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How Major Changes to the Federal Rules of Civil Procedure Will Impact Business Litigation

The Federal Rules of Civil Procedure govern all civil litigation in the federal courts. Recent major amendments to these rules—which became effective December 1, 2015—will impact the scope and cost. The amendments highlight the importance of electronic discovery in litigation, and reflect an effort on the part of the drafters to reduce its burden and cost. The result of the amendments, however, may lead to increased costs in the initial stages of litigation, given new rules that shift certain actions to earlier in the proceeding. The ultimate impact of these new rules will become clearer as courts apply and interpret them. Courts that have dealt with the new rules so far, have, by and large, found that they do not radically alter the nature of discovery in the federal courts. Still, several changes are particularly notable and discussed below.

Litigants Will Need to Mobilize Resources More Quickly

Several amendments are aimed at reducing delay in the early stages of litigation. First, Rule 4(m) has been revised to reduce the time to serve a defendant with the summons and complaint from 120 to 90 days. Similarly, the time in which a court must issue a scheduling order is reduced to 90 days (from 120 days) after any defendant has been served, or 60 days (from 90 days) after any defendant has appeared. These changes will require litigants to gear up quickly once a complaint is filed and served.

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INSIDE

Who's Who Legal 2015 Honors Eight Quinn Emanuel Partners in Litigation Rankings

Eight Quinn Emanuel partners were recognized for their legal work in *Who's Who Legal*'s 2015 litigation rankings. In Sydney, Michael Mills was named the "most highly regarded individual in the Asia-Pacific region" and Michelle Fox was commended for her "superb adaptability" across practices areas. Ted Greeno and Martin Davies were recommended as "highly sought after" London litigators and said to possess superb technical abilities across a range of disputes. In New York, Kathleen Sullivan was recognized for her "immaculate reputation" and Peter Calamari for his reputation as "a legend." Both were also praised for their legal prowess. Finally, Managing Partner John B. Quinn and London partner Richard East were recognized as some of the "foremost legal practitioners." Q

Quinn Emanuel and Philippe Selendy Honored in *The American Lawyer's* 2016 "Litigation Department of the Year" Competition

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Boris Bronfentrinker Named to *The Lawyer's* Top 100 of 2016

Boris Bronfentrinker, London partner and Head of the EU and Competition Litigation Practice in the UK, was named to *The Lawyer* magazine's elite list of 100 "best lawyers in the business." These lawyers were selected for having made a difference in the past year through their involvement in the most significant legal matters and for promoting legal innovation. Mr. Bronfentrinker was recognized for his leadership of the firm's UK competition practice, his notable clientele, his ever-expanding volume of work, and his and the firm's ability to represent both defendants and plaintiffs. *The Lawyer* writes that with Mr. Bronfentrinker at the helm, Quinn Emanuel's UK competition practice has been "thriving and growing." Q

Second, the new Rules allow litigants to propound discovery sooner. Under the prior Rules, a de facto "discovery hold" applied in most cases until the parties' initial case management conference—called a Rule 26(f) conference—which often did not occur until many months after a complaint was filed. Rule 26 has now been amended (via Rule 26(d)) to allow discovery requests to be served to the opposing party "more than 21 days" after the summons and complaint are served. While discovery requests may be propounded sooner, the time for responding to those early requests does not begin to run until the 26(f) conference.

The amendment is intended to make the parties' 26(f) conference more productive by facilitating focused discussion. In theory, if the parties know what documents will be requested earlier, they can discuss agreements to facilitate document searches and production, thereby streamlining discovery. The parties may also discuss revisions to their initial requests, thereby avoiding motion practice.

Views on this amendment to Rule 26(d), however, are mixed. Because the new rule allows discovery to be served sooner, but stays the period for responding, parties may chose to forgo early discovery and instead wait until after the Rule 26(f) conference to propound discovery in order to avoid giving their adversary an enlarged time period to respond. Alternatively, aggressive parties may use the opportunity to serve broad requests to gain leverage at the 26(f) conference. Regardless, to make these strategic decisions, litigants will need to have a good understanding of their case and the scope of their clients' relevant documents well in advance of the 26(f) conference, as it will be important to set the tone and expectations at the beginning of the litigation.

The Scope of Discovery May Be Narrowed

Perhaps the most significant and controversial change to the Federal Rules involves Rule 26 which defines the scope of discovery. The amendment to Rule 26 expressly incorporates a discovery rule of "proportionality." Under the amended rule, the factors to be considered in determining whether the discovery is "proportional to the needs of the case" are: (1) the importance of the issues; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

The amendment is intended to reduce "fishing expedition" discovery by identifying and discouraging discovery overuse. While the enumerated factors (except the parties' relative access to relevant information) are not new, their changed location within Rule 26 requires that they now are considered by both the parties and the court in determining the overall scope of discovery from the outset, rather than during later motion practice. (In the prior Rule, these factors were in the section regarding protective orders; they have been moved to the section regarding the scope of discovery.) It seems likely that making this proportionality analysis front-and-center will benefit parties that prefer less discovery—usually defendants. Of course, it is possible that litigants will attempt to use the proportionality factors to justify greater discovery in some cases.

Importantly, the Advisory Committee has made clear that this amendment is not intended to place the sole responsibility to address proportionality on the party seeking discovery. Likewise, the amendment is not intended to allow the responding party to make "boilerplate" objections that the request is not proportional. Rather, the parties and the court must collectively consider the proportionality of all discovery. In fact, the Advisory Committee notes accompanying the amendments encourage "close judicial involvement" in discovery. We anticipate that some courts may therefore take more active involvement in the management of discovery, particularly in complicated cases, early on.

Another change is the elimination of the provision of one of the most oft-quoted clauses in the Federal Rules that allowed for discovery of information that appears "reasonably calculated to lead to the discovery of admissible evidence." This change was made out of a concern that the "reasonably calculated" language may "swallow" any other limitation imposed on the scope of discovery. In its place, the amended rules state: "Information within this scope of discovery need not be admissible in evidence to be discoverable." While intended more as a clarification of the current rule, the amendment may have the effect of reducing a responding party's options when faced with a plainly overbroad discovery request. However, because discovery is still limited to "nonprivileged matter[s] that [are] relevant to any party's claim or defense," basic relevance objections should remain a viable alternative.

Discovery Responses Must Be Specific

Substantial changes have also been made to Rule 34, which controls the procedures for propounding and responding to requests for production of documents and materials. Amended Rule 34(b) requires that the

party responding to the RFPs: (1) state any objections with specificity; (2) produce documents within a "reasonable time"; and (3) expressly state whether any responsive materials are being withheld on the basis of any objection.

Under the new rules, a responding party may be required to specify precisely why a discovery request is "vague or ambiguous" or "unduly burdensome" rather stating that the request as a whole is. This change will likely result in greater time, effort and expense spent responding to written discovery requests, as the amended rule may require responses be tailored to the facts of the case. However, it may reduce costly disputes later in the discovery process, as the parties will have more information and thus be in a better position to reach mutually agreeable compromises.

Additionally, in its response, a party may have to commit to the production of documents by a date certain, either by the date requested in the RFP or within a reasonable time identified by the responding party. This change is likely to generate disagreement over the meaning of "reasonable time," with different courts arriving at different conclusions. This change may also be difficult to adopt, as it imposes new urgency on the time consuming and expensive process of collecting, reviewing, and producing documents in the electronic discovery era.

Finally, a responding party will need to state whether any documents are being withheld as a result of a stated objection. Importantly, the responding party need not identify *which* documents are being withheld. This amendment is aimed at ending the "confusion" that may arise when a producing party states an objection but still produces documents in response to the request. This change may require parties to devote early resources to conducting a document review in order to learn the universe of documents implicated by discovery requests before responses are due. Moreover, we anticipate that this amendment may require multiple amendments to discovery responses over the life of a case, as more is learned about the nature of potentially responsive documents.

Document Preservation Efforts Must Be "Reasonable"

To many in-house and outside counsel, electronic discovery has become the bane of modern litigation. Amended Rule 37 provides a safe harbor of sorts amidst a slew of amended rules focused on Electronically Stored Information ("ESI"). Under 37(e), courts may only impose sanctions on a party for failure to preserve ESI if: (1) prejudice results; or (2) the party acted with intent to deprive another party of information. This rule eliminates the possibility that a party may face certain severe sanctions (such as dismissal of the action or a jury instruction stating the jury should presume the lost evidence was unfavorable) upon a finding of negligence or gross negligence alone. But such a change should not encourage complacency. If prejudice is found as a result of negligent failure to preserve, the court may still order measures *no greater than necessary to cure the prejudice*. If, on the other hand, intentional destruction is found, the court may go so far as to *dismiss the action* or *enter a default judgment* against the party responsible for the failure to preserve.

To ensure that they fall within this safe harbor, companies must take reasonable steps to preserve ESI. The "reasonableness" standard is likely to be the focus of significant motion practice in the coming years, as "reasonable steps to preserve" is not defined by the Rule or the Committee Notes. In defending against a motion for sanctions, it may be important to have evidence of clear document retention policies that are reviewed and monitored on a regular basis. Additionally, when litigation does become reasonably foreseeable, it is advisable for a litigation hold letter to be sent to relevant persons. Clients will need to work with their lawyers to determine appropriate guidelines for document preservation, such as relevant date ranges for preservation and whether documents post-dating the filing of litigation need to be preserved rather than recycled. Having a process in place for imposing such holds will greatly expedite that effort once the possibility of litigation arises, thereby reducing the likelihood of facing a motion for sanctions.

These Amendments May Be Retroactive in Many Cases

Will these rules apply to cases already pending when they became effective on December 1, 2015? The answer is "likely, yes" in many cases. The amended rules are to "govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending."

The few courts that have had an opportunity to apply the amended rules have mostly found that retroactive application is appropriate. *See Brown v. Dobler*, No. 1:15-CV-00132-CWD, 2015 WL 9581414, at *2 (D. Idaho Dec. 29, 2015) (citing amended rules in ruling on motion filed prior to the rules' effective date); *Meeker v. Life Care Centers of Am., Inc.*, No. 14-CV-02101-WYD-NYW, 2015 WL 7882695, at *5 (D. Colo. Dec. 4, 2015) (same); *Granados v. Traffic*

Bar & Rest., Inc., No. 13CIV0500TPGJCF, 2015 WL 9582430, at *5 (S.D.N.Y. Dec. 30, 2015) (noting amended Rule 37 would apply to spoliation of any ESI); *but see Fowler v. City of New York,* No. 13-CV-2372(KAM)(RML), 2015 WL 9462097, at *3 (E.D.N.Y. Dec. 23, 2015) (declining to apply shorter 90-day time period for service of complaint to case filed prior to effective date of amendments); *Trowery v. O'shea*, No. 12-6473 (NLH/AMD), 2015 WL 9587608, at *5 n.11 (D.N.J. Dec. 30, 2015) (finding that, as the parties briefed the pending motions for sanctions under the prior rule, it would not be "just and practicable" to apply the amended rules).

In applying the amended rules, however, Courts have found that the analysis of some discovery disputes is much the same as before. A District of Columbia court explained that "like before, relevance is still to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on' any party's claim or defense." *United States v. CA, Inc.,* 2016 WL 74394, *7 (D.C. Jan. 6, 2016). A court in the Northern District of Texas likewise found that the "amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery" and that the "party seeking discovery, to prevail on a motion to compel or resist a protective order, may well need to make its own showing of many or all of the proportionality factors." *McKinney/Pearl Rest. Partners, L.P. v. Metropo. Life Ins. Co.*, No. 3:14-CV-2498-B, 2016 WL 98603, *4 (N.D. Tex. Jan. 8, 2016).

Conclusion

These recent amendments to the discovery rules have the potential to reshape how discovery is conducted and litigated in federal court. Parties engaged in, or preparing for, litigation should consider how to best leverage these amendments to meet their objectives, avoid sanctions and reduce costs.

NOTED WITH INTEREST

Ninth Circuit Grapples with "Boiler Room" Expert Opinions

Where does lay opinion stop and expert opinion begin? While assessing convictions for wire and mail fraud associated with the defendants' movie investment schemes, the Ninth Circuit considered this important question in *United States v. Lloyd*, 807 F.3d 1128 (9th Cir. 2015). Beyond its colorful facts, *Lloyd* is notable for the Ninth Circuit's treatment and eventual exclusion of the opinion testimony of a former colleague of the defendants, finding the testimony beyond the permitted scope of Rule 701 of the Federal Rules of Evidence. Because the error in admitting the opinion was not harmless, the Ninth Circuit reversed the conviction in part.

Lloyd illustrates a common dilemma faced by litigants, where the underlying facts involve technical or complex subjects. The question becomes at what point does opinion testimony of a lay witness become expert testimony, subject to the attendant disclosure requirements mandated by the Federal Rules. *Lloyd* and other recent decisions illustrate the mostly gray dividing line between the two and counsels a conservative approach in high-tech, or otherwise complex, criminal and civil litigation settings.

Defendants' Investment Schemes

Defendants were telemarketers charged with wire fraud, mail fraud, and the sale of unregistered securities. Working out of call centers—so-called "boiler rooms"—in Florida and California, they sold what they described as no risk, quick return investments in movie productions. The alleged investments were in "B" movies, including *Forbidden Warrior, From Mexico with Love,* and *Red Water*, all produced by Cinamour Entertainment. According to the opinion, while Cinamour did hire telemarketers to raise money for these projects, most of what the defendants collected from investors merely lined the pockets of boiler room employees. To solicit investments, "fronters" would cold call potential investors, and, reading from a script, describe the investment in glowing terms. If they received any interest, the call would be transferred to a "closer," whose job was to get signed investment documents. One of the defendants, Nelson, worked first as a fronter, and later as a closer, in one of these boiler rooms located in California. Like other employees, he followed a script, convincing targets to part with their money by guaranteeing quick, profitable returns

on their investments.

In 2011, Nelson, along with ten others, were indicted on charges of mail fraud, wire fraud, and securities fraud. Nelson's defense centered around the contention that he actually believed the investments were going to the movie productions, and—despite evidence to the contrary—that the investments would eventually pay returns to his clients. These claims, if true, would negate the knowledge element of fraud.

Nelson's claims, however, were undercut by the testimony of a former boiler room employee turned government witness, Allen Bruce Agler. Agler was no disinterested third party. Agler had worked with Nelson and his cohorts in related boiler rooms before. At trial, Agler testified to his opinions about the information and knowledge telemarketers have when they cold-call potential investors and when they close a deal. Among other topics, Agler testified that "[e]verybody that I've ever worked with will always stretch the truth and make out—outright lies especially in certain techniques" and the investors relied on what telemarketers told them. *Lloyd* at 1154. Under cross-examination, Agler admitted that his opinions were based on statements from unidentified telemarketers and investor-victims—that is, opinions beyond his own personal experience. The prosecutor seized on Agler's seemingly persuasive testimony, telling the jury in closing arguments: "Remember, all the closers knew that no investor makes money from an independent movie where the money is raised by cold call telemarketing." *Lloyd* at 1156. After hearing Agler's testimony, the jury convicted Nelson and the other defendants.

The Bounds of Lay Opinion Under Rule 701

On appeal, Defendant Nelson argued that Agler's testimony violated Rule 701's personal knowledge requirement for lay opinion, and could not be admitted as expert testimony because the government had not given the required advanced notice under Rule 16 of the Federal Rules of Criminal Procedure. The Ninth Circuit agreed and reversed Nelson's conviction.

Under Rule 701, a lay witness may testify in the form of an opinion only if it is "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." *Lloyd*, 807 F.3d at 1154 (quoting Fed. R. Evid. 701).

Unlike expert opinion, the personal knowledge requirement for lay opinion is met only if the witness demonstrates "firsthand knowledge or observation." *Lloyd*, 807 F.3d at 1154; *see* Fed. R. Evid. 602. According to the *Lloyd* Court, Agler went beyond these confines when he testified to the thoughts and opinions of unidentified people who invested in boiler room schemes and to the knowledge of all telemarketers when making these kinds of pitches—including the defendants themselves.

After finding it improper lay opinion testimony, the Ninth Circuit did not allow the testimony to be admitted as belatedly-disclosed expert testimony. Because Agler was never disclosed as an expert, the record did not establish that Agler qualified as an expert, that his opinions were reliable, or that what telemarketers "know" is a common subject for Rule 702 expert testimony.

Lloyd demonstrates both the power of strong lay opinion testimony as well as its potential pitfalls. The prosecutor did not hesitate to rely on Agler's testimony. He invoked it repeatedly during closing arguments to demonstrate defendants were aware of the fraud they were perpetrating on investors. Amongst other evidence, this testimony lead to defendants' convictions by the jury. By the same token, the shaky foundation of Agler's opinions lead to the Ninth Circuit reversing the conviction entirely.

Other Recent Views on Lay Versus Expert Opinion

In contrast to *Lloyd*, Judge Richard A. Posner recently found opinion testimony of police officers that their fellow officer used excessive and unreasonable force admissible. *United States v. Smith*, 811 F.3d 907, 909 (7th Cir. Jan. 28, 2016). Rejecting the argument that the opinions were undisclosed expert testimony under Rule 702, Judge Posner stated the "evidence was not based on 'scientific, technical, or other specialized knowledge' of the sort that only a witness whom the judge had qualified to be an expert witness would be allowed to testify to." *Id.* "Anyone who saw what the police saw [the defendant] Smith doing to [the victims] would have been able to offer an opinion on whether the force was reasonable and would have characterized [the defendant's] conduct the same way the officers did." *Id.* In contrast to *Lloyd*, even though police officers are specially trained on what constitutes excessive force and applied that knowledge in forming their opinions, Judge Posner found their testimony admissible as lay opinion under Rule 701. *Id.*

In the civil context, recent cases demonstrate the same fine line between permissible lay opinion and expert testimony. In *Open Text S.A. v. Box.com, Inc.*, 2015 WL 393858, at *7 (N.D. Cal. Jan. 29, 2015), a patent infringement case, the court permitted testimony from the "Architect and Co-Owner" of Box concerning the feasibility and time to implement

an alleged non-infringing software design. The court reasoned that Rule 701 allows testimony based on "particularized knowledge that the witness has by virtue of his or her position in the business." *Id.* Solely because the testimony involves knowledge that the average person would have to consult an expert to gain does not render the testimony based on "scientific, technical, or other specialized knowledge" under Rule 702. *Id.*

By contrast, in another recent patent case, *Munchkin, Inc. v. Luv N' Care, Ltd.*, 2015 WL 774046 (C.D. Cal. Feb. 24, 2015), Judge Otis D. Wright III charted a different course. The offered testimony was purportedly based on the witness's "nearly 50 years of experience in the field," and, according to the offering party, "personal knowledge of the topics he plans on testifying about." *Id.* Despite this, the court excluded the testimony as undisclosed expert opinion. In contrast to *Open Box,* the court stated that "[l]ay opinion testimony is 'not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.'" *Id.* (quoting *Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. 597, 2006 WL 1330002, at *3 (N.D. Cal. May 15, 2006)).

Where technical or complex opinion testimony is presented, one must evaluate carefully whether the opinions must be disclosed as expert testimony, or, whether they can be admitted as lay opinion. While some courts allow lay opinions based on "particularized knowledge" gained through one's profession and experience, others exclude such testimony as beyond the bounds of permissible lay opinion. Q

PRACTICE AREA NOTES

Bankruptcy & Restructuring Litigation Update

Quinn Emanuel Takes Leadership Role for New Potential Bankruptcy Chapter. Quinn Emanuel attorneys do more than argue the law—they help write it. As Chair of the National Bankruptcy Conference's ("NBC") Business Debtor Committee, Quinn Emanuel Partner K. John Shaffer played a central role in drafting the NBC's new proposed addition to the Bankruptcy Code: Chapter 16. In contrast to current Chapter 11 filings, a bankruptcy under the proposed new Chapter 16 could be completed in a few weeks, rather than months or years.

Background. The NBC is an invitation-only organization dedicated to improving the Bankruptcy Code and its administration. It consists of 60 conferees, themselves the nation's leading bankruptcy judges, professors, and practitioners. Formed in the 1930s at the request of Congress to assist in drafting major Depression-era bankruptcy law amendments, the NBC has provided advice to Congress on bankruptcy legislation and policy for nearly 80 years.

Rethinking the Trust Indenture Act and Chapter 11. The NBC has undertaken a comprehensive project to "Rethink Chapter 11" bankruptcy to evaluate the existing Chapter 11 process, consider improvements to the law and propose legislative changes. As part of this effort, the NBC has addressed the issue of holdouts in certain bond restructurings. Section 316(b) of the Trust Indenture Act (the "TIA") provides that the rights of a bondholder to payment "shall not be impaired or affected without the consent of such holder." In effect, the TIA requires the unanimous consent of all bondholders in order to modify or otherwise impair the bondholder's right to be paid principal or, with limited exceptions, interest. The TIA's unanimity requirement—which serves the important purpose of protecting minority bondholders from coercion—may also incentivize minority bondholders to use their veto rights to extract incremental value. One potential practical result of this holdout dynamic is to force companies in need of purely financial restructurings into costly, disruptive Chapter 11 filings. This threat may have increased in recent months due to Southern District of New York decisions that have rather broadly interpreted what constitutes "impairment" under the TIA. *See Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.,* 111 F. Supp. 3d 542 (S.D.N.Y. 2015); *BOKF v. Caesars Entm't Corp.*, 2015 U.S. Dist. LEXIS 113794 (S.D.N.Y. 2015).

In analyzing potential improvements, NBC concluded that the best approach would be a middle ground that alleviates minority bondholder vulnerability without forcing plenary Chapter 11 filings. The NBC proposed a new chapter be added

to the Bankruptcy Code, providing a streamlined judicial procedure for restructuring TIA-governed indentures and other "loan agreement" obligations that require unanimous or super-majority consent. The NBC enlisted Quinn Emanuel's John Shaffer and three other conferees to draft a comprehensive amendment to the Bankruptcy Code that would implement the NBC's proposal.

The New Chapter 16 Proposal. Chapter 16 would provide a simplified judicial process for modifying TIA-governed bonds and other debts for borrowed money. Although Chapter 16 is modeled after existing Chapter 11, it would focus exclusively on the restructuring of the debt, and thus would avoid many of the costs, delays and complications that accompany most Chapter 11 cases. Among other things, a Chapter 16 filing would not affect the debtor's contracts, leases, and payments to trade creditors. Nor would court approval be required for asset sales and other transactions outside the ordinary course of business. A Chapter 16 bankruptcy thus could be completed in a few weeks, rather than the likely months that are required by a Chapter 11 filing. The proposed legislation effectively would substitute in-court supervision for the TIA's unanimity requirement. A court could impose on all members of the affected creditor class a modification of payment terms that has been accepted by creditors holding at least 2/3 in dollar amount of claims in the class (excluding claims held by insiders and affiliates of the borrower), without triggering the whole panoply of Bankruptcy Code provisions, requirements, and limitations that typically accompany a Chapter 11 filing. The court, however, would still have to determine that the restructuring has been proposed in good faith and provides creditors with at least as much consideration as they would have received in a liquidation of the debtor, thus providing minority bondholders with basic judicial protections. Chapter 16 would preserve the TIA's protections against coercion, while also mitigating the problem of holdouts who refuse to be bound outside the context of judicial restructuring.

Conclusion. On December 18, 2015, the NBC sent its proposed legislation to the House Subcommittee on Regulatory Reform and the Senate Committee on the Judiciary. While its fate in Congress remains uncertain, one thing is for sure: Quinn Emanuel attorneys are helping to sharpen the cutting edge of bankruptcy law as both legal advocates and legislative authors.

Securities & Structured Finance Litigation Update

Quinn Emanuel Obtains Significant RMBS Sampling Ruling. Quinn Emanuel recently won a significant ruling permitting the use of statistical sampling to prove liability and damages on loan repurchase claims brought by the trustee of residential mortgage-backed securities ("RMBS") trusts. *SACO I Trust 2006-5, et al. v. EMC Mortgage LLC, et al.*, Index No. 651820/2012 (N.Y. Sup. Ct. Nov. 30, 2015). By removing one of the primary obstacles raised by defendants to the trusts' vindication of their contractual repurchase rights, the decision will facilitate proof of liability and damages in trustee RMBS repurchase suits.

In *SACO*, the trustee, represented by Quinn Emanuel, sought to enforce the RMBS sponsor's contractual obligation to repurchase tens of thousands of loans sold to the trustee because of materially breached representations and warranties. Like many RMBS contracts, the contracts specified that repurchase was the trustee's "sole remedy" arising out of a breach of representations and warranties. Defendants argued that the "sole remedy" provision in the *SACO* contracts required the trustee to prove and identify for repurchase each breaching loan, on a loan-by-loan basis—*i.e.*, not based on a sample. Given the volume of loans in the trusts (42,000), such proof would have been impractical and would have made the trusts' proof of their claims inordinately burdensome. As the trusts argued, the repurchase remedy was only intended for deals with a small number of breaching loans, not the systemic breaches present in these trusts.

In this particular instance, these arguments were strengthened because the loans were already liquidated. That is, there is nothing of value left to repurchase. A payment of damages is essentially identical to repurchase. In a separate decision, the New York Appellate Division endorsed this argument, explaining that for liquidated loans, RMBS trusts can obtain damages in lieu of actual repurchase. *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (2015). Since such damages can be reliably calculated based on a sample, there is no reason to require loan-by-loan review for such loans. In light of *Nomura*, and because almost all of the damages sought by the trusts relate to liquidated loans, the SACO trustee elected to confine its sampling motion to liquidated loans.

This focused strategy succeeded. The court noted: "[T]his motion pertains only to liquidated loans—

i.e., loans no longer in the Trust. Therefore, the mortgage loan[s] at issue could not be returned to EMC or substituted." Nov. 4, 2015 H'r'g Tr. at 10. "Plaintiffs explain the manner in which their experts will calculate a damages figure based on an aggregate purchase price for the liquidated loans in the pool and the breach rate in Plaintiffs' loan sample." *Id.* at 14-15. The court concluded: "There is nothing in the PSA that bar[s] Plaintiffs from proceeding in this manner. … Plaintiffs have demonstrated that as a matter of law, the PSAs' 'cure-and-repurchase provision' does not bar sampling as a method of proof." *Id.*

While numerous courts have approved the use of sampling in RMBS cases, this decision marks the first time a court has specifically approved the use of sampling in an action by a trustee subject to a "sole remedy" provision *and* expressly held that this method of proof is consistent with the "sole remedy" provision, resulting in a significant victory for trustees in similar situations.

Life Sciences Litigation Update

Federal Circuit Affirms Broad Personal Jurisdiction Over ANDA Filers. On March 18, 2016, in the first decision of its kind since the U.S. Supreme Court decided *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Federal Circuit issued a precedential decision confirming that patentees are essentially free to choose their forum in Hatch-Waxman patent litigation. *See Acorda Therapeutics, Inc. v. Mylan Pharms., Inc.*, No. 2015-1456 (Fed. Cir. March 18, 2016). *Daimler* effectively held that a defendant is only subject to general personal jurisdiction in its state of incorporation or its principal place of business, arguably overturning decades of precedent permitting general personal jurisdiction in any forum where the defendant is doing business.

Mylan Pharmaceuticals, Inc., a generic drug company incorporated in West Virginia and a frequent filer of Abbreviated New Drug Applications ("ANDAs"), used *Daimler* as an opportunity to challenge the long-established practice of filing Hatch-Waxman patent litigations in the patentee's home state, not the ANDA filer's. Mylan filed at least ten motions to dismiss for lack of personal jurisdiction in various federal district courts, including at least two in Delaware: *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*, No. 14-696 (D. Del.) and *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc., et al.*, No. 14-935 (D. Del.). In both *AstraZeneca* and *Acorda*, the District of Delaware denied Mylan's motions. Mylan appealed both rulings to the U.S. Court of Appeals for the Federal Circuit, where they were argued together in January 2016 before Judges Newman, O'Malley, and Taranto. The Federal Circuit's March 18, 2016 precedential decision affirms the district courts' denials of Mylan's motions, and essentially holds that a patentee is free to choose its forum in Hatch-Waxman cases where it is clear that the generic pharmaceutical company will engage in nationwide sales of its proposed ANDA product. *See Acorda*, No. 2015-1456 (Fed. Cir. March 18, 2016).

AstraZeneca and *Acorda* began like typical Hatch-Waxman cases. Mylan filed ANDAs seeking approval from the U.S. Food and Drug Administration ("FDA") to market generic drug products before the expiration of patents covering the branded versions of those products. Mylan's ANDAs included so-called Paragraph IV Certifications alleging that the patents were invalid, unenforceable, and/or would not be infringed. Mylan mailed the statutorily-required "Notice Letter" of its Paragraph IV Certifications to AstraZeneca and Acorda, and each sued Mylan for patent infringement in the District of Delaware. Mylan moved to dismiss both complaints, arguing that it was not subject to personal jurisdiction in Delaware in light of *Daimler*. In both cases, Mylan asked the district court to hold that Mylan is subject to jurisdiction in ANDA cases only in its home state of West Virginia.

While Judge Sleet in *AstraZeneca* and Judge Stark in *Acorda* disagreed over whether Mylan "consented" to general jurisdiction in Delaware by complying with the state's registration statute, both found specific jurisdiction and denied Mylan's motion on that basis. Judge Sleet reasoned that Mylan had purposefully directed its activities at Delaware by mailing its Notice Letter to AstraZeneca in Delaware, thereby establishing sufficient "minimum contacts" to confer jurisdiction. *AstraZeneca*, No. 14-696, 2014 WL 5778016, at *7 (D. Del. Nov. 5, 2014). Judge Stark agreed with Judge Sleet's reasoning, and expanded the reach of specific jurisdiction to cover Mylan's mailing of its notice letter to a Delaware corporation, even though the letter was not actually sent into Delaware. *Acorda*, No. 14-935, 2015 WL 186833, at *18 (D. Del. Jan. 14, 2015) (discussing Notice Letter sent to New York). Both judges also concluded that the patentees would suffer injury in Delaware—their "home" state—as a result of Mylan's ANDA filing, and that exercising specific jurisdiction over Mylan was fair and just under the circumstances.

Mylan appealed both decisions to the Federal Circuit. Just over two months after the January 4, 2016 oral argument, the Federal Circuit affirmed the rulings below. Limiting its ruling to specific

jurisdiction, the Federal Circuit held that jurisdiction exists in any state where the ANDA filer intends to market its proposed generic product—a "common-sense conclusion," according to the Court. *See Acorda*, No. 2015-1456, Slip Op. at 14 (concluding that "it suffices for Delaware to meet the minimum-contacts requirement in the present cases that Mylan's ANDA filings and its distribution channels establish that Mylan plans to market its proposed drugs in Delaware and the lawsuit is about patent constraints on such in-State marketing"). The Court relied on the forward-looking nature of the Hatch-Waxman Act, explaining that "Congress added § 271(e)(2) as a special means of litigating patent scope and validity only when . . . a declaration has been made by an ANDA filer—which has, by its filing, confirmed its plan to commit real-world acts that would make it liable for infringement if it commits them without the patentees' permission and it is wrong in its challenges." *Id.* at 10-11.

Finally, the Court concluded that it would be fair to subject Mylan to jurisdiction in Delaware, given that the generic company has "litigated many ANDA lawsuits in Delaware" and given the "interests of the plaintiffs and the judicial system in efficient resolution of litigation." *Id.* at 16.

While the majority opinion did not address general personal jurisdiction, Judge O'Malley's concurring opinion tracked Supreme Court precedent on the issue. It concluded that Mylan is also subject to general jurisdiction in Delaware "by virtue of its voluntary, express consent to such jurisdiction" based on its registration to do business in Delaware *Id.* (concurring opinion) at 12.

The Federal Circuit's landmark decision provides much-needed clarity regarding specific personal jurisdiction for Hatch-Waxman litigants going forward.

Quinn Emanuel and Philippe Selendy Honored in *The American Lawyer*'s 2016 "Litigation Department of the Year" Competition

Quinn Emanuel was named a "General Litigation Finalist" and one of the top six litigation firms in the United States by *The American Lawyer* in its 2016 "Litigation Department of the Year" competition. The firm was recognized for a number of accomplishments, including, prominently, its partnership with the Federal Housing Finance Agency ("FHFA") to take on Wall Street's biggest banks in connection with residential mortgage-backed securities litigation. Quinn Emanuel helped FHFA recover more than $20 billion for U.S. taxpayers in settlements with major financial institutions. The firm was also recognized for its successes in IP, white collar, and antitrust matters, including a $100 million settlement for ViaSat in a patent case involving high-speed satellite technology, a stunning defense victory for PetroTiger CEO Joseph Sigelman in a rare Foreign Corrupt Practices Act (FCPA) jury trial, and one of the largest antitrust class action settlements in history ($1.87 billion), in a cartel case against major Wall Street banks related to manipulation of the market for credit default swaps. Philippe Selendy, Chair of the firm's Securities and Structured Finance practice, was also named the grand prize winner in *The American Lawyer's* "Litigator of the Year" competition. Selendy has achieved national prominence for his lead role in the firm's aforementioned representation of FHFA against the banks implicated in the financial crisis.

Class Actions Litigator Damian Scattini Joins Quinn Emanuel's Sydney Office

Partner Damian Scattini joined Quinn Emanuel's Sydney office from Maurice Blackburn, where he was a Principal and Head of the firm's Queensland class actions practice. Mr. Scattini has more than 20 years of experience in complex commercial litigation, class actions, and product liability claims in both Australia and the United States. He is one of the leading corporate plaintiff and class action lawyers in Australia.

VICTORIES

Groundbreaking Constitutional Due Process Victory

The firm recently won a groundbreaking motion to dismiss decision in the Southern District of New York, holding that exercising personal jurisdiction over a foreign defendant, on the basis of leave-and-mail service of process on the doorman of a building where the defendant is staying, does not comport with the Due Process Clause.

Earlier this year, Quinn Emanuel was retained by Indian businessman, Kabul Chawla, to oppose confirmation of a $90 million foreign arbitral award against him. The action, brought by JPMorgan subsidiary Harbour Victoria Investment Holdings Limited, also involved motions for a temporary restraining order, attachment and discovery related to a New York apartment rented by Mr. Chawla and his family. After Harbour Victoria obtained a TRO in state court, the firm removed the action to the Southern District of New York, where Judge Laura T. Swain ultimately vacated the TRO and denied the attachment and discovery motions. Harbour Victoria again sought discovery, through a Section 1782 petition, but again was denied, this time by Judge Alison J. Nathan. Judge Nathan's decision held, for the first time, that a Section 1782 petition may be denied where it is an attempt to evade a U.S. discovery ruling. Here, Judge Nathan determined Harbour Victoria's Section 1782 petition was really an attempt to circumvent Judge Swain's denial of discovery.

Following these victories, Quinn Emanuel moved to dismiss the confirmation action for lack of personal jurisdiction. The firm made several arguments under both state and federal law, including that exercising personal jurisdiction over Mr. Chawla violated the Due Process Clause because (1) Mr. Chawla is domiciled in India; (2) the dispute arose between foreign parties over conduct in India and was heard by a foreign arbitral tribunal; and (3) Harbour Victoria did not adequately plead that Mr. Chawla had minimum contacts with New York sufficient to meet the Supreme Court's standard in *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945).

Harbour Victoria's only real argument for jurisdiction was that its process server served the doorman of Mr. Chawla's New York apartment building while Mr. Chawla was staying in New York. Harbour Victoria argued that such service established "transient" jurisdiction over Mr. Chawla based on the Supreme Court's decision in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), which held that service of process on a person while in the jurisdiction, even absent any other contacts with the state, satisfied federal due process requirements.

Quinn Emanuel argued that *Burnham* was irrelevant because it involved personal service directly on the defendant, rather than service on a doorman. This distinction was crucial, the firm argued, because (1) personal service is a longstanding part of American legal tradition, whereas leave-and-mail service was a more recent alternative to personal service; and (2) personal service was far more likely to apprise the defendant of the lawsuit, in contrast to serving a doorman of a building where a foreign defendant may only reside a few days out of the year.

Judge Swain agreed, incorporating both arguments in her decision. Specifically, Judge Swain wrote that, "the use of a method of service that both has an historic pedigree and leaves no doubt that the person is in fact properly notified of the lawsuit while present in the forum is likewise a requisite of constitutionally valid transient jurisdiction." *Harbour Victoria Inv. Holdings Ltd. v. Chawla*, 2015 WL 7871042, at *3 (S.D.N.Y. Dec. 3, 2015). Judge Swain found that leave-and-mail service did not have a historical tradition of use, nor did it provide any assurance of actual, effective notice. Thus, Judge Swain found that exercising personal jurisdiction over Mr. Chawla would violate the Due Process Clause and, as such, granted Mr. Chawla's motion to dismiss for lack of personal jurisdiction.

The decision has broad constitutional and practical implications. The decision is the first to address the constitutionality of using leave-and-mail service as a basis for personal jurisdiction absent additional contacts with the jurisdiction. In holding that such service does not establish personal jurisdiction, the decision limits plaintiffs' ability to sue foreign nationals that maintain part-time residences in the United States or stay in hotels while in the country by serving a doorman or hotel employee, provided the dispute did not arise in the jurisdiction and the foreign national lacks other contacts with the jurisdiction sufficient to meet due process requirements.

The decision provides important new protections for our non-U.S. clients seeking to protect their assets in the United States against enforcement of arbitration awards rendered outside the United States.

Sweeping Sanctions Victory in Central District of California

The firm recently obtained a sweeping sanctions victory in the Central District of California for client American Rena International Corporation in a case involving trademark, copyright, RICO, and related claims.

In 2012, the firm was retained to represent American Rena—distributor of products under the RENA and RENA BIOTECHNOLOGY trademarks—against a former senior sales distributor who left the company to sell competing products under the "aRena" brand. In late 2012, the firm obtained a far-reaching preliminary injunction enjoining defendants from marketing or selling their competing products and requiring defendants to turn over all products under their control bearing the infringing marks.

In response, defendants claimed it was American Rena, not them, that was infringing because defendants had, in fact, used their marks years before American Rena. When asked to support their claim, defendants provided three declarations purportedly from individuals who all claimed to have purchased defendants' products before American Rena began using its marks.

Quinn Emanuel's extensive discovery efforts revealed troubling facts about these declarations. The first came from an individual who did not appear to exist. The second came from an individual who testified that her identity had been stolen, that the declaration was a forgery, and that she had never even heard of, let alone purchased, the items at issue. After the firm obtained an order in the Northern District of California holding the third individual in contempt for ignoring orders that she appear for deposition, that individual confirmed that she had not purchased any of the products when the declaration claimed. She also claimed that she did not know what the declaration said and was deceived into signing it, also that she had repeatedly been instructed by defendants to refuse to appear and to obstruct the firm's efforts to depose her, efforts which included the filing of false accusations with the Court. Though defendants' principal initially denied any knowledge of this misconduct in deposition, she broke when confronted with the evidence, eventually admitting defendants' central role in orchestrating and perpetrating this litigation misconduct.

Armed with this information, the firm promptly moved for terminating sanctions, asking that defendants' counterclaims be dismissed and that default be entered against defendants on all of American Rena's claims. On December 14, 2015, the district court ruled and, in a strongly-worded 84-page opinion, granted American Rena's motion in full, dismissing defendants' counterclaims, entering default judgment against defendants on all of American Rena's affirmative claims, and awarding American Rena $1.2 million in attorneys' fees. Among other things, the Court found that, "Plaintiffs have demonstrated by clear and convincing evidence that defendants fabricated a declaration for a phantom witness, forged a declaration, falsified and fraudulently procured a declaration, filed these false declarations with different federal courts, obstructed the discovery process, … lied under oath, and violated the court's preliminary injunction." The victory marks an extremely unusual use of the inherent powers of federal courts to grant sanctions of this magnitude.

Industry-Leading Settlement for EFG Bank in DOJ Program for Swiss Banks

On December 3, 2015, the Department of Justice announced it had concluded a non-prosecution agreement and final settlement with our client EFG Bank, one of the largest Swiss private banks. The settlement amount of $29.9 million, was a small fraction of the Bank's U.S. business and one of the best settlements reached to date by that measure.

EFG entered the DOJ program in the beginning of 2014 facing a potential penalty of hundreds of millions of dollars. At that time, the size of the penalty and the work required by the DOJ program were daunting. Over the next 12 months, Quinn Emanuel (1) conducted an extensive review of the Bank's accounts to identify those held on behalf of U.S. persons, including a manual review of hundreds of paper files; (2) reviewed tens of thousands of emails and documents to identify employees with exposure and get a grasp of the evolution of the Bank's policies towards U.S. persons; (3) coordinated with an Independent Examiner to demonstrate the robustness of the Bank's compliance with the DOJ program; and (4) contacted hundreds of U.S. clients and convinced them to declare their accounts through the Offshore Voluntary Disclosure Program.

Along the way, Quinn Emanuel conducted interviews with employees, made presentations to DOJ regarding the Bank's findings, reassured current and former employees, and was often the first source of information for U.S. clients with undeclared accounts who were looking to come clean. This is in addition to managing Deloitte AG, Swiss counsel, and the Independent Examiner.

One of the most difficult parts of the case was explaining Swiss banking secrecy and Swiss data protection laws to a skeptical DOJ. These laws make it a criminal offense for the Bank—or its attorneys—to transmit client information to foreign authorities without a waiver from the client or a formal treaty request to the Swiss government by DOJ. This was a point of contention throughout the program, as DOJ was obviously interested in the names of clients with undeclared accounts. Ultimately, Quinn Emanuel was able to work with the Bank, DOJ, Swiss counsel, and the clients to provide useful information to DOJ. The lead DOJ lawyer who handled EFG's case told us that a key distinguishing factor was the quality and thoroughness of the investigation, and the cooperation provided by the Quinn Emanuel team.

The final penalty amount of $29.9 million was particularly notable when compared to the penalty other large Swiss banks have paid to date. The Bank's penalty represented only 1.9% of the peak value of its problematic United States' assets under management of roughly $1.6 billion. The average penalty for the other banks with comparable exposure was twice as much, or 4% of United States' assets under management. In comparison to the other banks with large numbers of U.S. accounts, EFG has obtained the lowest penalty as measured against exposure. Q

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business litigation report
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- We are a business litigation firm of more than 700 lawyers — the largest in the world devoted solely to business litigation and arbitration.
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