at best ambiguous." *Id.* at 494-95. In particular, the carve-out could be read to remove actions seeking injunctive relief from the ambit not only of arbitration but also of the AAA rules. *Id.* at 494-95.

After noting the difficulty of this interpretive question, the Fifth Circuit sidestepped it. "Regardless of whether an agreement clearly and unmistakably delegates the question of arbitrability, [the 'wholly groundless' exception] provides a narrow escape valve." *Id.* at 495. Because the lawsuit in that case sought injunctive relief (in addition to substantial money damages), the court held that it was clearly outside the scope of the arbitration agreement in light of the express carve-out for "actions seeking injunctive relief." The court noted that the carve-out "does not limit the exclusion to 'actions seeking *only* injunctive relief,' nor 'actions for injunction in aid of an arbitrator's award,'" and "[n]or does it limit itself to only *claims* for injunctive relief." *Id.* at 497 (emphasis added by Fifth Circuit). Accordingly, the Fifth Circuit affirmed the district court's order denying the motion to compel arbitration.

As noted above, the Supreme Court granted review and vacated the Fifth Circuit's decision. The Supreme Court's analysis was straightforward: the FAA requires courts to interpret contracts as written, and thus courts may not decide arbitrability issues that the parties have delegated to an arbitrator. *See* 139 S. Ct. at 529. Whether a court thinks the arbitrability issue is "wholly groundless" is irrelevant where the parties entrusted that decision to an arbitrator. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. The Court rejected arguments that, as a practical and policy matter, it would be a waste of time and money to send a wholly groundless arbitrability issue to an arbitrator, noting that the contours of the "wholly groundless" exception are themselves murky, and there is no guarantee that an arbitrator will always agree with a court with respect to what arguments are "wholly groundless." *See id.* at 530-31. To the extent that parties file frivolous motions to compel arbitration, an arbitrator can dispose of them quickly, and may even be able to impose sanctions. *See id.* at 531.

After rejecting the "wholly groundless" exception, the Court "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to the arbitrator," given that the Fifth Circuit had not decided that issue. *Id.* The Court thus remanded for the Fifth Circuit to address that issue in light of the

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A Potential Source of Disharmony in Claim Construction Standards

On October 11, 2018, the U.S. Patent and Trademark Office published a final rule change, replacing the former claim construction standard of "broadest reasonable interpretation" applied by the Patent Trial and Appeal Board in review proceedings with the more narrow district court standard established in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). The rule change has been described as an effort to harmonize results in PTAB review proceedings and district court litigation. However, the rule change specifies that the *Phillips* standard will apply to both America Invents Act proceedings involving unexpired patent claims *and substitute claims proposed in motions to amend*. This potentially gives rise to a new source of disharmony: while patent examiners apply the broadest reasonable interpretation standard when prosecuting new claims submitted in patent applications, the PTAB will now apply the narrower *Phillips* standard when construing new claims submitted by patent owners in motions to amend. Part I of this article will discuss the previously expressed justifications for applying the two standards in their respective forums. Part II will discuss the potential implications of the PTO's rule change.

Part I

To grasp the implications of the PTO rule change, it is first necessary to understand the expressed justifications for patent examiners' application of the broadest reasonable interpretation standard to new claims in patent applications, versus district courts' application of the *Phillips* standard to granted patent claims. Patent examiners give new claim terms their broadest reasonable interpretation in light of the specification as it would be interpreted by one of ordinary skill in the art because doing so "establish[es] a clear record of what [an] applicant intends to claim" and "reduce[s] the possibility that the claim, once issued, will be interpreted more broadly than is justified." Manual of Patent Examining Procedure Section 2111 (citing *In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984)); *see also In re Zletz*, 893 F.2d 319, 321-22 (Fed. Cir. 1989) ("During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow. . . . An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. Only in this way can uncertainties of claim scope be removed, as much as possible, during the administrative process."). Additionally, patent examiners construe claims using the broadest reasonable interpretation standard to explore how the possible scope of a claim implicates prior art, and ensure the claim does not sweep in such prior art. *In re Zletz*, 893 F.2d at 321 (holding that examiners apply the broadest reasonable interpretation standard "in order to achieve a complete exploration of the applicant's invention and its relation to the prior art"); *Flo Healthcare Sols., LLC v. Kappos*, 697 F.3d 1367, 1378 (Fed. Cir. 2012), *overruled on separate grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) ("The ostensible purpose behind the PTO's use of the 'broadest reasonable interpretation' of an applicant's proposed claim is to allow the examiner and the applicant to explore the possible scope of the claim, particularly as it implicates prior art"); *In re Wong*, 80 F. App'x 107, 109 (Fed. Cir. 2003) (holding that "[w]hen claim 1 is given its broadest reasonable interpretation, the claim 'sweeps in the prior art'"). Accordingly, the stated purpose of an examiner's application of the broadest reasonable interpretation standard to new claims in patent applications is to protect the public by ensuring that granted patent claims are clear, understandable, unambiguous, and do not cover already-patented inventions.

On the other hand, the district court standard annunciated in *Phillips*—the well-known "ordinary and customary meaning to a person of ordinary skill in the art at the time of the invention"—is, by its literal terms, ostensibly more narrow than the broadest reasonable interpretation standard applied by patent examiners. This standard is appropriate in court, particularly given that granted patent claims enjoy a presumption of validity. 35 U.S.C. Section 282(a) ("A patent shall be presumed valid."). Accordingly, the stated rationale behind the *Phillips* standard being narrower than the broadest reasonable interpretation standard is that granted patent claims presumed to be valid should be construed more narrowly, and therefore should be harder to invalidate, as compared to new patent claims not entitled to a presumption of validity that are construed for the first time by patent examiners.

But submitting a patent application to the PTO for examination is not the only way to obtain new patent claims—a patent owner may also file a motion to amend during inter partes review and propose "a reasonable number of substitute claims" to the PTAB. 35 U.S.C. Section 316(d)(1)(B). Prior to the PTO's recent rule change, these new "substitute claims" were construed by the PTAB using the broadest reasonable interpretation standard. *See, e.g., Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1298-1301 (Fed. Cir. 2017) (noting that broadest reasonable interpretation is the claim construction standard applied by the PTAB to amended or substitute claims in inter partes reviews). Indeed, the U.S. Supreme Court in *Cuozzo Speed Techs., LLC v. Lee* held that it was specifically the patent owner's opportunity to amend (or substitute) claims that justified the PTAB's use of the broadest reasonable interpretation claim construction standard. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2145 (2016).

Part II

The PTO's Oct. 11 final rule change creates a potential new source of disharmony regarding the examination of new patent claims: While patent examiners at the PTO

will construe new claims submitted in patent applications using the broadest reasonable interpretation standard, the PTAB will construe new "substitute claims" submitted in motions to amend using the more narrow *Phillips* standard. This appears to contradict the justifications by the U.S. Court of Appeals for the Federal Circuit's described in Part I of this article for applying the broadest reasonable interpretation standard to new claims, while reserving the more narrow *Phillips* standard for claims that have already been granted and thus enjoy a presumption of validity. Indeed, the Federal Circuit noted in *In re Morris*, 127 F.3d 1048 (Fed. Cir. 1997), that applying the more narrow district court standard to new claims would be contrary to the justifications for applying each of these standards in their respective forums. There, the Federal Circuit explained that "[i]t would be inconsistent with the role assigned to the PTO in issuing a patent to require it to interpret claims in the same manner as judges who, post-issuance, operate under the assumption the patent is valid. The process of patent prosecution is an interactive one. . . . This promotes the development of the written record before the PTO that provides the requisite written notice to the public as to what the applicant claims as the invention. . . . [P]ublic notice is an important objective of patent prosecution." 127 F.3d at 1054; *see also In re Yamamoto*, 740 F.2d at 1572 ("The PTO broadly interprets claims during examination of a patent application. . . . This approach serves the public interest," whereas "[d]istrict courts may find it necessary to interpret claims to protect only that which constitutes patentable subject matter to do justice between the parties.").

Moreover, the fact that an inter partes review, in which new "substitute claims" can be proposed in a motion to amend, is a post-grant procedure, while an examiner's review of new claims in a patent application is a pre-grant procedure, appears to add to the potential disharmony in claim construction standards. In post-grant procedures such as reissues and reexaminations, the PTO applies the broadest reasonable interpretation claim construction standard. *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1276 (Fed. Cir. 2015), *aff'd sub nom. Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016) ("This court has approved of the broadest reasonable interpretation standard in a variety of proceedings, including ... post-grant proceedings such as reissues and reexaminations."). This remains unchanged by the PTO's new rules. Accordingly, the rule change's application of the *Phillips* standard to substitute claims submitted in motions to amend may be inconsistent not only with the Federal Circuit's directives regarding construction of new claims, but also with the claim construction standard applied in other post-grant procedures.

While the on-the-ground implications of the rule change will remain unclear until the rule change has been in effect for more time, the Federal Circuit has noted in the past that applying the broadest reasonable interpretation claim construction standard makes invalidation based on prior art easier. *See, e.g., ePlus, Inc. v. Lawson Software, Inc.*, 790 F.3d 1307, 1314 (Fed. Cir. 2015) (noting that the "claim construction construct—broadest reasonable interpretation— . . . makes invalidation based on prior art easier."). Based on this theory, and the Federal Circuit's directives described above, one possible on-the-ground effect of this potential disharmony in claim construction standards is that it would be easier to reject a new claim as anticipated by or obvious in light of prior art at the PTO in front of a patent examiner (because the examiner is applying a broader construction standard that sweeps in more prior art), than it would be to reject that same claim in light of prior art at the PTAB as submitted in a motion to amend (because the PTAB is applying a more narrow construction standard that avoids certain prior art). This would mean, conversely, that it would be more difficult to invalidate a new claim submitted in a motion to amend at the PTAB (and therefore easier to obtain a new claim as a motion to amend applicant), than it would be for a patent examiner to reject that same claim if submitted in a patent application.

This potential effect may be entirely theoretical if, as pointed out by various practitioners, certain Federal Circuit panels, and select PTAB judges, there is really no difference in claim construction outcome regardless of which standard is applied. Examples of cases in which the standard applied did not make a difference to the outcome of claim construction include *Black & Decker, Inc. v. Positec USA, Inc.*, 646 F. App'x 1019, 1024 (Fed. Cir. 2016) (noting that the PTAB erroneously applied the broadest reasonable interpretation standard to an expired patent, but holding that, "[d]espite the Board's use of an improper standard, applying the *Phillips* standard, we find that its ultimate construction of 'fixedly secured/securing' is nonetheless correct"); *Straight Path IP Grp., Inc. v. Sipnet EU S.R.O.*, 806 F.3d 1356, 1360 (Fed. Cir. 2015) ("Straight Path . . . asks us to determine the governing construction under the principles of *Phillips* . . . , rather than the broadest-reasonable-interpretation standard. . . . We need not explore the issues raised by that request, however, because we conclude that the Board adopted a claim construction that is erroneous even under the broadest reasonable-interpretation standard."); *In re CSB-System International, Inc.*, 832 F. 3d 1335, 1337-38 (Fed. Cir. 2016) ("We agree with CSB that the Board should have applied the *Phillips* standard of claim construction rather than the broadest reasonable interpretation standard used by the examiner. . . . We conclude, however, that the Board's claim construction was correct even under the *Phillips* standard."); and *Cisco Systems, Inc. v. AIP Acquisition, LLC*, IPR2014-00247, Paper 20 at 3 (July 10, 2014) ("We have determined, on the record before us, that the claim construction of the three phrases . . . under the rule of construction similar to that

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EU Litigation Practice Update

Legal Professional Privilege under European Union Law. The scope of legal professional privilege when antitrust investigations are conducted by the European Commission ("EC"), most notably in relation to merger control, cartels and abuse of market dominance, ("EU LPP") is very different from that applicable in, e.g., the USA. LPP is under discussion at OECD level and the European Commission's views on this subject are summarized in its recent note *Treatment of legally privileged information in competition proceedings*, OECD, 21 November 2018, DAF/COMP/WP3/WD(2018)46. The purpose of this note is to summarize the current EU position.

Principles

EU LPP does not emanate from legislation, but has been established by the EU Courts. *AM & S v Commission* (as further elaborated in *Hilti v Commission and Akzo v Commission*) set out the principle of confidentiality of communications between a company and an independent external lawyer, subject to two strict conditions.

First, EU LPP only covers communications between a client and an independent external lawyer, i.e., a lawyer who is: (i) registered with the Bar of a European Economic Area member state (the EEA comprises all 28 (soon to be 27) member states of the EU plus Norway, Liechtenstein and Iceland); and (ii) "*not bound to the client by a relationship of employment*". Note that EU LPP also covers internal notes which report the text or the content of these communications for the purpose of distributing them within the company.

Second, as established by the *AM&S* case law, EU LPP only applies to communications that were made "*for the purposes and in the interests of the client's rights of defense.*" This covers all communications exchanged after the initiation of administrative proceedings, as well as "*earlier written communications which have a relationship to the subject-matter of that procedure*". A distinction therefore exists between privileged communications related to, e.g., a competition investigation and non-privileged general legal advice.

In Practice

- EU LLP does not apply to communications between in-house lawyers and their internal clients, even where privilege is recognized under the national law of EEA member states (as well as that of third countries, such as the USA);
- EU LPP does not extend to communications with non-EEA-registered external lawyers. While, in practice, the EC has - so far - not sought to obtain disclosure of advice provided by non-EEA-registered external lawyers, in principle it may do so. For safety, non-EEA-registered lawyers may wish to work with EEA-registered lawyers to ensure that sensitive legal advice is fully protected by EU LPP;
- EU LPP does not extend to pre-existing underlying documents, even if they have been selected and copied in response to a request by an independent external lawyer and/or annexed to a protected document;
- Even if they were not exchanged with a lawyer, preparatory documents "*drawn up exclusively for the purpose of seeking legal advice from a lawyer*" may be protected. The mere fact that a document was discussed with a lawyer is not however sufficient to give it such protection;
- In order to obtain documents, the EC may opt for sending a 'request for information' ("RFI") by formal decision. Non-compliance would subject the company concerned to heavy fines and, in merger cases, could lead to the EC withholding the grant of a clearance unless and until documents that it wishes to see are disclosed to it. Receipt of a 'request for information' requires the recipient company to cooperate and, as regards communications between in-house lawyers and their internal clients (which are not privileged under EU LLP), some measure of protection from the risk of privilege waiver: exists[?]. *See* OECD paper at para 29. Complicated issues can arise when the EC seeks disclosure of documents or data that are not within the geographic jurisdiction of the EAA and are not accessible from it. In practice, the EC has, in some cases, agreed to the withholding of documents originating from, e.g., US lawyers from the same international law firm.
- Inevitably, document requests may require thousands of responsive documents to be identified and potentially disclosed. Those covered by EU LPP will be exempted from the scope of the request. Companies may, especially merger investigations, be required to produce a 'privilege log', providing for each document over which the company claims EU LPP, information such as the author and the addressees of the document, as well as a summary and the grounds upon which the company claims protection.
- EU LPP issues may occur during EC inspections, so-called "*dawn-raids*." The EC now systematically makes electronic copies of all material found during an inspection. Investigated companies may challenge the seizure of alleged privileged data and request the EC to separate such data from other sets of documents. Such data will not be included in the case file before their status has been determined. When the EC and the investigated company do not agree on whether a paper document should benefit from the EU LPP protection, the 'sealed envelope procedure' is used, i.e., a copy of the document for which privilege is claimed is placed in a sealed envelope until resolution of the dispute.
- EU LPP does not prevent companies from disclosing written communications with their lawyers, while

reserving privilege vis-à-vis others, if they consider it is in their interest to do so.

Crisis Law Update

Ten Lessons for Coping with Crisis — an interview with partners in Quinn Emanuel's Crisis Law and Strategy Group. Several years ago, Quinn Emanuel launched a Crisis Law & Strategy Group to help clients in all facets of crisis management, from developing effective short-fused communications to providing advice on longer-term strategic legal and policy issues. As the rapidly-growing group heads into its third year, we interviewed partners from the group in early 2019 to learn their best lessons for managing a crisis.

1. "Set the Narrative"

Quinn Emanuel's Crisis Law & Strategy Group is co-chaired by firm Founder and Managing Partner, John B. Quinn. John built the firm's reputation for winning "bet-the-company" litigation by assembling the most talented dispute resolution lawyers in the world into one firm, and by recognizing that winning at trial often starts with in-house early management of a crisis.

John's goal in forming the Crisis Law Group three years ago was to organize an impressive team of lawyers and former government officials who bring decades of experience and contacts to bear, who can offer clients much-needed assistance and guidance as a crisis is first developing. He has assembled a group of lawyers with the experience to define the problem, outline your message, then help you get out front and set the narrative. In John's experience, a successful crisis management strategy always begins with the long-term goal in mind. Step One in a crisis is figuring out the end-game from the very beginning: know what your goals and objectives are, who your audience is, what benchmarks will help define success, and where the obstacles and landmines are buried that must be avoided or overcome.

2. "Three Dimensional Vision Helps"

According to Bill Burck, Co-Chair of the Crisis Law & Strategy Group and Co-Chair of firm's Investigations, Government Enforcement and White Collar Criminal Defense Practice, there's no such thing as a one dimensional crisis. Burck should know, in 2017 he was Benchmark Litigation's "White Collar/Investigations/Enforcement Lawyer of the Year" and for four consecutive years has been named a "White Collar MVP's" by *Law360*. He is also a former Deputy Counsel and Special Counsel to President George W. Bush.

Crisis management is always three dimensional chess — the crisis right in front of you, the one just ahead, and the one around the corner — and you have to be thinking about all three at once. When you are in crisis management mode, you have to start thinking that way on Day One, and keep thinking that way, every day. Congress is a court of public opinion, not a court of law, so it helps to know the ultimate audience for your strategy up front. Whether you're in front of an international regulator, a jury, a Congressional Committee, all three, or more, specifically identifying your audience as you develop your strategy helps keeps everyone on your team focused on the goal.

3. "Focus on the Facts You Know"

Tara Lee, Co-Chair of Quinn Emanuel's National Trial Practice, joined the firm in 2016. She is a former military lawyer, and in 2017, after several high-profile trial victories on behalf of companies facing potentially debilitating whistleblower claims, she was recognized as the 2017 Benchmark Litigation Trial Lawyer of the Year.

Tara regularly serves as spokesperson for her clients' crisis communications while shepherding their investigation and litigation efforts. In the recent deluge of cases involving allegations of sexual assault, her perspective has been invaluable because she has experience representing both defendants and plaintiffs in civil claims based on sexual assault, discrimination and harassment, in both individual and class action contexts, and has prosecuted and defended sexual assault cases as a criminal lawyer. As a result, she brings a particularly balanced perspective to #metoo cases, recognizing that there's often a rush to judgment on both sides, in situations where getting to the truth can be elusive. She urges her clients managing crisis situations to keep their messaging focused on the facts they know, and on their ultimate objectives.

4. "Keep Everyone Rowing in the Same Direction"

Lazar Raynal joined Quinn Emanuel in 2017 from McDermott Will & Emery, where he was Global Chair of the Litigation Practice Group and Chair of the Trust & Estates Practice Group. His practice involves representing some of the wealthiest families and well-known private businesses in the world.

Lazar advises clients facing crisis to focus on keeping the internal stakeholders aligned. This is often the General Counsel's toughest task during crisis. But it can be done. Legal doesn't have to operate at odds with PR, the Board needn't be at war with its President. It takes some leadership skill and some diplomacy, but as the crisis evolves and as facts develop, a good General Counsel will keep seeking input and sharing information. It's almost impossible to ultimately have a successful external message without your internal stakeholders aligned. If you've got critical directors on your board, they generally don't go away by ignoring them. Once you have outlined a strategy, communicate it with your internal stakeholders, and you'll be better positioned to be able to hold the course.

5. "Be Proactive"

Described by American Lawyer magazine as Quinn Emanuel's "real-life Olivia Pope," Crystal Nix-Hines rejoined Quinn Emanuel in 2017 after a stint as U.S. ambassador to the United Nations Educational, Scientific and Cultural Organization. She specializes in advising clients on proactive and prophylactic approaches to crisis management.

Crystal's lesson for coping with crisis is that the best defense can sometimes be a good offense. Proactive responses are possible where prophylactic programs are institutionalized, and cultural values are already in line with the message you want to promulgate. Having a strong, positive company culture doesn't just help you formulate positive messaging quickly, it ultimately mitigates your legal risk and improves your brand. And when crisis does hit, that engrained culture puts you in the best position to retain the trust of your Board, your shareholders and the public.

6. "Turn Class Action Litigation Into Opportunity"

Shon Morgan heads Quinn Emanuel's National Class Action Practice, specializing in collective action defense and multi-district litigation. He has defended over 250 class actions in over 20 different states, and has developed a reputation for finding creative and often early-stage solutions.

These days, a lot of crisis management situations eventually morph into class action litigation. But class action litigation can be turned into opportunity, whether defended or resolved. There is no "right" response to class litigation that seeks to capitalize on a brand in crisis. Plaintiffs' attorneys bank on adverse publicity to drive a quick settlement, but the reality is that the public has largely become desensitized to class actions. Group litigation can be weathered, and presents a better forum than the press to tell the "long-form" story, i.e., that the company had been diligent; that very few plaintiffs were actually injured or at risk, etc. Perhaps even more often, the real opportunity lies in early resolution. A creative class settlement can often be layered onto voluntary initiatives the defendants were already offering or considering, with modest incremental cost. Such resolutions can convert the suing attorneys and plaintiffs from irritant to advocate, lauding the defendant's swift and comprehensive response.

7. "Not Every Crisis is Existential"

Ben O'Neil is a former federal prosecutor and *Law360* Rising Star in White Collar who urges his clients in crisis to recognize that not every crisis is life-threatening. The crisis you are experiencing will likely feel like an existential threat to your company's existence at some point, but over time, you develop a sense for what is truly bet-the-company, and what isn't.

It often feels like every aspect of a crisis situation is all-out conflict. That's when it's especially important to be working alongside a team who has been through it before, so that they can serve as a guidepost for you. When you're navigating your way through a crisis, you are going to have some good ideas, and some bad ones. And in all likelihood, some powerful, persuasive people on your Board will have at least one really bad idea. You will need an advisor at your side with the reps to know which are the bad ideas and someone strong enough enough to tell you so, or, better yet, to convincingly tell your Board so for you.

8. "Crisis is Opportunity"

JP Kernisan brings a career in sports law and employment law expertise to his crisis management perspective. He joined the firm in 2018, just in time to manage the Carolina Panthers' response to allegations that owner Bill Richardson had interacted inappropriately with female employees of the organization. Sports Illustrated described the resulting pivot in media coverage as a "brilliant stroke of crisis management."

Many people see crisis as something to avoid at all costs, JP observes. But when managed properly, crisis can serve as a unique opportunity for positive change, a chance to do better and be better as an organization. When setting goals for the outcome of any crisis, the best organizations keep this in mind and hold their people internally and their external advisors to this commitment to improvement. JP's experience in helping professional sports franchises through numerous crises has taught him that some of the most significant and positive organizational change opportunities stem from the crisis management process.

9. "You Need Well Worn Pathways"

This lesson comes from Michael Liftik, who leads the SEC practice at QE. He joined in 2017 from his position as the Deputy Chief of Staff of the SEC, where he served as a senior legal advisor to Chair Mary Jo White on all aspects of the SEC's operations, as well as the day-to-day management of the agency. In both his investigations practice and his advisory role to clients, he prepares them to weather the storm, whether that means preparing for congressional testimony or an existential threat to the company.

Michael has substantial experience handling the public relations and public testimony aspects of a crisis. Knowing that crisis management mode is not the time to be forging new paths or testing new relationships; his advice is to make certain you have well-worn pathways in place, routes you can traverse in the dark, routes that go directly to trusted press, accountants, and public relations specialists. When crisis hits, as a general counsel, you will want to have a tier of advisors already in place who are deeply connected and can bring to bear resources very quickly for you. These advisors have to be people you trust. And your crisis management strategy will be far easer to implement if the press already trusts you, if you have a go-to relationship with someone

at the most important newspaper to your industry. You might think you don't need that now, but the crisis you don't know about yet is the reason you need it now. Build that media relationship over time, while you can, and make it personal. You will ultimately need a spokesperson who can place a personal call to a reporter and be believed when you need that credibility. That's a game changer.

10. "You Do Not Need Blind Loyalty"

The most recent QE addition to the Crisis Law and Strategy Group is Sandra Moser, who joins the group as its new Co-Chair, and who joined the firm in February of this year as Co-Chair of the White Collar and Investigations Group. Sandra was most recently Chief of the US Department of Justice Fraud Section, which has exclusive criminal jurisdiction over the DOJ's enforcement of the Foreign Corrupt Practices Act and routinely handles many of the world's most publicized and noteworthy complex criminal cases brought against individuals and corporations. In 2018, she was named as one of the world's "Top 100 Women in Investigations" by Global Investigations Review.

As an in-house counsel managing a crisis, your subject matter expertise matters less than your managerial judgment and investigatory skills. If those skills are not your strengths, elevate or hire someone who has them, because you will need those skills to make the tough calls that are coming. And know this: Blind Loyalty Kills. Often, your first impulse will be to protect your people, but if done reflexively, that can be the impulse that leads to your worst decisionmaking. It's especially important while managing a crisis to look immediately and objectively at what your staff should have done or could have done differently and what decisions led to where you find your company now. If you can't be dispassionate about who has to go, the person who has to go is probably you. Q

(Noted With Interest continued from page 5)

applied by the district courts, . . . are the same as the claim construction for those phrases under the rule of broadest reasonable interpretation."). However, even if this may be the case in certain circumstances, if it were universally true, then that would mean the PTO just went through a whole lot of effort to change the standard applied by the PTAB in America Invents Act proceedings for no practical purpose. Indeed, in other cases, the standard applied has made a difference in outcome. *See, e.g., PPC Broadband, Inc. v. Corning Optical Communications RF LLC*, 815 F.3d 734, 741 (Fed. Cir. 2016) ("This case hinges on the claim construction standard applied—a scenario likely to arise with frequency. And in this case, the claim construction standard is outcome determinative."). Moreover, by its own most recent statistics based on AIA trial data through March 31, the PTAB has only allowed claim amendments (granting or granting-in-part) ten percent of the time in response to motions to amend filed by patent owners. This may suggest that any potential practical effect of the recent rule change on the issuance of new claims at the PTAB would be minimal, if present at all.

If it turns out that the rule change does, in fact, create a more-than-theoretical effect on the issuance new claims at the PTAB, the significance of this potential effect may be heightened by PTO Director Andrei Iancu's recent statements on the rule change made in his speech at the American Intellectual Property Law Association's annual meeting on Oct. 25. During the meeting, Director Iancu emphasized that the current system "is not working as intended" and that the PTO is proposing a "robust new amendment process" to address the current sentiment among patent owners that motions to amend submitted during inter partes review proceedings are always unsuccessful. Director Iancu specifically noted that "[s]ome have suggested that parties have simply stopped even trying to amend the claims because they see the effort as largely futile," but "the AIA statute specifically provides for claim amendments in [inter partes reviews], so in order to fully implement the intent of the AIA, we must find a way to make this amendment process feasible and meaningful." Under the proposed new amendment rules, after a compressed 12-week schedule for motion practice, the PTAB would issue a preliminary ruling on the proposed amendments to which both parties could respond prior to receiving the PTAB's final ruling. Director Iancu explained that this procedure "should lead to more narrowly tailored and focused claim amendments, and potential earlier resolution of the issues." Accordingly, if these new procedures for motions to amend are put into effect and patent owners are incentivized to file more motions to amend, then we may potentially see even more test grounds for new "substitute claims" to be granted at the PTAB using the more narrow *Phillips* standard that may not have been granted by a patent examiner using the broadest reasonable standard.

The PTO's rule change just took effect on Nov. 13, so we will soon see whether this potential source of disharmony regarding claim construction standards applied to new claims will have any on-the-ground effects on claim issuance at the PTAB. Q

VICTORIES

Another Win in the Federal Circuit

Quinn Emanuel recently achieved dismissal ¬with prejudice for Alphabet, Google, and several of its senior executives, in a case in which plaintiffs asserted 13 causes of action and sought $500 million.

Plaintiff Gimmegelt was a Nevada corporation that participated in Google's free AdSense program. It was terminated from the program after Google found suspicious activity suggesting fraudulent clicks on Gimmgelt's website. Following its termination, Gimmegelt purportedly assigned its claims to plaintiffs Gottlieb and Khokhar, the individuals behind the corporation. Gottlieb and Khokhar then filed a complaint in the Eastern District of New York, where they reside. The complaint used Google's termination of Gimmegelt from the AdSense program as a launching pad for claims of RICO violations, securities fraud, antitrust, conspiracy, and breach of contract, among others.

Quinn Emanuel's first step was to move to transfer the case to California, Google's home forum. Once in California, Quinn Emanuel crafted a strategy to dismiss the complaint, arguing that the assignment of claims was invalid and that plaintiffs had therefore failed to name the real party in interest. The Court agreed, granting our motion and dismissing the complaint with leave to amend.

Plaintiffs the filed an amended complaint, joining Gimmegelt as a plaintiff. Quinn Emanuel immediately moved to dismiss again, this time based upon the statute of limitations. The strategy was unconventional – the only change to the complaint was the addition of a plaintiff and yet we were arguing that the amended complaint was time barred – but we marshalled case law in support of our argument that the real party in interest didn't get the benefit of any equitable tolling or relation back, as the assignment was a strategic decision, not a mistake. The Court agreed. We also argued that the individual plaintiffs (who remained in the case) were improper assignees, and thus had to be dismissed too. The Court also agreed.

Quinn Emanuel stopped the plaintiffs' case before it could get past the pleadings. The Court granted our motion and dismissed the $500 million lawsuit with prejudice.

Complete Victory in Dismissal of Taberna IV CDO Involuntary Bankruptcy

The firm achieved a groundbreaking victory in the U.S. Bankruptcy Court for the Southern District of New York when, on November 8, 2018, Judge Vyskocil issued an opinion dismissing an involuntary chapter 11 petition that had been filed against Taberna Preferred Funding IV ("Taberna") – a collateralized debt obligation vehicle (or "CDO").

On June 12, 2017, three senior noteholders – Opportunities II Ltd., HH HoldCo Co-Investment Fund, L.P., and Real Estate Opps Ltd. – filed an involuntary bankruptcy petition against Taberna. The petition was opposed by Taberna, Taberna's collateral manager, TP Management LLC, and five holders of junior classes of notes, including Quinn Emanuel's clients Hildene Opportunities Master Fund II Ltd. and EJF Capital LLC.

Following five days of trial, the objecting parties moved for judgment as a matter of law, arguing that because the petitioning creditors held only secured nonrecourse claims under the governing indenture, they did not satisfy Bankruptcy Code section 303(b)'s eligibility requirements which require that a petitioning creditor hold an unsecured claim "against such person." In subsequent briefing, the parties also argued that Taberna's involuntary case should be dismissed for "cause" under section 1112(b) of the Bankruptcy Code because the filing did not advance a valid bankruptcy purpose and the petitioning creditors would not suffer any prejudice if the case were dismissed.

In a comprehensive 52-page opinion, the Court adopted virtually all of the arguments advanced by our clients and ordered dismissal of Taberna's case. Focusing on the plain language of section 303(b), the Court held that the statue "requires that an involuntary petition be brought by at least three qualifying creditors and that each such creditor holds a claim against the target of the involuntary petition." The Court agreed that "the Indenture explicitly provides that the Notes are nonrecourse," and therefore concluded that because the petitioning creditors "hold claims against only the Collateral, and do not hold claims against Taberna" they failed to meet the eligibility requirements of section 303(b). The Court added that even if the petitioning creditors were eligible to file a petition under section 303(b), dismissal of the case was still warranted for "cause" under Bankruptcy Code section 1112(b). Specifically, the Court observed that the petitioning creditors had "in a very methodical and deliberate process, set out to force an accelerated liquidation" of Taberna, "solely for their benefit, and at the expense of other Note holders." The Court emphasized that "[n]ot only is this involuntary petition fundamentally at odds with the purpose of securitization vehicles," but "it also violates the spirit and purpose of the Bankruptcy Code." The Court further reasoned that "allowing a party to force a CDO into bankruptcy at the expense of all [other] noteholders" would encourage other parties "to disregard bargained-for contractual remedies in an Indenture and pursue bankruptcy as a way to redefine the terms of the contracts they freely entered."

The opinion represents not only a significant win for Taberna's junior noteholders, but also for the CDO market as whole. Not only does the opinion establish new precedent that nonrecourse creditors are not eligible to file involuntary bankruptcy petitions under section 303(b), it strongly reinforces that CDOs (and other similarly structured finance entities) do not belong in bankruptcy.Q

(lead article continued from page 3)

principle that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Id.* (quoting *First Options*, 514 U.S. at 944).

Looking Ahead: "Clear and Unmistakable Evidence" To Arbitrate Arbitrability

The Supreme Court's unanimous rejection of the "wholly groundless" exception in *Henry Schein* returns the focus of the inquiry to the critical question of what qualifies to "clear and unmistakable" evidence that parties intended to assign arbitrability disputes to an arbitrator. As noted above, in some cases that is an easy inquiry, because the arbitration provision expressly delegates such disputes to the arbitrator. The harder issue arises in cases where the parties provide that their arbitration will be governed by particular set of procedural rules, like those of the AAA and JAMS, that empower (but do not require) arbitrators to decide arbitrability questions. Insofar as such rules authorize arbitrators to decide arbitrability, is a provision agreeing to arbitrate in accordance with such rules enough to evince a "clear and unmistakable" intent to arbitrate arbitrability? That issue can be argued both ways. On the one hand, it can be argued that the parties must be deemed to know the arbitral rules they are incorporating, and that incorporation of an arbitral rule empowering an arbitrator to decide arbitrability reflects a choice to have the arbitrator exercise that power. On the other hand, it can also be argued that an agreement to follow rules that empower arbitrators to decide arbitrability does not invariably mean that the parties intended for the arbitrators to decide arbitrability—the existence of a power is not the same as a decision to invoke that power.

These interpretive questions over who decides arbitrability are often more difficult than the underlying arbitrability question itself, which is one of the reasons why the "wholly groundless exception" offered courts an appealing alternative ground to resolve such cases. Now that this alternative is gone, courts will have no choice but to face the difficult interpretive question.

As a practical matter, parties supporting or opposing arbitration should be aware that the incorporation of common arbitration rules (*e.g.*, AAA and JAMS) in an arbitration agreement may be characterized as "clear and unmistakable" evidence that the parties intended to arbitrate arbitrability. If that is not their intention, they may wish to modify their arbitration agreements accordingly, because this issue is clearly headed for further litigation in light of *Henry Schein*.

Corporate Restructuring and Bankruptcy Litigator Patricia B. Tomasco Joins the Firm

Patricia B. Tomasco has joined the firm as a partner in the Houston office. Patty has more than 30 years of experience litigating corporate insolvency problems including workouts, distressed acquisitions and corporate reorganizations for both debtors and creditors in chapter 11 cases. Patty frequently represents clients in the energy and telecommunications industries and high-tech debtors in contentious and disputed restructurings. Patty serves as the chair of the Complex Case Committee for the Southern District of Texas and frequently lectures and writes on restructuring topics. Patty has been consistently ranked as a "Super Lawyer" by *Super Lawyers* and was named "Best Bankruptcy Attorney" by *Austin Business Journal*. She received her J.D. from South Texas College of Law Houston and her B.A. from Rice University.

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business litigation report

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