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Seminar Takeaways

Recent developments and anticipated court decisions continue to impact how corporations do business and manage disputes globally. The speakers, or any of your usual contacts at Skadden, would welcome the opportunity to discuss these topics in greater detail at your convenience. In addition, upon your request, we will send you a copy of the seminar slides.

The US Supreme Court Term: Business Cases to Watch

To provide some context in connection with the cases before the U.S. Supreme Court this term, **Gregory Craig** and **Cliff Sloan** discussed the current composition of the Roberts Court and its relationship with the business community. According to one study, during the first five years after John Roberts became Chief Justice, the Court sided with the business community in 61 percent of relevant cases — a notable figure when compared with the last five years of the Rehnquist Court, which sided with businesses in 46 percent of relevant cases. While the Roberts Court is viewed as having a great interest in business, voting patterns sometimes have resembled a shuffled deck, with conservative and liberal justices making some unpredictable choices.

Affirmative Action. *In Fisher v. University of Texas at Austin* (*UT*), the question of whether race can be used as a factor in college admissions will be addressed. Under UT's admissions policy, race sometimes is a factor in the evaluation of applicants. Nine years ago, in *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's use of race as one of a number of factors in its admissions policy; the *Fisher* litigant argues that UT's policy is invalid under *Grutter* — and, alternatively, that *Grutter* should be overruled. A group of 57 leading U.S. companies — including more than one-half of the *Fortune 100* — filed an amicus curiae brief supporting the university, noting that the *Fisher* case is important to them because they recruit extensively from UT and other public universities. An additional factor is the recusal of Justice Elena Kagan from the case, as a 4-4 vote would leave the decision intact.

Marriage Equality. Some of the world's most prominent employers also have voiced very strong feelings in connection with the same-sex marriage debate before the Court (*Hollingsworth v. Perry* – California's Proposition 8 and *U.S. v. Windsor* – *Defense of Marriage Act* (*DOMA*)). In *Hollingsworth*, more than 60 companies filed a brief stating that Proposition 8 should be struck down and, in *Windsor*, more than 278 companies filed an amicus brief urging the Court to overturn a section of DOMA that denies federal benefits and recognition to same-sex couples. In each case, the business community has stated that a company's success greatly depends on the welfare of all its employees, and that accepting second-class status for any of its personnel is bad for business — and unconstitutional.

Additional Cases to Watch. Greg and Cliff also discussed the range of cases that significantly could impact:

- **Class action litigation and arbitration**, including the recently argued *American Express v. Italian Colors Restaurant*, which addresses whether arbitration clauses could prohibit class actions; and the recently decided *Amgen v. Connecticut Retirement Plans and Trust Funds*, where the Court ruled in a 6-3 vote that a plaintiff alleging fraud on the market does not need to establish the materiality of an alleged fraudulent statement to obtain class certification;
- **The extraterritoriality of the U.S. Alien Tort Statute**, which is at the center of *Kiobel v. Royal Dutch Petroleum*, where the Court will decide whether non-U.S. companies can be sued by non-U.S. plaintiffs for alleged involvement in human rights abuses that occur outside of the United States; and
- **Statute of limitations for government enforcement actions**, including the recently decided *Gabelli v. SEC*, where the Court unanimously held that the five-year limitations period that governs SEC enforcement actions begins to run when the alleged fraud is complete versus when the agency discovers the conduct has occurred.

Antitrust and Competition

Sharis Pozen and **James Keyte** discussed the leadership changes at and enforcement agendas of the U.S. Department of Justice and the Federal Trade Commission, and provided an overview of global private antitrust litigation trends.

Department of Justice. Bill Baer assumed leadership of its Antitrust Division in January 2013. Baer, who is a former head of the FTC's Bureau of Competition and previously a partner with Arnold & Porter, has significant experience with the application of economic theory in antitrust analysis. On a related note, Baer has appointed Northwestern University Professor Aviv Nevo as the Division's deputy assistant attorney general for economic analysis.

The Division continues to investigate merger activity and prosecute and litigate criminal matters aggressively. Recent deal-related lawsuits include two actions in January 2013, where the Division sued to unwind Bazaarvoice's June 2012 acquisition of PowerReviews and to block Anheuser-Busch's proposed acquisition of Grupo Modelo. The Bazaarvoice suit is notable as the transaction was not reportable under the Hart-Scott-Rodino Act; the inference is that the Division is casting a wider civil net. In criminal cases, the Division has racked up 21 guilty pleas from individuals and companies in its ongoing auto parts investigation, which has resulted in more than $800 million in fines to date. Its investigation of LIBOR and EURIBOR manipulation by banks has included admissions of misconduct by several financial institutions that have agreed to pay fines their violations. The Division is emboldened by a string of wins and its criminal enforcement activity — including seeking significant fines — can be expected to continue with the same intensity.

Federal Trade Commission. The FTC also has experienced a change in leadership with the departures of chairman Jon Liebowitz and commissioner J. Thomas Rosch, who was replaced by George Mason University School of Law Professor Joshua Wright. With its current vacancy, the FTC has four commissioners, consisting of two Democratic and two Republican appointees, which offers some uncertainty as to how some matters may be decided.

Recent FTC enforcement actions have focused on intellectual property issues, including standards-essential patents (SEPs). In its recent consent agreement with Robert Bosch GmbH, the FTC resolved its concerns that the company's proposed acquisition of SPX Service Solutions would have resulted in SPX's SEPs not being licensed in a fair and reasonable manner. In a similar investigation into Google's business practices, the FTC wound up settling for a voluntary commitment by Google to modify some of its Internet search methods. FTC enforcement also has been a significant part of the current U.S. Supreme Court term. In the recently decided *FTC v. Phoebe Putney Health System*, the Court agreed with the FTC's view of the state-action doctrine in a hospital merger case. In *FTC v. Actavis*, which is scheduled for oral argument on March 25, the Court will consider whether reverse payments in pharmaceutical patent litigation should be presumptively unlawful

Private Litigation. In addition to increased government scrutiny over competition matters, global private antitrust litigation has continued to rise in volume and complexity. In the U.S., which is viewed as the most expansive forum for private litigation, the limitations of going to court are outweighed by the appeal of easily financed actions, treble damages, contingency fees and other factors that enable plaintiffs and their legal counsel to bring litigation at virtually little to no cost.

Recent developments in the U.K. suggest a perfect storm may be on the horizon for companies exposed to antitrust claims. England, which already has become an increasingly popular forum for resolving such disputes, has announced a number of changes to private antitrust enforcement. These include indirect purchasers having standing, decisions being certified by the Competition Appeals Tribunal and losers paying the other party's attorneys' fees. "Cautiously optimistic" comments by a partner at one U.K. plaintiff's firm lead many to believe that the proposed changes not only will result in the U.K. becoming the preferred destination for EU class actions, but also will let the "class action litigation genie" out of its bottle. While other Europe jurisdictions are seen as potential hot spots for private antitrust litigation, the EU limits on damages likely will strengthen the appeal of the proposed U.K. model.

Regardless of where a company is based, it must be proactive and ready to face the reality of global private class action litigation in the antitrust context. Compliance programs, targeted education, and effective internal reporting and investigative systems are key steps companies and their counsel need to consider.

Securities Litigation Update

Scott Musoff and **Susan Saltzstein** examined key securities litigation developments and recent and anticipated decisions of interest.

Key Developments. 2012 was a year with fewer cases filed and even fewer cases resolved. Securities class action plaintiffs filed 207 actions in federal court in 2012, compared to an average of 221 over the previous five years; and only 152 securities class actions were dismissed or settled in 2012, compared to 244 actions resolved in 2011. Financial firms bore slightly less of the brunt in 2012: 28 percent of new filings were against this sector, compared to 31 percent in 2011. However, while the numbers are down, there is a feeling that litigants increasingly are willing to take cases further with the hopes of getting to summary judgment.

Recent and Anticipated Decisions. Courts have or are expected to touch on a number of interesting securities litigation issues, including:

- **Distinguishing between statutes of limitation and repose** (*FHFA v. UBS Americas*). The outcome of this case, which is before the U.S. Court of Appeals for the Second Circuit, likely will impact the ability of other regulatory agencies to use "extender provisions" to lengthen the time period applicable to federal and state statutory claims. While the Supreme Court's recent decision in *Gabelli v. SEC* went against the government, it's hard to predict if circuit courts will take a similar view.
- **The extent to which class plaintiffs can represent investors in offerings other than the ones in which plaintiffs bought securities** (*NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*). In this case, the plaintiffs purchased two of the 17 offerings at the center of the dispute. However, the Second Circuit ruled that investors in the proposed class had similar, overlapping sets of concerns about the offerings they purchased and, therefore, the named plaintiffs could sue on behalf of the former.
- **A securities defendant successfully rebutting a plaintiff's reliance on alleged misstatements in bench trial** (*GAMCO Investors, Inc. v. Vivendi, S.A.*). In this case, which was before the U.S. District Court for the Southern District of New York, Vivendi was able to rebut the fraud on the market presumption of reliance.
- **Materiality need not be proven at class certification stage** (*Amgen v. Connecticut Retirement Plans and Trust Funds*). On the surface, the Supreme Court's aforementioned ruling may not have significant implications, as the issue of materiality was not considered a matter of "if" but rather of "when." One impact of the decision is the question of the long-term viability of the fraud-on-the-market presumption.
- **The extent to which claims based on state law that bear some connection to securities actions are barred by the State Litigation Uniform Standards Act** (*Chadbourne & Parke LLP v. Troice*). This case, which is before the Supreme Court, concerns the extent to which SLUSA will preclude certain state law claims asserted against certain defendants in a ponzi scheme context.

Government Enforcement Actions

Richard Marmaro and **Patrick Fitzgerald** discussed SEC enforcement trends, the agency's new Dodd-Frank Whistleblower Program and how SEC and DOJ leadership changes may affect each agency's enforcement agenda in 2013.

SEC Enforcement Trends. The SEC has become more of a prosecutorial agency than ever before. Insider trading remains a high priority, with the SEC bringing 58 actions against 131 individuals and entities during its 2012 fiscal year. The actions focused largely on financial professionals, hedge fund managers and lawyers. The SEC also stepped up its efforts to freeze assets. Historically, the agency would conduct an investigation and then seek the asset freeze. Times are changing, and quickly: a mere 28 hours after H.J. Heinz announced its acquisition by Berkshire Hathaway, the SEC froze the assets of a Swiss trading account alleging suspicious activity. Other areas of focus include Foreign Corrupt Practices Act actions and prosecutions related to the financial crisis.

Whistleblower Program. One of the more significant recent developments is the SEC establishing its Office of the Whistleblower under the Dodd-Frank Act. The SEC is directed to make monetary awards to individuals who volunteer information that leads to successful

enforcement actions resulting in monetary sanctions of $1 million or more. The Office of the Whistleblower has eight full-time lawyers plus a support staff. In August 2012, the SEC awarded its first whistleblower $50,000, which was approximately 30 percent of the money recovered by the agency.

SEC and DOJ Changes. Leadership changes at the SEC and DOJ likely will not signal a decrease in enforcement activity. Former federal prosecutor and Wall Street lawyer Mary Jo White, who was selected by President Obama to lead the SEC, has stated her intent to continue a vigorous enforcement agenda. Given her experience as a defense attorney — among her other representations, White led the internal investigation of Siemens that resulted in the German company paying $1.6 billion to resolve a federal bribery investigation — it will be interesting to see what measures she will take.

Lanny Breuer's departure from the DOJ, where he was one of the longest-serving leaders of its Criminal Division, has raised questions about who his successor may be and how faithful the new assistant attorney general will be in following Breuer's superlative enforcement activity. Given the record FCPA activity under Breuer's watch, it's likely that DOJ prosecutor trends, such as the recent deferred prosecution agreement with HSBC, will continue. Companies and their counsel need to evaluate the potential collateral consequences of alleged wrongdoing by employees and shareholders.

International Arbitration

David Kavanagh and **Tim Nelson** spoke about the continued appeal of international arbitration to resolve commercial disputes and examined the recent developments in the use of bilateral investment treaties (BITs) by businesses.

Arbitration's Appeal. International arbitration often is described as the "TINA Principle," a term coined by former British Prime Minister Margaret Thatcher, which stands for "there is no alternative." This reflects that there are some markets (particularly in BRIC countries, Latin America and the former Soviet Union) where companies remain reluctant to submit to litigation before the domestic courts, leaving international commercial arbitration as the only acceptable procedure for solving business-to-business disputes.

Over the last two decades, International arbitration has been aided by two factors: (i) the enforceability an arbitral award is guaranteed by treaty (the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Panama Convention on International Commercial Arbitration), thus giving a more reliable and predictable outcome compared with a domestic court judgment that is not always assured of international recognition; and (ii) arbitration has come to be viewed as a predictable procedure, with internationally recognized standards designed to ensure a fair and just hearing.

The major international arbitral venues continue to be London, certain European capitals, New York, Singapore and Hong Kong. English law and New York law remain widely used as the governing law. A number of high-profile international practitioners from various countries have come to be regarded as trusted arbitrators in large cases.

An example of international arbitration in action, in a BRIC economy, is the high-profile dispute between Alfa-Access-Renova (AAR) and BP regarding the latter's proposed alliance with Rosneft, the state-owned Russian oil and gas company. The parties' contract provided for international arbitration of disputes under English law, before a three-person tribunal in Stockholm. The AAR parties, seeking to challenge a transaction between BP and Rosneft,

were able to obtain an injunction in late 2010 from the English courts to prevent the deal from proceeding, pending an expedited arbitration to determine the parties' rights. In early 2011, after a six-week arbitral procedure, the tribunal held in the AAR parties' favor. The case illustrates how an international arbitral tribunal can solve disputes expeditiously — in a manner that could not have occurred using the relevant domestic courts.

BITs. Since the 1990s, there has evolved a network of more than 3,000 BITs and Free Trade Agreements (FTAs) among numerous governments, which are intended to promote and encourage cross-border investment. These treaties (i) guarantee against expropriation or unfair treatment of foreign investors' assets and investments by a host state and (ii) also provide for arbitration of disputes before international bodies such as the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

In the last 20 years, BITs have been utilized by businesses:

- to seek redress for expropriation, *e.g.,* by the Venezuelan, Bolivian or Ecuadorian governments in pursuing their respective nationalization schemes, or by former Soviet Union jurisdictions that have reclaimed privatized assets without paying adequate compensation), or
- to obtain redress when host states have sought to enact unilateral measures that adversely affect investors' contractual rights (*e.g.,* the Argentine government's "pesification" of electrical or gas tariffs in 2002.

In the last few years, businesses have been prepared to utilize BITs in a more novel manner, to challenge a broader range of government measurers. For example:

- in the renewable energy sector, some governments such as Spain and Italy have changed their regulatory regimes in a manner unfavorable to renewable energy project investors (*e.g.,* in wind and solar industries). This potentially has triggered BIT claims, as well as claims under the Energy Charter Treaty, a multilateral investment treaty applicable to that sector.
- There has been resort to BIT arbitration in the wake of the government's response to the global financial downturn. In the *Ping v. Belgium* case now pending before ICSID, a Chinese investor is seeking to utilize the China-Belgium BIT to challenge the restructuring of Fortis, which it claims was conducted in a manner that violated foreign investors' rights.

The next few years likely will see an increased use of BITs to raise government-to-business disputes in ways that had not been encountered by arbitral tribunals previously.

Consumer Class Action Outlook

Sheila Birnbaum and **Mark Cheffo** shared their insights into the evolving products liability landscape, the role of arbitration as a potential bar to class actions and the impact of the U.S. Supreme Court's ruling in *Wal-Mart v. Dukes* (2011).

The Evolving Landscape. While high-profile personal injury cases seem to be over — classes repeatedly have been denied certification — actions involving consumer goods have increased sharply. For example, in the pharmaceutical industry, a report of an adverse reaction to medicine likely will be followed by a wave of false claims class actions. Virtually everything is in play, from health claims related to yogurt to the use of cosmetics.

Arbitration and Class Actions. Two recent Supreme Court cases have influenced the dialogue about arbitration and class actions. In *AT&T v. Concepcion* (2011), the Court ruled that the Federal Arbitration Act (FAA) preempts state laws making arbitration clauses enforceable only if classwide arbitration is available. As arbitration is intended to be informal, it carries a greater risk of an incorrect result, which defendants would not be able to tolerate in a class action context. In *CompuCredit v. Greenwood* (2012), the Court ruled that the FAA also requires the enforcement of arbitration clauses with federal claims, absent any contrary congressional command. The Court likely will have an additional impact in this area later this year, as the recently argued *American Express v. Italian Colors Restaurant* will address whether arbitration clauses could prohibit class actions. Depending on how the Court rules, arbitration clauses may need to contain procedural protections (*e.g.*, fee shifting) comparable to those in *Concepcion*. However, the scope of *Concepcion* as a defense to class actions in consumer cases is limited at the outset, since most consumer transactions (*e.g.*, buying food at the grocery store) do not involve written agreements.

Wal-Mart v. Dukes. Although the impact of *Wal-Mart v. Dukes* on consumer classes remains unclear — several circuit court decisions have provided mixed results and limited citations to the 2011 case — certain of its holdings remain relevant. Notably, a court cannot avoid scrutiny of class certification requirements merely because they overlap with the case's merits, and defendants have the right to raise individual defenses. This is particularly significant because it provides a valuable opportunity for defense counsel to argue due process, which could provide an avenue to have the case heard before the Supreme Court. Justice Antonin Scalia's 2010 order to stay a $270 million tobacco verdict against Philip Morris was due to his belief that the lower court's denial of individual plaintiffs being questioned implied that they could not recover damages from suing separately, and that the defendants were denied their rights to due process in a class action. While the Court ultimately declined to hear an appeal of the verdict, it is another sign that its justices are finding the rush to aggregate damages in these cases to be troubling.

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