

Global Litigation

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U.S. Supreme Court Cases to Watch

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In the current term, the Supreme Court has once again agreed to decide cases of significant interest to the business community. Media coverage has justifiably concentrated on the potential implications of the challenges to President Obama's health care reform, but other cases also are likely to have important impacts on the business world.

- The Supreme Court will consider the constitutionality of President Obama's Affordable Care Act in three consolidated cases, *National Federation of Independent Business v. Sebelius*, No. 11-393, *Florida v. Department of Health & Human Services*, No. 11-400, and *Department of Health & Human Services v. Florida*, No. 11-398. The Court ordinarily limits oral argument in cases to a total of one hour, but it has agreed to hear five and a half hours of argument about the Affordable Care Act. The issues that the Court will consider include whether the Commerce Clause permits Congress to require individuals to purchase health insurance (the so-called individual mandate), whether the individual mandate, if deemed unconstitutional, can be severed from the rest of the act, whether the incentives given to states to expand Medicaid are unconstitutionally coercive under the Spending Clause, and whether the challenges to the law are prohibited at this time by the Anti-Injunction Act. The Court's interpretation of the limits of Congress' power under the Commerce and Spending Clauses is likely to have ramifications far beyond the health care industry.
- In *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, and *Mohamad v. Palestinian Authority*, No. 11-88, the Supreme Court will consider whether the Alien Tort Statute and the Torture Victim Protection Act of 1991 permit actions against corporations or other organizations of individuals. If the Court permits suits against such defendants, some corporations with significant assets in the United States that do business elsewhere in the world likely will face additional claims in U.S. courts arising from their business outside the United States. Given the limitations on U.S. courts' authority to compel witnesses and documents located abroad to appear before them, corporate defendants in these suits could face many practical problems in preparing their defenses. (See "[Global Litigation/International Litigation and Arbitration: Upcoming Supreme Court Cases and Arbitration Claims Against Sovereigns.](#)")
- In *Magner v. Gallagher*, No. 10-1032, the Court will consider whether disparate impact claims are cognizable under the Fair Housing Act. The Obama administration has brought new FHA actions under a disparate impact theory, and private plaintiffs have brought actions premised on similar theories of liability under fair lending laws. The Court's decision in this case is likely to affect disparate impact suits under the Fair Housing Act and other statutory provisions as well.
- The Supreme Court has agreed to hear two notable tax cases. In *United States v. Home Concrete & Supply, LLC*, No. 11-139, the Supreme Court will consider whether to defer to a retroactive regulation that was issued during pending litigation in an effort to determine the outcome of the litigation. In *Armour v. Indianapolis*, No. 11-161, the Court will consider whether the Equal Protection Clause permits a local tax authority to refuse to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multiyear installment plan.

- In *FCC v. Fox Television Stations, Inc.*, No. 10-1293 131 S. Ct. 3065 (2011) (mem.), the Supreme Court has agreed to hear a First Amendment challenge to the Federal Communications Commission's indecency regime. One argument the broadcasters in the case make is that the reduced First Amendment scrutiny the Supreme Court has applied to restrictions on broadcast media is inappropriate and should be abandoned. In addition to the obvious effects the case will have on broadcast media, it will be important to see if the Court continues its recent trend of affording broad First Amendment protection to corporations, such as in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (striking down limitations on political speech based on the speaker's corporate identity), and *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011) (striking down restrictions on violent video games). The Supreme Court also may clarify the level of specificity required of a regulation, at least where the regulation affects fundamental rights.

Securities Litigation: Recent Supreme Court Decisions and Future Trends

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Recent and Upcoming Supreme Court Decisions

In 2011, the Supreme Court decided three significant securities cases: *Matrixx Initiatives, Inc. v. Siracusano* 131 S. Ct. 1309 (2011), regarding statistical significance in the context of securities fraud; *Erica P. John Fund, Inc. v. Halliburton Co.* 131 S. Ct. 2179 (2011), addressing the relationship between loss causation and class certification; and *Janus Capital Group, Inc. v. First Derivative Traders* 131 S. Ct. 2296, 2305 (2011), construing the phrase "to make" under the SEC's Rule 10b-5. Coming up in the term that began in October 2011, the Court will decide *Credit Suisse Securities v. Simmonds*, to clarify the two-year statute of limitations under Section 16(b) of the Securities Exchange Act.

- In *Matrixx*, a unanimous Supreme Court rejected statistical significance as a bright-line test for materiality and scienter under Section 10(b) of the Securities Exchange Act. The Court held that shareholders can state a claim based on a company's failure to disclose adverse events associated with the company's product, even if the complaint does not allege that the company knew of a statistically significant number of such adverse events. The Court reasoned that if regulators and consumers rely upon information that fails to attain statistical significance, it follows that investors could as well.
- In *Halliburton*, the Court resolved a split between the Fifth and Seventh Circuits regarding whether plaintiffs must prove loss causation at the class certification stage. The justices unanimously sided with the Seventh Circuit, ruling that plaintiffs need not prove loss causation to certify a class. The Court noted that the merits of loss causation — unlike, for example, the reliance element of fraud — bear no logical connection to whether individual or common issues will predominate for a proposed class action.
- The *Janus* opinion clarified what it means to "make" a false statement under Section 10(b)'s anti-fraud provision. The majority held that the maker of an allegedly false statement is "the person or entity with ultimate authority over the statement." Under that ruling, one who merely publishes a statement on

another's behalf is not the statement's maker and cannot be liable for the alleged fraud. Lower courts continue to explore how the *Janus* holding applies to corporate officers when an allegedly false statement is attributed to the officer, but the company holds the ultimate authority over the statement.

- On the horizon for 2012 is *Simmonds*, which will review the Ninth Circuit's long-standing accrual rule for insider trading claims under Section 16(b). The Ninth Circuit recently reaffirmed its rule that the two-year limitations period to recover short-swing profits from corporate insiders under Section 16(b) is tolled until the insider reports the offending trades to the SEC under Section 16(a) — regardless of the plaintiff's actual knowledge of his or her claim and failure to sue in spite of that knowledge. Notably, the Ninth Circuit opinion's author also wrote separately that the Ninth Circuit rule ignores the statutory text and congressional intent, and the Supreme Court granted *certiorari*.

Filings Trends Continued to Evolve in 2011

The number of securities class actions decreased slightly in 2011 as compared to 2010; however, considering the recent decline in the number of public companies, an argument can be made that the number of filings (as a percentage of public companies) is on the rise.

Among other trends, while credit crisis-related litigation continued in 2011, it has extended beyond the securities class action realm, as evidenced by a recent surge in mortgage-backed securities (MBS) actions, including "put-back" suits involving contractual breaches of representations and warranties. Litigation activity in this area also is being driven by more than just the "traditional plaintiff," with monoline insurers, financial firms and other industry participants bringing credit crisis-related claims of their own. Additionally, government agencies, such as the Federal Housing Finance Agency and the FDIC are becoming active litigants. For example, the Federal Housing Finance Agency, as conservator for Fannie Mae and Freddie Mac, recently filed suits against financial institutions alleging securities law and state law violations stemming from MBS issuances; and the FDIC has initiated more than a dozen "failed bank" lawsuits against former officers and directors, alleging negligence and related theories.

One trend we observed in 2011 was a marked increase in M&A-related securities litigation, something we expect to continue in the coming year. (See "[Global M&A/ The Impact of Recent Delaware Decisions and Multiforum Litigation on M&A.](#)")

Also during 2011, there was increased litigation against and regulatory focus on Chinese firms that gained access to U.S. equity markets through reverse mergers, in which an existing U.S.-listed shell company acquires a nonlisted firm.

Circuit Courts Addressed a Number of Diverse Issues in 2011, With the Second Circuit Leading the Way

Several important cases percolated to the Circuit Court level last year, resulting in important decisions across a number of key issues. In light of the increase in financial services securities litigation, it is not surprising that the Second Circuit — sometimes referred to as the "mother court" of securities law — led the way.

For example, in the first putative securities class action challenging the adequacy of disclosures by underwriters in relation to their participation in the auction rate securities market to be decided by a Circuit Court, the Second Circuit affirmed the dismissal of the action, finding the disclosures of the underwriter's involvement in the auctions to be sufficient to negate any claim of market manipulation. (*Wilson v. Merrill Lynch & Co.*, No. 10-1528-cv, 2011 WL 5515958 (2d Cir. Nov. 14, 2011) (to be published in F.3d)). In *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), the Second Circuit found that statements about good will and reserves were matters of opinion and held that when a Section 11 or 12 claim is based on matters of "belief or opinion . . . , liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." This decision will be significant in financial crisis litigation where valuations of complex financial instruments often are based on subjective judgments.

In reversing the dismissal of a securities class action, the Second Circuit provided guidance on whether (and under what circumstances) issuers must disclose "adverse trends" under Item 303 of Regulation S-K (*Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 241 (2011)). The Second Circuit found error in the district court's decision to measure the materiality of statements regarding a portfolio company against the private equity firm's entire business. The court explained that segment information can be material if it "plays a 'significant role' in the registrant's business."

Other appellate courts have been active as well. The Eleventh Circuit, for example, rejected the argument that misstatements must cause price inflation for loss causation to exist. In *FindWhat Investor Group v. FindWhat.com*, 658 F.3d 1282 (11th Cir. 2011), the plaintiff argued that the issuer's stock price was inflated by an equal amount both before and during the class period. Given the foregoing, the district court held that the challenged statements could not have caused price inflation or any subsequent loss. At issue was whether false statements that prevent a stock price from falling can cause harm by prolonging the period during which stock is traded at inflated prices. The Eleventh Circuit answered the question in the affirmative.

The Sixth and Seventh Circuits had the opportunity to address the application of the Securities Litigation Uniform Standards Act (SLUSA). The Sixth Circuit addressed whether SLUSA reaches a claim that does not require a misstatement or omission as a necessary element. In *Atkinson v. Morgan Asset Management*, 658 F.3d 549 (6th Cir. 2011), shareholders in three mutual funds accused the funds' advisors, officers and directors (among others) of taking "unjustified risks in allocating the funds' assets and conceal[ing] these risks from shareholders." According to plaintiffs, under SLUSA, the fact that their complaint included certain fraud-based allegations was irrelevant to their prosecution of claims that do not contain fraud as a necessary element (*e.g.*, breach of contract, breach of fiduciary duty). The Sixth Circuit disagreed: SLUSA "does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple. . . . That the claims did not 'depend' on these

“ [The *Fait*] decision will be significant in financial crisis litigation where valuations of complex financial instruments often are based on subjective judgments. ”

allegations [was] inapposite, as [was] Plaintiffs' 'artful'" attempt to carve out "any facts that are unnecessary ... for purposes of stating" such claims. In *Brown v. Calamos*, No. 11-1785, 2011 WL 5505375 (7th Cir. Nov. 10, 2011), the Seventh Circuit took a more flexible approach. Plaintiffs, investors in a closed-end mutual fund, accused the fund's advisors and others of breaching fiduciary duties owed to common shareholders by redeeming certain auction rate securities owned by preferred shareholders. Plaintiffs argued that the complaint's averments of fraud (such as an alleged misrepresentation that the securities would never be liquidated) failed to trigger SLUSA because they were not a necessary element of their claim. The Seventh Circuit disagreed, although it declined to adopt the Sixth Circuit's bright-line approach and focused instead on whether "the allegations ... make it likely that an issue of fraud will arise in the course of the litigation," regardless of whether fraud is a required legal element. Judge Richard A. Posner described this more contextual analysis as "close to the Third Circuit's" approach. See *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 300 (3d Cir. 2005) ("misrepresentation prong is satisfied under SLUSA" if "allegations of a material misrepresentation serve as the factual predicate of a state law claim"); see also *Romano v. Kazacos*, 609 F.3d 512, 521 (2d Cir. 2010).

Courts Reject Efforts to Limit *Morrison*

As evidenced by numerous decisions in federal courts in 2011, plaintiffs have been largely unsuccessful in their attempts to avoid the limitations of the Supreme Court's ruling in *Morrison v. National Australia Bank Limited*, 130 S. Ct. 2869 (2010), which established a transaction-based test focusing on the location of the purchase or sale of the securities for determining whether U.S. courts have jurisdiction.

Relevant cases include:

- *In re Vivendi Universal S.A. Securities Litigation*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011): The court held that 10(b) does not apply to securities that may be cross-listed on a U.S. exchange, where alleged purchases and sales do not arise from the domestic listing.
- *In re UBS Securities Litigation*, No. 07 Cir. 11225 (RJS) 2011 WL 4059356 (S.D.N.Y. 2011): In addition to dismissing "foreign-cubed" claims on grounds similar to those invoked in *Vivendi*, the court rejected "f-squared" claims by U.S. purchasers of foreign company shares on a foreign exchange, noting that *Morrison's* formulation of a "domestic transaction" looks to the location of the transaction, not the purchaser.
- *Elliott Associates v. Porsche Automobil Holdings SE*, 759 F. Supp. 2d 469 (S.D.N.Y. 2010) (on appeal, see below): The court barred Section 10(b) claims brought on the basis of swap agreements whose referenced securities traded on a foreign exchange, because such agreements were economically and functionally equivalent to foreign transactions.

The Second Circuit is now poised to weigh in on the issue. The court will decide two appeals (*Absolute Activist Master Fund Limited* (2d Cir. 11-221) and *Porsche*) in which district courts have rejected efforts to evade *Morrison* through allegations that plaintiffs engaged in various U.S.-based purchase activities.

Madoff-Related Litigations Have Produced Several Important Rulings in 2011

Several important rulings in litigation stemming from the Bernard Madoff scandal shed light on potential outcomes in cases involving similar issues. For example, in *Picard v. HSBC Bank PLC*, 454 B.R. 25 (S.D.N.Y. 2011), Judge Jed S. Rakoff ruled that the trustee overseeing the liquidation of Bernard L. Madoff Investment Securities, Irving Picard, did not have standing to assert common law claims on behalf of customers. The district court also found that Picard, in his capacity as trustee, stepped into the legal shoes of the debtor. This, in turn, left him vulnerable to the doctrine of *in pari delicto*, which bars litigants from asserting claims on behalf of equally culpable tortfeasors.

Judge Colleen McMahon, in *Picard v. JPMorgan Chase & Co.*, Nos. 11 civ. 913 (CM), 11 civ. 4212 (CM), 2011 WL 5170434 (S.D.N.Y. Nov. 1, 2011)(to be published in B.R.), dismissed common law claims on similar grounds, and the same issue is pending before Judge Rakoff in *Picard v. Kohn*, another trustee case involving UniCredit S.p.A. The common law claims in these cases had originated in bankruptcy court and were successfully removed by the defendants under 28 U.S.C. § 157 as involving significant issues of nonbankruptcy federal law.

Mortgage-Backed Securities and Put-Back Litigation

The credit crisis spawned a wide range of litigation against issuers and underwriters of MBS, as well as credit-rating agencies and others. The reverberations from these lawsuits, which continue to be filed, will be felt well into 2012. Generally, MBS investors have pursued two avenues: misrepresentation claims and contractual claims, each of which presents its own set of hurdles and obstacles for parties litigating, and courts grappling with, such claims.

Misrepresentation claims often are based on Sections 11 and 12 of the Securities Act, although some plaintiffs also have asserted state statutory and common law claims. In a series of recent rulings, courts have divided on whether, and to what extent, to certify MBS class actions. Some courts have denied certification outright, while others have certified after paring down the class significantly by limiting standing to pursue claims only in the offerings or even the tranches in which the representative plaintiff purchased its securities. In 2012, a major battlefield in misrepresentation litigation will be “negative causation” — a defense that the losses suffered were a result of something other than the alleged false and misleading statements in the offering documents, such as general economic conditions or the nationwide decline in housing prices.

Contractual put-back claims face a different set of issues. Holders and insurers of MBS have sought to “put back” loans on the theory that the loans violate contractual representations and warranties made at the time of the offerings. Generally, the underlying documents require at least 25 percent of the certificate holders to act together in order to enforce such contractual rights. Furthermore, many of these documents require a loan-by-loan analysis, which can become extremely time-consuming and expensive where plaintiffs attempt to put back every loan in

an offering. Plaintiffs are seeking advance rulings, through motions *in limine* or for partial summary judgment, that they may review a sample of the loan files within a given securitization and extrapolate their findings across the entire securitization. We expect to see further decisions addressing sampling, and as the cases progress in 2012, various substantive issues relating to the scope and extent of sampling to be rendered.

We anticipate that in 2012 the courts will provide significant guidance regarding whether plaintiffs must establish that the alleged breaches of the representations and warranties actually caused the losses claimed or the nonperformance of the loans sought to be repurchased. Indeed, just after the New Year, two decisions were issued by the New York Supreme Court (New York's trial court) addressing these issues. We anticipate that additional decisions from both trial and appellate courts will come down throughout the year as these issues continue to percolate throughout the courts.

Trends and Developments Involving Chinese Reverse-Merger Companies

Although the number of securities suits against Chinese reverse-merger companies has increased significantly in the last two years, the limited number of such companies — Cornerstone identifies a total of 159 Chinese reverse mergers from January 2007 through March 2010 — means that this filing category likely will run its course in the relatively short term, and thus may not be a good indicator of future trends.

Despite the modest number in the aggregate of reverse-merger companies, 55 suits had been filed through the third quarter of 2011 against these companies, up from 24 in the whole of 2010 and just five in 2009. Many of these suits focus on the discrepancies between the financial statements a company filed with the SEC and those filed with the China State Administration for Industry and Commerce, and on unreported or inadequately disclosed related-company transactions. Because it may be difficult to collect ultimately from a Chinese company, the suits often also name as defendants the companies' auditors, underwriters and other secondary actors with exposure to the companies' financial statements and capital markets transactions.

A Sampling of Decisions in 2011 Involving Chinese Reverse-Merger Companies

- **Numerous cases have preliminarily survived a motion to dismiss.** Although many of these suits are based on potentially self-serving reports published by hedge funds that short the companies they expose, trial courts allowed plaintiffs' claims to proceed in a majority of cases in 2011. In *Henning v. Orient Paper, Inc.*, No. CV 10-5887-VBF (AJWx), 2011 WL 2909322 (C.D. Cal. July 20, 2011), the first reported opinion in a Chinese reverse-merger securities fraud claim, the court allowed a Section 10(b) claim to proceed, despite the plaintiffs' reliance on reports by short-seller Muddy Waters. Similarly, in *In re China Education Alliance, Inc. Securities Litigation*, No. CV 10-9239 CAS (JCx), 2011 WL 4978483 (C.D. Cal. Oct. 11, 2011), the plaintiffs relied heavily on a short-seller's

report claiming that a Chinese reverse-merger company filed false financial statements with the SEC, which were contradicted by accurate financial statements filed with Chinese regulators. The court specifically rejected the defendant's argument that the report was not sufficiently reliable to meet the Private Securities Litigation Reform Act's heightened pleading standards. See also *Munoz v. China Expert Technology, Inc.*, No. 07 Civ. 10531 (S.D.N.Y. July 19 and Nov. 7, 2011) (upholding claims that a Chinese reverse-merger company had filed misleading statements with the SEC that were inconsistent with its Chinese filings) (Dkt. Nos. 159, 160, 183).

- **Relatively few cases were dismissed at the pleading stage.** In *Katz v. China Century Dragon Media, Inc.*, No. LA CV11-02769 JAK (SSx) 2011 WL 6047093 (C.D. Cal. Nov. 30, 2011), however, the court dismissed the plaintiffs' fraud claims, which alleged that the company's SEC filings were inconsistent with its Chinese filings, because the plaintiffs did not adequately allege that the Chinese company's SEC filings, rather than its filings with Chinese regulators, were false. But the court stated that the plaintiffs could meet their pleading burden by alleging that the filings should be substantially similar because Chinese and American accounting standards were similar or the defendants relied on the same underlying financial data. In *re China North East Petroleum Holdings Limited Securities Litigation*, No. 10 Civ. 4577 (MGC) 2011 WL 4801516 (S.D.N.Y. Oct. 6, 2011) (to be published in F.Supp. 2d), also was dismissed at the pleading stage, but its primary lesson is that Chinese reverse-merger claims are subject to the same defenses as any other securities class action. In that case, the putative lead plaintiff had an opportunity to sell at a profit following the disclosure of the alleged misrepresentations; thus, it could not attribute its subsequent losses to the alleged misrepresentations.

In November, the SEC also approved new listing rules ... that are designed to increase the disclosure requirements involved in reverse-merger listings.

Regulatory Responses to Chinese Reverse-Merger Allegations

In response to a number of allegations of fraud by Chinese companies that had used reverse mergers to list on U.S. exchanges, the SEC warned investors in April about investing in foreign companies that used reverse mergers, because these companies were not subject to the stringent disclosure requirements involved in an IPO. In November, the SEC also approved new listing rules proposed by Nasdaq, the New York Stock Exchange and NYSE Amex that are designed to increase the disclosure requirements involved in reverse-merger listings. Under the new rules, a reverse-merger company will need to trade in the over-the-counter market or on another regulated exchange for one year before it can apply to be listed. During that period, the company must maintain a certain minimum share price for a "sustained period," and for at least 30 of the 60 trading days before its application and the exchange's decision to list. In addition, the SEC has targeted specific listings, halting trading in more than a dozen stocks that were initially listed using reverse mergers.

Conflicts Between U.S. and Chinese Law

Both the SEC and the Department of Justice have launched investigations into potential fraud at listed Chinese companies, but they have been hindered by Chinese secrecy laws that may not allow companies and auditors to turn over documents.

These investigations can create difficulties for global auditors with affiliates in China, which may face conflicting requirements from U.S. and Chinese laws and regulations. This can be seen in *SEC v. Deloitte Touche Tohmatsu CPA Ltd.*, No. 1:11-mc-00512-GK-DAR (D.D.C. filed Sept. 8, 2011), where the SEC has filed an action to enforce a subpoena issued to Deloitte's Chinese affiliate requesting documents related to a Chinese company. Deloitte asserts that turning over documents might violate China's state secrets laws, and Chinese regulatory agencies have refused to grant Deloitte's affiliate permission to produce any of the requested documents. If the court decides against Deloitte, its Chinese affiliate may have to choose between contempt sanctions and possible revocation of its audit registration in the U.S. and potential civil and criminal penalties in China. Despite these difficulties, such enforcement actions by U.S. regulators are likely to increase in 2012.

Continued Step-up in Government Investigations and White Collar Crime Prosecution: Developments in Insider Trading, FCPA and UK Bribery Act, Cross-Border Tax Fraud and Health Care Prosecution

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In 2012, we anticipate a continuation of last year's trend by the Department of Justice (the DOJ) to step up its efforts to investigate and prosecute white collar crimes.¹ In 2011, the DOJ focused on insider trading and Foreign Corrupt Practices Act (FCPA) cases, as well as financial, tax and health care fraud prosecutions. This year, federal prosecutors will continue their aggressive pursuit of financial crimes, with the only potential headwind on the horizon being budgetary constraints.

Insider Trading and the Targeting of Suspicious Investor Returns

We expect federal prosecutors to continue their aggressive pursuit of insider trading cases in 2012. The U.S. attorney for the Southern District of New York (S.D.N.Y.), Preet Bharara, considers insider trading "rampant" and has declared it his "top criminal priority."² In 2011, Bharara's office obtained convictions and guilty pleas in more than 30 insider trading cases, culminating in the conviction of Raj Rajaratnam, the founder of Galleon Group, who was sentenced to 11 years in prison. The S.D.N.Y. has shown its willingness to employ aggressive investigative tactics in these cases, including the use of wiretaps and informants, and it has stated that it will continue to do so whenever traditional techniques prove unable to obtain the evidence necessary to establish its case.³ Recent news reports and public filings also suggest the S.D.N.Y. is readying for another round of arrests, as prosecutors continue to mine informants, cooperating witnesses and hundreds of hours of wiretaps for additional leads. Other prosecutors throughout the country have brought their own high-profile cases and also should be expected to vigorously pursue any instances of insider trading within their jurisdictions.

The SEC likewise has indicated it will continue to aggressively pursue insider trading. Its director of enforcement, Robert Khuzami, recently testified to Congress that

¹ Assistant Attorney General Lanny A. Breuer, remarks at the Practising Law Institute Global (Nov. 4, 2010).

² United States Attorney Preet Bharara, remarks at the New York City Bar Association Global (Oct. 20, 2010).

³ Christopher Garcia, chief of the Securities and Commodities Fraud Task Force for SDNY, remarks at the New York City Bar Conference on Securities Litigation and Enforcement (Dec. 6, 2011), as reported by Steven Joyce in the *BNA White Collar Crime Reporter*, available at http://news.bna.com/wcrn/WCRNWB/split_display.adp?fedfid=23730433&vname=wcrnotallissues&fn=23730433&jd=23730433&lf=eml&emc=wcrn:wcrn:112.

“the detection and prosecution of those who engage in insider trading remains one of the Division of Enforcement’s highest priorities.”⁴ Most recently the SEC has increased its focus on hedge funds to assess whether perceived abnormal returns reflect fraud or other misconduct. Through its “Aberrational Performance Inquiry,” the SEC is using proprietary analytical tools to identify funds whose returns appear to be inconsistent with their own strategy or benchmarks and therefore should be subject to further review. The SEC recently brought a number of actions against funds and individuals for various forms of fraudulent behavior, including the improper use of fund assets, fraudulent valuations and misrepresentations.

Below are some of the trends and issues in insider trading cases that we anticipate seeing over the course of the next year:

- A continued focus on hedge fund insiders, other market professionals and gatekeepers (*e.g.*, lawyers and accountants) in investigations and prosecutions;
- A continued focus on corporate executives and whether they are trading (and/or tipping others to trade) ahead of market-moving corporate announcements and events;
- The continued use of wiretaps, wired informants and other electronic surveillance in investigations;
- Investigations and prosecutions arising from whistleblower tips that the SEC receives from its newly implemented whistleblower program; and
- Investigations and prosecutions of non-U.S. persons for participating in insider trading schemes that touch U.S. markets.

Another trend that we expect to continue in 2012 and beyond is the criminal prosecution of individuals for disclosing or receiving confidential information, in breach of a fiduciary duty — where there has been no trading on the information — under a mail or wire fraud theory (“insider trading light”). Prosecutors used this strategy in 2011 when they prosecuted James Fleischman, an employee of expert network firm Primary Global Research LLC (PGR). We predict that the government’s success in this case will embolden it to continue using this legal theory, and to prosecute not only those who disseminate confidential company information, but the recipients of this information as well.

The facts of the Fleischman case are straightforward. For a fee, PGR allegedly connected hedge fund clients with expert consultants who provided firm clients with market color regarding companies and industries. Fleischman allegedly arranged consultations between PGR clients and the firm’s expert consultants. Prosecutors alleged that the consultants sometimes divulged inside information during consultations, and that Fleischman arranged these consultations knowing that inside information would be disclosed to clients for the purpose of securities trading. Notably, there was no allegation, or proof, that any of the recipients actually traded on the information at issue.

⁴Robert Khuzami, Director of Division of Enforcement, SEC, Before the U.S. Senate Committee on Homeland Security and Government Affairs, Statement on the Application of Insider Trading Law to Trading by Members of Congress and Their Staffs (Dec. 1, 2011).

Fleishman was convicted of conspiracy to commit securities fraud and conspiracy to commit wire fraud after a three-week jury trial in September 2011.

By pursuing this “insider trading light” strategy, prosecutors may be able to avoid litigating an important defense in those cases — the materiality of the underlying information. Unlike securities fraud, mail or wire fraud does not require prosecutors to prove that the information is material, nor does it require that the fraud be in connection with the purchase or sale of a security. Instead, under the U.S. Supreme Court’s decision in *Carpenter v. United States*, 484 U.S. 19, 26 (1987), prosecutors can establish wire fraud by proving, in relevant part, that “confidential business information” was misappropriated in violation of a person’s “right to the exclusive use of the information.”

If, as we predict, prosecutors greatly expand their pursuit of “insider trading light” scenarios, it could expose individuals to liability for conduct that has not traditionally been considered criminal. When employees of a public company breach their duties to their employers by disclosing confidential company information (and there has been no trading on that information), the sanction typically is termination of employment — not criminal prosecution. In addition, although prosecutors have made statements that the current insider trading prosecutions do not represent an attack on the mosaic theory, and for the most part the allegations in those cases support those statements, the pursuit of “insider trading light,” which would enable them to side-step the element of materiality, would most certainly undermine the theory.

By seeking to criminalize conduct that has not traditionally been considered criminal, and thereby arguably stretching the boundaries of the criminal laws, prosecutors using the “insider trading light” approach may risk a backlash from the courts. This was certainly the case in the collapse of the “floor broker” inter-positioning prosecutions in the mid-2000s, as well as the reversal of various convictions obtained during the insider trading prosecutions in the late 1980s. In particular, the further criminalization of contractual or ethical breaches to keep information confidential may result in successful due process challenges like those raised in *Skilling v. United States*, 130 S. Ct. 2896 (2010).

Foreign Corrupt Practices

Lanny Breuer, the assistant attorney general for the DOJ’s Criminal Division, recently reinforced that the “fight against corruption” remains a “top priority” for the division and a “personal priority” for him.⁵ To that end, Breuer heralded the fact that 2011 brought four FCPA trials — the largest number ever in one year. Of course, this represents only the tip of the iceberg as far as the number of active FCPA investigations, which typically end with substantial fines and deferred prosecution agreements. Although members of Congress, the U.S. Chamber of Commerce and the white collar defense bar all have suggested that the FCPA needs to be clarified and limited in certain areas, we believe such efforts are unlikely to bear

⁵ Assistant Attorney General Lanny A. Breuer, remarks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011).

“ [C]ompanies should expect the DOJ to continue its aggressive approach to transnational corruption. ”

fruit in 2012. Indeed, Breuer has stated that the DOJ “[h]as no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.”⁶ The DOJ does plan, however, to release new guidance on the FCPA’s civil and criminal enforcement provisions in 2012.

In the meantime, companies should expect the DOJ to continue its aggressive approach to transnational corruption, including by prosecuting individuals whenever possible and seeking severe penalties on corporations that run afoul of the FCPA. We also believe the new whistleblower program enacted as part of the Dodd-Frank Act — which pays tipsters an award of 10 percent to 30 percent of any recovery more than \$1 million in a covered proceeding — will result in an uptick in criminal FCPA investigations as employees now have a powerful incentive to come forward whenever they believe something may be amiss.⁷ Companies also should stay mindful of a growing number of anti-corruption laws in other countries, including the UK Bribery Act and new laws in traditional corruption hotspots such as China and Russia.

UK Bribery Act

The Bribery Act 2010 (UK Bribery Act) came into force on July 1, 2011, after both an extensive legislation period and a consultation period on regulatory guidance. The statute coincides with significantly accelerated enforcement action by the UK regulators responsible for corruption investigations and prosecutions: the UK Serious Fraud Office (SFO), the Crown Prosecution Service (CPS) and the Financial Services Authority (FSA). Both before and after the effective date of the UK Bribery Act, UK regulators have steadily increased their global reach and stature with significant enforcement outcomes against corporates and individuals for bribery and bribery-related offenses. This trend can be expected to continue through 2012, with UK regulators taking advantage of the ability to bring cases under the UK Bribery Act.

The CPS prosecutes all criminal offenses, including some economic crime. (The most serious and/or complex economic crime is prosecuted by the SFO.) In August 2011, the CPS initiated the first prosecution under the UK Bribery Act, charging an Essex court clerk with receiving bribes.⁸ The prosecution stemmed from a sting operation in which evidence was produced that the clerk requested and received money in exchange for not entering driving offense convictions into the register of such offenses and into the police national computer. On November 18, he was sentenced to six years imprisonment for misconduct in public office and three years concurrently for the UK Bribery Act offense. The conduct for which the clerk was convicted almost entirely predated the effective date of the UK Bribery Act; the UK Bribery Act charges related to a single instance of misconduct after its effective date.

⁶ *Id.*

⁷ The SEC issued its first annual report on the whistleblower program in November 2011. Of the 334 total tips that the SEC received during the seven weeks between when the final rules concerning the program became effective and the date of the report, 13 (3.9 percent) concerned FCPA allegations. We believe the number of FCPA-related tips will grow as the whistleblower program becomes better known.

⁸ *R -v- Munir Patel*, (2011) Southwark Crown Court.

Because corporate and overseas corruption cases are time consuming to build and frequently relate to conduct that spans several months, if not years, prosecutions brought by the SFO in 2011 were based on pre-UK Bribery Act conduct and legislation. The SFO has pursued criminal resolutions, as well as civil recovery actions, and has focused on prosecution of both individuals and corporate entities.

The SFO's 2011 criminal charges and convictions have been individual prosecutions. On February 10, 2011, the chief executive and managing director of Mabey & Johnson Ltd., David Mabey and Charles Forsyth, were found guilty after trial of making illegal payments to Iraq during 2001-02 in breach of United Nations sanctions. The prosecution stemmed from the SFO's investigation of Mabey & Johnson, which pleaded guilty in September 2009 to sanctions violations and bribery offenses. Mabey (who still is named one of Britain's most wealthy people by *The Sunday Times* "Rich List") was sentenced to eight months imprisonment, while Forsyth was sentenced to 21 months. In addition, Richard Gledhill, a Mabey & Johnson sales manager for contracts in Iraq, pleaded guilty and gave evidence for the prosecution. In recognition of his cooperation, Gledhill received a suspended sentence of eight months imprisonment.

In 2011, the SFO also initiated prosecutions against individuals in connection with corruption investigations involving Securrency International Pty. Ltd., Aluminium Bahrain BSC (Alba) and Innospec Limited.

On September 8, 2011, Bill Lowther, a director of the currency paper manufacturing firm Securrency, was charged with corruption. The SFO alleged that in 2003, while Securrency was pursuing a significant bank-note contract in Vietnam, Lowther used his influence to secure an interview at Durham University for the son of the governor of the Central Bank of Vietnam and later used company money to pay for the son's university course fees.

On October 24, 2011, the SFO charged Victor Dahdaleh with corruption, conspiracy to corrupt and money laundering in relation to an investigation of payments to secure contracts with Alba, a smelting company majority-owned by the Bahraini state. On October 21, the Australian Federal Police arrested the former Alba CEO, Bruce Hall, on corruption and money laundering charges. The SFO sought extradition of Hall to the UK and, on December 20, at a court hearing in Sydney, he surrendered to UK jurisdiction.

On October 25 and 27, the SFO announced corruption charges against former Innospec Ltd. executives David Turner, Dennis Kerrison and Paul Jennings. The charges against the former executives stem from the coordinated SFO, DOJ, SEC and Office of Foreign Assets Control investigation of Innospec Inc. and Ltd. that was resolved in March 2010.

With regard to investigation of corporate entities, the SFO has sought to encourage self-reporting and corporate cooperation, following the DOJ's model. Although there were no criminal prosecutions of companies by the SFO in 2011, there have been a number of corporate "civil recovery" (or disgorgement) settlements.

Civil recovery is a procedural settlement where no conviction is entered against the company, but a money sum is payable based on identifiable criminal property obtained by corruption. In 2011, the SFO reached civil recovery settlements with

KBR Halliburton (£7 million), Johnson & Johnson/DePuy Ltd. (£5 million) and MacMillian Publishers Ltd. (£11 million), among others.

The FSA, which has jurisdiction over regulated entities in the financial services sector, has signalled that it will actively enforce existing guidelines requiring controls to prevent bribery or corruption risks, “regardless of whether or not bribery or corruption has taken place.”

The FSA has pioneered a sectoral approach to monitoring and enhancing compliance functions and controls of regulated entities. In 2009-10, the FSA undertook a sectoral review of insurance brokers after evidence obtained in an investigation of Aon Ltd. led the regulator to believe similar practices existed at other firms. On July 21, 2011, the FSA issued a final notice imposing a penalty of £6.895 million on insurance broker Willis Limited relating to inadequate controls over overseas third-party brokers. The final notice stated that Willis had paid approximately £27 million to third-party agents in perceived high-risk jurisdictions, and Willis’ gross commission or brokerage earned in relation to the business secured was approximately £59.7 million. The FSA stated that Willis’ conduct was not deliberate or reckless; instead, the basis for the enforcement action was serious breaches of systems and controls.

The banking sector cannot be far behind in the regulators’ sights. Investigation of manipulation of LIBOR rates and transactions spread to the UK in 2011, and banking relationships with sovereign-wealth funds have been targeted by the SEC with reported assistance from UK regulators.

The UK Bribery Act was not born into an enforcement vacuum but into an already existing and lively enforcement culture populated with three sophisticated regulators. 2011 saw the continued trends of significant penalties for corporate entities and jail terms for individuals. Bribery and corruption are high priorities for all three UK regulators. These officials have relationships with overseas regulators on complex and multijurisdictional cases, most notably the DOJ, as well as Australian law enforcement (for example, in the Securrency and Alba matters). However, perhaps the newest trend is a growing emphasis on compliance guidance in the UK, with all three regulators issuing guidance reflecting their expectations regarding control procedures. Careful study of regulator requirements will pay dividends, as an ounce of compliance may prevent a pound of enforcement action in 2012.

Cross-Border Tax Fraud

In the past three years, the Internal Revenue Service and the DOJ’s Tax Division have initiated a widespread crackdown on cross-border tax evasion by U.S. taxpayers. Most notable was the deferred prosecution agreement that UBS AG entered into with the DOJ and the U.S. Attorney’s Office for the Southern District of Florida in 2009 for conspiring to defraud the U.S. by assisting wealthy taxpayers in avoiding their tax obligations. As part of the agreement, UBS paid a \$780 million fine and disclosed the identities and account information of more than 200 U.S. clients. Subsequent agreements between the DOJ, the IRS, UBS and the Swiss Confederation paved the way for the U.S. authorities to receive information on

approximately 4,450 other accounts. In addition, the IRS recently announced that more than 30,000 taxpayers took advantage of its 2009 and 2011 voluntary disclosure programs, resulting in more than \$2.7 billion in payments to the IRS.⁹ The massive amount of data gained from these disclosures has allowed the DOJ to bring charges against scores of U.S. taxpayers and more than 20 bankers, lawyers and accountants who allegedly serviced them. Press reports have stated that the DOJ is currently investigating 11 Swiss banks suspected of helping U.S. taxpayers evade taxes, and it is no secret that the IRS and DOJ also are examining other traditional tax havens, including those in Europe and Asia. In short, 2012 promises to be another busy year in cross-border tax investigations and prosecutions.

Health Care Prosecution Trends

One of the core themes repeated throughout the Patient Protection and Affordable Care Act is a shift (in part) toward value-based reimbursement measures. While the ultimate rules for many providers are still in flux, the regulations for Accountable Care Organizations (ACOs) provide a glimpse into the future and point to the concerning possibility that law enforcement efforts will focus on reporting of quality measurements that are difficult to achieve with precision.

ACOs are structured to incentivize providers to continue delivering the same care delivered today but at lower cost. If an ACO, through its organizational structure, achieves a certain level of cost reduction, the Centers for Medicare and Medicaid Services (CMS) will, through a complex formula, share a portion of those increased savings with the ACO. Cost reduction, the premise goes, can be achieved by delivering care in a smarter way that results in lower overall cost. Active management of the entire course of treatment, it is believed, can achieve cost reductions without sacrificing the quality of care.

But, there is, of course, a catch. Simply reaching the cost reduction benchmark will not qualify the ACO for a share of the savings. To even be eligible for a share in the cost savings, the ACO must first satisfy a series of CMS-selected "quality performance requirements." These measures must be designed by CMS "to determine an ACO's success in promoting the aims of better care for individuals, better health for populations, and lower growth in expenditures." While important concepts, these requirements are not matters capable of precise measurement. Nevertheless, the regulations require the ACOs to self-report their achievements on these measures; failure to "report quality measure data accurately, completely and timely (or to timely correct such data)" exposes the ACO to sanctions. The ACO that achieves substantial cost reductions through proactive patient management may only share in the savings generated upon achievement of the quality standards.

Similar quality measures and CMS measurement with attached financial incentives already exist for some providers. For example, health maintenance organizations already receive a numbered "star" rating from the CMS on various quality standards. In future years, achievement by the HMO of a minimum number of "stars" will earn the business a financial reward.

⁹ <http://www.irs.gov/newsroom/article/0,,id=245768,00.html> (Sept. 15, 2011).

“Quality, like every other aspect of the provider’s business, will be expected to contribute its share to the business’ bottom line.”

In short order, quality achievement and, equally important, quality measurement and reporting, will be viewed within provider management as contributors to revenue. Goals will be established, and the attendant pressure to meet those goals will mount. Quality, like every other aspect of the provider’s business, will be expected to contribute its share to the business’ bottom line. In tight times, and especially at fiscal year-end, quality will be expected to help the business meet its revenue targets. Indeed, by that point, the only real source of additional potential revenue, and the difference between a good year and a bad one, may be the boost generated by achieving a quality benchmark.

Bluntly stated, quality will be tied to generating government revenue rather than to ensuring certain levels of care. Quality managers will have two goals: achieve quality and achieve quality revenue. These goals, in the heat of the business moment, will conflict. Inexorably, errors and worse will occur in the reporting on quality measures. Inevitably, the government will commence criminal investigations on quality measurement reporting deviances. Law enforcement will recognize the profit incentive facing the business’ quality managers. Errors will be viewed with a jaundiced eye and ultimately prosecutions will ensue.

This trend toward prosecution could prove to be a troubling turn for society and for law enforcement. While some quality measures will be capable of precise measurement, many will be inherently fuzzy. Law enforcement, similarly subject to pressures to “produce,” will hunt for measurement-reporting deviances and will push hard to determine whether the deviance was the product of genuine error or deliberate malfeasance. Where the judgment is in the margin, prosecutions will ensue with the law-enforcement-safe conclusion: Let the jury decide.

Budget Constraints

The DOJ operated under a general hiring freeze in 2011, which prevented the department from filling various law enforcement openings, including those for investigators and prosecutors. Given that the DOJ is predicting that “budget conditions [are] unlikely to improve in the immediate future,” the hiring freeze may extend into 2012, and cuts may need to be made to various programs and priorities.¹⁰ Despite its budget woes, we think it is unlikely that the DOJ — or state and local prosecutors facing similar budget pressures — will withdraw funding or shift its focus from (relatively) resource-intensive white collar prosecutions, as such cases are politically popular, raise the profile of the DOJ and generate revenue through fines, forfeitures and disgorgements.

We believe the 2012 elections also could impact certain programmatic choices at the DOJ. If President Obama is reelected, the DOJ and U.S. attorney’s offices are likely to maintain their focus on existing policies and priorities, even if there is some natural turnover in DOJ leadership and U.S. attorneys after the election. However, if the Republican candidate wins, we may see a “rush to the exits” among political appointees, which may result in a slower pace of investigations

¹⁰ Assistant Attorney General Lanny A. Breuer, remarks at *The American Lawyer / National Law Journal Summit* (Nov. 15, 2011).

and delays in the effectuation of existing policies, as the DOJ will begin to prepare for the transition to a new administration with its own law enforcement priorities.

Compliance Programs

New laws and regulations to address areas of perceived financial and corporate wrongdoing over the last few years, along with harsher prosecutions and penalties for compliance failures, have made existing policies, procedures and internal controls that ensure compliance increasingly important to companies.

The DOJ's Principles of Federal Prosecution of Business Organizations and recent amendments to the Federal Sentencing Guidelines for Organizations make clear that companies with effective compliance programs are eligible for substantially reduced penalties. While prosecutors have been reluctant to bring criminal charges against companies in the past — preferring to settle such matters out of concern for potentially dramatic collateral consequences — there is a growing chorus of commentators, prosecutors and judges arguing that “mere” settlements are not sufficiently deterring corporate wrongdoing. For example, U.S. Attorney Preet Bharara (S.D.N.Y.) has stated that “we should not be telling any institution that it is too big to be prosecuted” and “if an institution is so fragile that the mere issuance of a subpoena or performance of a court-authorized search might destroy the entire business, then it is incumbent on that business to be even more careful and more scrupulous than everyone else.”¹¹

Companies with effective compliance programs have a much easier time convincing prosecutors that an instance of misconduct was aberrational and any indictment of the company would not be an appropriate outcome. Companies that promptly investigate and report potential criminal misconduct similarly find themselves in a much better position under the sentencing guidelines, which the DOJ uses as a reference point when negotiating settlements. Being able to point to a top-flight compliance program also has proven to be an effective way to convince prosecutors conducting industrywide investigations through subpoenas and informational requests that their resources and attention could be better spent elsewhere.

Class Action Outlook

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In 2011, the U.S. Supreme Court breathed new life into the commonality requirement for class certification and tightened requirements for Rule 23(b)(2) injunctive relief classes in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and upheld the enforceability of class action waivers in consumer arbitration agreements in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Federal courts also continued to recognize that injury and causation requirements pose substantial hurdles to class certification and other forms of aggregate litigation under RICO and most states' consumer fraud laws. In 2012, we will see whether *Dukes* spells the demise of employment and consumer class actions that purport to seek injunctive relief — and whether it has the effect of ratcheting up Rule 23(b)(3)'s

¹¹Preet Bharara, U.S. Attorney for the Southern District of New York, remarks at the CUNY School of Journalism, New York Financial Writers Association (June 6, 2011).

predominance requirement. We also can expect more efforts by plaintiffs' counsel to team up with attorneys general to bring *parens patriae* suits as class certification standards become stricter. At the same time, we also may see additional class actions in states that have adopted loose causation standards, including Missouri, California and Florida.

- **Will the Impact of *Dukes* Extend Beyond Employment Class Actions?** Based on early returns, *Dukes* is having a significant impact not only on employment class actions, but also on consumer fraud, product liability and even medical monitoring cases. Courts are paying attention to the Supreme Court's pronouncement that there must be "some glue" that holds the class together — *i.e.*, a "common answer to the crucial question" at issue in the suit — for commonality to be satisfied. *Dukes*, 131 S. Ct. at 2552. Indeed, this is fast becoming the sound bite of *Dukes*. Similarly, courts and plaintiffs in employment cases have been backing away from Rule 23(b)(2) as a vehicle for certifying claims seeking backpay. In 2012, we also will see: (1) whether the Court's reinvigorated commonality requirement will translate into a heightened standard for predominance — the requirement that common issues predominate in monetary-damages class actions under Rule 23(b)(3); and (2) whether *Dukes* has sounded the death knell for class actions seeking both injunctive and monetary relief under Rule 23(b)(2).
- **Will Class Action Waivers Become Standard in Consumer Arbitration Agreements?** In *Concepcion*, the Supreme Court held, by a vote of 5-4, that class action waivers in consumer arbitration agreements are enforceable and that state laws deeming such waivers unconscionable are preempted by the Federal Arbitration Act. In so holding, the Court reasoned that "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The *Concepcion* decision paves the way for wide use of such agreements, leading many to ask whether the ruling will mark the end of consumer class actions. Will efforts be made to extend arbitration to the full range of consumer goods or to products, such as prescription drugs, that frequently spawn lawsuits? In the end, *Concepcion* likely will be limited by the practicality of obtaining waivers for mundane consumer transactions; nonetheless, its potential impact cannot be underestimated.
- **Will Growing Skepticism of 'No Injury' Lawsuits Continue?** At the end of 2010, we noted that causation continues to pose a significant obstacle to class actions in federal court. While that trend continued in 2011, some courts have gone even further, asking whether theoretical losses can satisfy the injury prong of various statutory and common-law causes of action. In *Ironworkers Local Union 68 & Participating Employers Health & Welfare Funds v. AstraZeneca Pharmaceuticals*, 634 F.3d 1352 (11th Cir. 2011), for example, the Eleventh Circuit affirmed the dismissal of claims by plaintiff health benefit plans against a pharmaceutical manufacturer under various states' consumer protection laws. According to the court, a plaintiff "suffers no economic injury merely by being prescribed and paying for a more expensive drug."

- **More Consumer Fraud Class Actions in California, Florida and Missouri?**

Although many California courts appeared in 2010 to be on the road to adopting meaningful causation requirements in consumer class actions, the Ninth Circuit took several steps backward when it recently held “that relief under the UCL” — one of California’s most popular consumer protection statutes — “is available without individualized proof of deception, reliance and injury.” *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 2011 WL 3659354, at *5 (9th Cir. 2011) (internal quotation marks and citation omitted). Florida and Missouri have similarly applied loose causation standards, allowing courts to presume causation on a classwide basis, even if the actual class members had different motivations for purchasing a product. But with more defendants willing to take consumer class actions to trial, and few — if any — plaintiff verdicts at the end of expensive trials, the attraction of the plaintiffs’ bar to such cases may diminish significantly.

Product Liability: Issues to Watch in 2012

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The primary targets for product liability claims in 2012 are many of the same targets as in 2011: those who make medicines and medical devices, the food and beverage industries, the automotive industry and the consumer electronics industry, as well as companies associated with asbestos-containing products. Issues of importance to watch include:

- **Preemption** — After the Supreme Court recently held that federal regulation of generic pharmaceuticals preempts state law requirements in *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), plaintiffs will continue to describe various claims — such as express warranty claims — as not imposing state law requirements, but rather enforcing voluntarily adopted standards. Outside of suits over generic medicines, plaintiffs will continue to argue that their state law claims are merely co-extensive with federal regulation and thus not preempted. The challenge for defendants — from food suppliers to tire manufacturers — will be demonstrating an actual conflict between state law and federal regulation.
- **Personal Jurisdiction** — Because the Supreme Court could not amass a majority to agree on a standard for personal jurisdiction besides stream of commerce in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), courts will continue to differ on whether simply placing a product into the stream of commerce with knowledge that it may end up in the United States can, without more, subject a foreign manufacturer to personal jurisdiction in a particular state.
- **The Boundaries of Strict Liability** — In the case of prescription products, plaintiffs will continue to try to cast their claims as “design defects” to get around the learned intermediary defense to failure-to-warn claims, despite the fact that most courts hold that there can be no design defect theory for unavoidably unsafe products such as medicines. In consumer product cases involving alleged design defects, plaintiffs increasingly will invoke a “malfunction theory” to avoid having to prove a feasible alternative design and to create a presumption of defectiveness intended to shift the burden of proof.

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- **Economic Loss Doctrine** — As plaintiffs continue to sue for “unmanifested” defects and seek recovery for “diminished value” and “lost expectations,” expect courts to reinvigorate the economic loss doctrine to dismiss such claims, at least where risks of product failure are addressed in the warranty.
- **Global Warming** — Because the Supreme Court only addressed the federal law issues in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), lawsuits seeking to hold product manufacturers and energy suppliers liable for the effects of global warming under state law public nuisance theory will continue, with standing, “remoteness,” proximate cause and the political question doctrine being strong defenses to liability.
- **First Amendment** — From tobacco to telephones, 2011 was a year for testing the limits of what the government could force product sellers to say about their products. 2012 will see appellate courts grapple with the commercial speech rights of product sellers and the right not to be forced to convey a government message where there are other methods of achieving the government’s purpose.

Intellectual Property and Technology: Update on Patents, Copyright, Cybersquatting, Global Domain Name Systems and E-Commerce

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Patent Issues to Watch in 2012

In September 2011, Congress passed and President Obama signed into law the most comprehensive revision to United States patent law since the 1950s. The America Invents Act sought to tackle an aggressive agenda, including increasing harmonization of the U.S. patent acquisition process with the rest of the world, attempting to relieve the ever-increasing burdens on a cash-strapped U.S. Patent and Trademark Office (PTO), and addressing perceived abusive patent litigation practices. Some provisions took effect immediately, with the more sweeping changes phasing in over the following two years. As such, 2012 promises to be an important year in the development of policy and practice under the act. Issues of particular importance will include:

- The America Invents Act changes U.S. patent practice from a “first-to-invent” system to a “first-to-file” system, meaning the first entity to file a patent application will be recognized as the inventor regardless of whether another can demonstrate that he or she was actually the first to invent the subject matter of the patent application. The new U.S. system still differs from other major global patent systems in a number of important ways. Principal among these is that the new U.S. system will allow a grace period such that an inventor who makes certain disclosures of the invention will not lose patent rights if he or she files a patent application within one year of the public disclosures. This difference has led many practitioners to refer to the new system as a “first-to-disclose” system rather than a “first-to-invent” system, as the first entity to make a public disclosure of an invention will be the only entity entitled to seek patent protection on that invention. While the transition to a “first-to-file” system will not be fully implemented until March 2013, patent application strategy will change immediately in preparation for the transition.
- Those wishing to challenge the validity of pending and issued U.S. patents now will have multiple avenues to do so without engaging in costly litigation.

Beginning in September 2013, the PTO will conduct post-grant review proceedings within nine months of a patent's issuance based on a showing that certain types of prior art "more likely than not" raise an issue of patentability. Alternatively, patent challengers will have the option of an *inter partes* review process, which replaces the *inter partes* reexamination process and offers advantages in terms of a reduced initial threshold of proof, the availability of limited discovery and less Draconian estoppel provisions. The America Invents Act provides a range of other challenge procedures, such as (1) supplemental examination, which may help patent holders preempt claims of inequitable conduct, (2) derivation proceedings, in which a party can seek to establish that an invention was effectively stolen and patented by another, and (3) enhanced mechanisms by which members of the public may bring prior art to the attention of the PTO before a patent issues.

- Several provisions of the America Invents Act that have already gone into effect address patent litigation practices that were widely attacked as abusive and anti-competitive. In particular, "false marking" suits have been substantially curtailed, the bar has been raised for bringing multiple defendant patent infringement suits, and the relevance of opinion-of-counsel letters in the context of willful infringement has been clarified to reflect Federal Circuit jurisprudence. On balance, these litigation-related provisions tend to protect corporate defendants, especially from the burden of suits brought by "patent trolls."

In addition to long-awaited action by Congress on patent reform, the U.S. Supreme Court remains highly active in the patent area, with decisions in several cases expected in 2012. While none of these cases will have the far-reaching implications of recent landmark decisions like *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), and *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), the steady stream of patent decisions emanating from the high court is indicative of the increasing importance of patent rights in the modern economy. Decisions in the following cases are expected in 2012:

- ***Mayo Collaborative Services v. Prometheus Labs., Inc.***: Argued on December 7, 2011, this case involves the patentability of a method of optimizing the efficacy of drug dosage by: (1) administering a drug, (2) observing the level of the drug in the patient, and (3) altering the next dosage level based on observed correlations between the blood test results and patient health. The petitioner is arguing that the claims are unpatentable because they preempt all uses of this naturally occurring correlation. The decision should provide the patent community with much needed guidance on the patentability of medical diagnostic and treatment processes.
- ***Caraco Pharmaceutical Labs, Ltd. v. Novo Nordisk A/S***: This case asks the Supreme Court to resolve whether a generic drug company sued for patent infringement under the Hatch-Waxman Act may counterclaim, alleging that the U.S. Food and Drug Administration's "use code" corresponding to a drug is overbroad. A decision in favor of the petitioner, Caraco, would add a powerful arrow to the quiver of companies seeking to introduce lower-priced generic drugs in the face of patent-protected branded drugs.
- ***Kappos v. Hyatt***: In this case the Supreme Court will address actions brought by patent applicants pursuant to 35 U.S. Code Section 145. Sitting *en banc*,

“ [T]he U.S. Supreme Court remains highly active in the patent area, with decisions in several cases expected in 2012. ”

the Federal Circuit previously held that in these actions a patent applicant may present new evidence to the district court that could have been, but was not, presented to the PTO. It further held that any factual determinations that are impacted by that evidence are to be made without deference to the PTO. This decision will shed light on the role of federal district courts in appeals from the PTO at a time when the America Invents Act is poised to provide direct appeals to the Federal Circuit (eliminating recourse to district courts) in certain contexts.

Finally, the Federal Circuit will address the issue of joint infringement in two cases in which it has granted *en banc* review, *Akamai Technologies, Inc. v. Limelight Networks, Inc.* and *McKesson Technologies Inc. v. Epic Systems Corp.* In recent years questions have arisen as to whether, and under what circumstances, a patent owner may prove infringement where multiple actors are involved in a single act of infringement, *e.g.*, by carrying out separate steps in a process. The Federal Circuit's first ruling in *Akamai* analyzed the issue of joint infringement as a question of agency law, requiring either an agency relationship or contractual obligation between the joint infringers. The court followed the same reasoning in *McKesson*. These rulings continued the Federal Circuit's trend in recent years toward limiting the ability of patent holders to bring joint infringement claims.

The Impact of *Viacom International, Inc. v. YouTube, Inc.*

In October 2011, the Second Circuit heard oral argument on an appeal from a 2010 district court decision, *Viacom International, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), in which Viacom and other copyright owners sued YouTube, Inc., YouTube LLC and Google (collectively, YouTube) for direct and secondary copyright infringement. Viacom and the other copyright owners claimed that YouTube assisted in distributing copyrighted material uploaded on its website without the permission of the copyright owners. YouTube moved for summary judgment, arguing that it was entitled to the Digital Millennium Copyright Act's 17 U.S. Code Section 512(c), "safe harbor" protection. More than two dozen *amici* briefs were filed with the Second Circuit in the appeal, and a decision in this closely watched case is expected in the spring.

The district court granted summary judgment for YouTube, finding that it qualified for the safe harbor. The court explained that, to qualify, a service provider (such as YouTube) must promptly remove infringing material when it knows of specific instances of infringement or is aware of "red flags." General knowledge, the court held, was not enough to impose a duty on a service provider to monitor or search its service for instances of infringement. Because YouTube removed all material that it was given notice of — including all of Viacom's complaints — it qualified for the safe harbor, despite overwhelming evidence that YouTube was aware of the rampant copyright infringement occurring on its website. In so holding, the court placed the burden on the copyright owner to police a service provider's website for its own content rather than require a service provider to do so.

On appeal, the plaintiffs argued that the decision should be reversed. Although, as noted, oral argument is complete, on October 25, 2011, the Second Circuit posed two additional questions to the parties. The first question focused on "red flag" knowledge and its relationship to "specific knowledge." The second question

focused on YouTube's practice of syndicating videos to third parties and whether this falls outside the safe harbor's protection. Accordingly, although the Second Circuit's decision likely will not come for months, these questions may provide some insight into the court's thinking.

Cybersquatting

Most organizations and senior executives generally are aware of the risks posed by the unauthorized registration of infringing Internet domain names. However, the activation of the ".co" country top-level domain provides a new mechanism for cybersquatters to interfere with global business operations — registering a .co domain name for the purpose of intercepting confidential business e-mails intended for a ".com" recipient.

Although the ".co" extension is the top-level domain for the country Colombia, there is no requirement that the domain name registrant reside or conduct business in Colombia. As a result, anyone (including cybersquatters) can register a .co domain name. In one recent case Skadden handled, an individual who formerly worked for an international corporation registered nearly one dozen ".co" domain names that were identical to the company's ".com" domain names. The domain names were registered to capitalize on mistakes where a sender mistyped and inadvertently omitted the "m" in a ".com" e-mail address. The individual attempted to extort a substantial sum for the transfer of the domain names and return of the intercepted e-mail communications.

The remedial measures available to companies victimized by unauthorized .co cybersquatting vary based on the specific facts and circumstances of each case. First, all registrants of the ".co" domain name consent to submit to an administrative proceeding commenced pursuant to the Uniform Domain Name Dispute Resolution Policy (UDRP), which provides for written submissions and the resolution of a domain name dispute in approximately 60-90 days. Although UDRP proceedings ensure a forum in which a rights holder can present its claim, immediate injunctive relief is not available, and the several-months-long decision process may not offer a sufficiently expeditious resolution where a cybersquatter is intercepting confidential business communications.

Second, companies may be able to invoke the *in rem* provisions of the Anti-cybersquatting Consumer Protection Act (ACPA), 15 U.S.C. §1125(d), which provides aggrieved rights holders with the ability to commence a federal court action and seek relief on an expedited basis. The ACPA is available, however, only in cases in which the infringing domain name was registered through a domain name registrar based in the United States. Accordingly, a cybersquatter who plans ahead and registers the infringing domain name using a non-U.S. registrar can altogether avoid jurisdiction in the United States. Additional legislation may be required to address this limitation of the ACPA.

As a precautionary measure, to limit their risk and exposure in this area, companies should research the registration status of any ".co" domain names similar to domain names used in the regular course of business and, if available, register the ".co" version to prevent potential cybersquatting.

Global Domain Name Systems

On June 20, 2011, the Internet Corporation for Assigned Names and Numbers (ICANN), the organization responsible for coordinating the global domain name system, approved a plan to rapidly increase the number of available “top-level” domains (TLDs). This change could impact the way companies brand themselves on the Internet dramatically by allowing companies to use their brand name (*i.e.*, “[brand]”) as the top-level domain instead of the ubiquitous “[brand].com.” The new plan therefore presents unique opportunities and a new set of challenges for companies exploiting and protecting their marks in the online environment.

Generic top-level domains (gTLDs) are the commonplace strings at the end of domain names (such as .com, .net, .info and .tel) and are subject to control by ICANN. In fact, ICANN previously has allowed only a very few new gTLDs (such as .biz, .info and .name). However, in June ICANN announced that it will authorize potentially 1,000 or more new gTLDs. For brand owners, a flood of new gTLDs will present new opportunities and challenges for projecting and protecting their brands online. Brand owners accordingly will have to decide whether or not to register their own marks as gTLDs and will have to monitor the application process of other entities to prevent misuse of their marks.

In addition, brand owners will have to consider the significant cost associated with the new gTLDs. The applicant for a gTLD will have to pay ICANN a \$185,000 application evaluation fee and an annual fee, as well as pay fees to technical service providers. Applicants also likely will need to engage accountants and technical service providers for support, which as a practical matter will increase the cost of registering and maintaining a gTLD.

Because only one application for any particular gTLD can be registered, there likely will be cases where more than one application is filed for the same string. ICANN has proposed resolution procedures to determine which application should prevail, but if a resolution is not reached pursuant to such procedures then ICANN will auction the string to the highest bidder among the contending applicants. Given the public notice and objection period for gTLDs, trademark owners should closely monitor the gTLD application process and be prepared to file such objections.

At a minimum, ICANN has mandated that all gTLD applicants implement the following trademark protection mechanisms when they launch their gTLDs:

- A “sunrise” policy, under which trademark owners (including owners of unregistered trademarks under certain circumstances) may register their marks as domain names before the gTLD is opened to the public; and
- A “trademark claims service,” which will provide notice to domain name registrants of rights in particular words, phrases or other marks claimed by trademark holders, and notice to trademark holders of domain name registrations that may infringe those rights.

Because each gTLD likely will have different launch dates, eligibility requirements and challenge periods, trademark owners will need to work diligently to protect their brands across the various new gTLDs.

ICANN has indicated that it plans to accept applications for new gTLDs from January 12 to April 12, 2012. Interested parties should bear in mind, however, that ICANN's plans for launching a new gTLD application process have been in development for years and have been subject to a number of delays.

Brand owners considering filing an application should begin their preparations to do so. The application itself is long and will require a substantial amount of information that will take time to gather. Potential applicants also should engage technical service providers, accountants, attorneys and other external advisers as soon as possible. As noted above, whether or not trademark owners seek to file a gTLD application for their own marks, they should closely monitor the application process to see whether other applications were filed for any strings that potentially infringe their marks and keep abreast of the various trademark protection mechanisms being proposed by new applicants.

E-Commerce Update: Businesses Attacked on Two Fronts: Government and Consumer Actions

Litigation by taxing authorities against e-commerce companies did not diminish in 2011 and is expected to propagate in 2012, as taxing authorities continue to search for additional sources of revenue. For example, taxing authorities nationwide continue to assert claims against online travel service companies for alleged failure to collect and remit hotel occupancy tax from customers for their online travel services. A number of such cases were resolved on the merits in 2011, including *St. Louis County v. Prestige Travel, Inc.*, No. SC91228 (Miss. June 28, 2011), and *City of Houston v. Hotels.com, L.P.*, No. 14-10-00349-CV (Tex. App. - Houston [14th Dist.], Oct. 25, 2011), in which each court ruled in favor of the online companies and determined the companies did not operate hotels and did not receive compensation for the occupancy of hotel rooms. However, due to variation in the applicable tax statutes, courts have not unanimously ruled in favor of the online travel companies (cf. *Village of Rosemont v. Priceline.com Inc.*, Case No. 09-cv-0448, at 2 (N.D. Ill. Oct. 14, 2011) (holding online companies liable because they receive consideration for the rental of a room), and taxing authorities are expected to continue to pursue such claims. Several taxing authorities, including New York state and New York City, North Carolina, Minnesota and the District of Columbia, have amended their relevant tax statutes to aid in that pursuit.

Taxing authorities also continued their efforts to impose sales tax on nonresident e-commerce companies. Six states passed laws intended to extend sales tax obligations liability to e-commerce companies in 2011: Arkansas, California, Connecticut, Illinois, Texas and Vermont. In response, e-commerce companies are changing their corporate practices to avoid triggering an obligation to collect and remit sales taxes under the newly enacted laws. Such changes include relocating employees from those states and ending relationships with suppliers in those states. Additionally, e-commerce companies are filing legal challenges to such laws. For example, in *Amazon.com LLC v. New York Department of Taxation & Finance*, Index No. 601247/2008 (N.Y. Sup. Ct. filed July 10, 2008), Amazon is challenging the application of New York's sales tax but complying with the law

pending a final resolution of the case. Finally, some large, national e-commerce companies are lobbying for a federal standard for the collection of state sales taxes on Internet purchases to avoid operational difficulties stemming from compliance with a patchwork of differing state laws.

Consumers continue to pursue cases against e-commerce companies relating to the practice of “up-selling.” Beginning in 2009, Vertrue, LLC and its affiliates, which offer online membership programs that provide discounts and savings on products and services in areas such as safety, privacy, entertainment and credit, were sued under various states’ consumer protection statutes. In general, various plaintiffs alleged that Vertrue, its affiliates and/or others doing business with Vertrue engaged in unfair business practices and committed false advertising through their use of post-transaction Internet marketing. To date, one such action asserting claims on behalf of a putative class was dismissed with prejudice by the U.S. District Court for the Central District of California, which ruled that the company’s Web pages were not deceptive as a matter of law. In addition, one of Vertrue’s affiliates — FreeScore — also was sued under the Credit Repair Organizations Act in the U.S. District Court for the Central District of California. That case also was dismissed on the basis that FreeScore is not a “credit repair organization” and thus not subject to the law’s requirements. In December 2010, the Restore Online Shoppers’ Confidence Act was signed into law, prohibiting unfair and deceptive Internet sales practices (including up-selling), granting the Federal Trade Commission enforcement authority and authorizing state attorneys general to sue for injunctive relief in federal courts. While the act did not result in a large number of actions in 2011, litigation stemming from the act can be expected, as its enactment signals increased interest in consumer protection enforcement.

Government authorities also have sought to protect consumers against alleged unfair and deceptive practices by e-commerce companies. As an example, the U.S. Department of Transportation entered into a consent order with Orbitz Worldwide, LLC regarding alleged violations of the advertising requirements specified in 14 C.F.R. Part 399, as well as 49 U.S.C. §41712. The alleged violations stemmed from an advertisement on Orbitz’s home page that did not provide the required information on taxes and fees, including a statement regarding the nature and amount of the taxes and fees. The consent order directed Orbitz to cease and desist from future violations and assessed a civil penalty of \$60,000.

In addition to such direct efforts, government authorities at the state and local levels have partnered increasingly with private counsel (often on a contingency-fee basis) to enforce consumer protection laws and tax laws. The partnerships have increased the number and scope of actions by removing the out-of-pocket cost component of enforcement. Cases that involve the participation of such counsel include the hotel-occupancy tax cases being pursued against online travel companies.

Globalization of Antitrust Litigation and Enforcement Continues

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The trend toward ever-increasing convergence in international antitrust enforcement will continue in 2012. Another important possible trend is the extension of global antitrust enforcement to private antitrust actions, particularly in the European Union (EU). The European Commission (EC) is currently considering the hundreds of comments it received in response to its April 2011 consultation on collective redress by private parties in the EU and/or its member states.

Below, we discuss the possible trend toward the globalization of private antitrust litigation. We then turn to some of the most notable recent developments in U.S., EU and global antitrust enforcement. The clear import of the trend toward globalization in both private litigation and antitrust enforcement is that antitrust strategy in dealing with enforcement and litigation issues must be considered in a global context.

An Incipient Trend: Globalization of Private Antitrust Litigation

There can be no dispute that the links in the global economy have become inextricably intertwined. As myriad industries have grown more global, so too has the private plaintiffs' bar, particularly in the EU and certain of its member states. Private antitrust actions are no longer limited to the United States but have begun to be filed internationally. This is a particularly important trend to watch, because as antitrust litigation becomes more global, antitrust litigation strategy must be considered — and coordinated — in a more global context.

Antitrust/competition litigation is becoming increasingly common in Europe. Private plaintiffs have filed or continued to pursue a number of actions in European national courts. The most notable examples include cases involving National Grid (UK), Pfeleiderer (Germany) and AF-KLM (Netherlands). Cartel Damage Claims (CDC), a Brussels-based group of companies recently established and specializing in the purchase, preparation and pursuit of damage claims resulting from the infringement of European and/or national antitrust laws, has filed follow-on damage claims in various EU member state courts on the basis of decisions finding cartels in the cement, hydrogen peroxide, sodium chlorate and paraffin wax markets.

Of particular note is that the EC has continued to consider whether and what type of system of collective redress would be appropriate for the EU and/or its member states. Previously, the EC has considered this issue in a Green Paper (2005) and a White Paper (2008), and renewed its consideration in 2011 when it issued a consultation on collective redress. The EC has expressly and repeatedly stated that it does not wish to import the U.S.-style class action industry. The devil, however, is in the details, and the U.S. plaintiffs' bar and others are pushing hard for a system that effectively could have many of the attributes of the U.S. system. The EC currently is considering the more than 300 comments received in response to its collective redress consultation and is expected to propose a directive pertaining to collective redress, among other matters, in June 2012.¹² The EC's views on collective redress

¹² Skadden's Antitrust Group was among those submitting comments to the European Commission regarding its 2011 collective redress consultation. Response to Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, April 30, 2011, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/skadden_en.pdf.

“While antitrust litigation has had years to mature in the United States, emerging case law in ... new jurisdictions may cause unexpected results as “wrinkles” are ironed out and case law is developed.”

will shape private antitrust litigation, but private plaintiffs are pushing ahead without awaiting those views. Thus, antitrust litigation and antitrust litigation strategy also must be considered globally, regardless of how the details play out.

While antitrust litigation has had years to mature in the United States, emerging case law in these new jurisdictions may cause unexpected results as “wrinkles” are ironed out and case law is developed. In fact, there are a number of areas where the current lack of clarity and/or uniformity may affect not only litigation results and damages exposure in Europe (such as differences in availability of the “pass on” defense and joint-and-several liability), but also may have consequences for parties in U.S. litigation, *e.g.*, in relation to discoverability of leniency documents and claims of privilege.¹³ EU and/or EU member state legislative initiatives likely will develop to address imbalances resulting from the inherently fragmented way in which these issues are addressed through case law, but these initiatives may not take effect for some time.

Globalization is playing an increasingly important role even within the context of U.S. litigation. The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) 15 U.S.C. § 6a, which limits the extraterritorial reach of antitrust laws, again was an area of focus in antitrust law this past year. The FTAIA has generally stood as a barrier to plaintiffs recovering for foreign injuries based on foreign conduct. The U.S. Supreme Court’s seminal decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), was helpful in protecting defendants against overreaching by private plaintiffs and in promoting international comity.

In 2011, the pendulum may have started to swing back in a more pro-plaintiff direction. Some courts, such as the Third Circuit in *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), have now interpreted the FTAIA to be simply a substantive element of a Sherman Act claim rather than a jurisdictional limitation on the courts. This could have important ramifications in certain litigations because, rather than facing a jurisdictional attack early in the litigation, a plaintiff may be able to jump the FTAIA hurdle by adequately pleading a “plausible” claim and forcing at least some discovery.¹⁴ There is now a significant circuit court split, which makes a case such as *Animal Science* ripe for review by the U.S. Supreme Court.¹⁵

U.S. Antitrust Enforcement

In August 2011, Sharis Arnold Pozen became acting assistant attorney general in charge of the DOJ’s Antitrust Division, replacing Christine Varney, who returned to private practice. Pozen served as a key deputy to Varney since the early days of the Obama administration and can be expected to continue to look for opportunities to reinvigorate antitrust enforcement, including convergence with positions taken by

¹³See, *e.g.*, Skadden Client Alert, National Grid: Disclosure of EC Leniency Materials at Stake, Nov. 29, 2011, available at <http://www.skadden.com/Index.cfm?contentID=51&itemID=2601>.

¹⁴The pleading standards are still being guided by *Twombly* and *Iqbal* and continue to be refined as more cases apply the “plausibility” standard. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹⁵On January 5, 2012, China Minmetals filed a petition for a writ of certiorari to the U.S. Supreme Court. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), petition for cert. filed, (U.S. Jan. 5, 2012) (No. 11-846). China Minmetals is represented by Skadden.

the Federal Trade Commission (FTC) — where Jon Leibowitz continues as chairman — and international enforcement. Of note on the U.S. antitrust enforcement front:

- The DOJ brought an action in federal court seeking to block AT&T's proposed acquisition of T-Mobile.¹⁶
- The DOJ and FTC updated their Horizontal Merger Guidelines, which were last overhauled in 1992. (See "Global M&A/Global Antitrust Enforcement in M&A Transactions.") The guidelines, which are more evolutionary than revolutionary, deemphasize the role of relevant market definition. In federal district court, the DOJ applied the new guidelines in successfully seeking to block H&R Block's proposed acquisition of TaxACT.
- The FTC has continued to challenge so-called "reverse payment" patent settlements between branded and generic pharmaceutical companies, both in court and through vociferous support of proposed legislation in Congress that would outlaw certain reverse payment settlements.
- The Antitrust Division continues its efforts to enhance its litigation capabilities, announcing in November 2011 its plans to hire a new director of litigation to oversee the agency's actions in court.

EU Competition Law Enforcement

The ongoing financial challenges facing the EU, such as those in Greece, Italy and Ireland, did not slow down the EC's enforcement of the competition laws last year:

- The EC took various antitrust actions in relation to financial services, including (i) unannounced inspections relating to an alleged collusion in the market for derivatives products linked to the Euro Interbank Offered Rate (Euribor) in October, (ii) the opening of formal investigations into the standardization process for payments over the Internet ("e-payments") in September, and (iii) the opening of two antitrust investigations relating to the credit default swaps (CDS) market in April.
- The EC also opened two additional investigations into "reverse payment" patent settlements between branded and generic pharmaceutical companies, increasing the total number of pending "reverse payment" investigations in the pharmaceutical sector to four. It is anticipated that the EU will formally bring charges in one or more investigations in 2012, following the FTC's position in relation to reverse payment settlements. This is a good example of convergence.

Against the backdrop of the increasing number of successful challenges of EC decisions before the EU courts, the EC in October 2011 also issued a "best practices" staff working paper in relation to antitrust proceedings. The best practices are directed at increasing the transparency of EU antitrust proceedings through, among other things, a strengthening of the role of the EC hearing officer, earlier and more frequent meetings with the EC case team, and potentially wider and earlier access to documents in the EC's file for defendant companies.

¹⁶ Skadden represented Sprint in a related case opposing the proposed acquisition. On December 19, 2011, AT&T announced it was abandoning the transaction.

International Litigation and Arbitration: Upcoming Supreme Court Cases and Arbitration Claims Against Sovereigns

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Global Cartel Enforcement

2011 saw no let-up in cartel enforcement around the globe, with close cross-border cooperation among enforcement agencies. Examples include continuing enforcement targeting airlines, freight forwarders, power cable producers, and manufacturers of color display tubes and thin film crystal transistor liquid displays. The Brazilian antitrust authority in particular has touted its intent to enforce its competition laws in relation to international cartels.

Companies must remain vigilant in 2012 and beyond to ensure that employees are not engaging in collusive behavior with competitors. In this regard, in November 2011 the EC released a brochure providing guidance on antitrust compliance, particularly designed for smaller companies lacking the resources to develop their own compliance programs.

Kiobel and *Mohamad*: U.S. Supreme Court to Consider Corporate Liability in Cases Involving Alleged Human Rights Abuses in Foreign Countries

During its current term, the U.S. Supreme Court will hear two cases that may have far-reaching implications for corporations doing business in politically volatile regions. In these cases, the Supreme Court will decide whether corporations can face claims for damages based on accusations that they violated international law in foreign countries.

The Alien Tort Claims Act, or Alien Torts Statute (ATS), enacted in 1789, vests U.S. federal courts with jurisdiction to hear claims for wrongs understood to be a violation of international law. See 28 U.S. Code Section 1350. The scope of the 200-year-old ATS was further refined by a Second Circuit decision in 1980 (*Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), which held that the ATS conferred jurisdiction on U.S. courts to hear certain claims by foreign citizens against defendants charged with violations of modern-day “customary international law”) and a 2004 U.S. Supreme Court decision (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which ruled that the ATS was intended to permit claims only for wrongs based on “a norm of international character accepted by the civilized world and defined with ... specificity”).

In the ensuing years, various ATS complaints have continued to be pressed in the U.S. courts alleging human rights violations in foreign countries. Several of these claims have been brought against corporations, on the theory that corporations doing business in foreign countries can be held responsible for alleged human rights abuses committed in those countries. In 2011, the Supreme Court announced that it would review one of these claims, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), in order to rule on the issue of whether corporations can be the subject of ATS claims based on alleged human rights abuses.

In *Kiobel*, a group of Nigerian citizens, on behalf of the Ogoni people of Nigeria, asserted claims under the ATS for damages against Shell Petroleum Development

Company of Nigeria, Ltd. (SPDC) and its parent entities, claiming that these corporations had aided and abetted human rights abuses by the Nigerian government in connection with the government's suppression of protests against SPDC's activities in Nigeria in the 1990s. In September 2006, the U.S. District Court for the Southern District of New York sustained claims for aiding and abetting (i) arbitrary arrest and detention; (ii) crimes against humanity; and (iii) torture or cruel, inhumane and degrading treatment, and certified the matter for an interlocutory appeal. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006). In September 2010, however, the majority of a three-member panel of the Second Circuit held that the ATS did not apply because international law does not recognize corporate liability for the kinds of wrongs alleged by plaintiffs in that case. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

The majority in *Kiobel* held that, for an ATS claim to be viable, the plaintiff needed to allege violation of the "norm" that had gained "universal acceptance" by the international legal community as a binding "rule." The court also noted that "customary international law imposes individual liability" for only "a limited number of international crimes," and acknowledged a lack of precedent for imposing liability on corporations for human rights violations.

The court added that "the purpose of the ATS was not to encourage United States courts to create new norms of customary international laws unilaterally," and that to do so "would contravene the international comity the statute was intended to promote." The court noted that some ATS litigation, which often involves highly charged foreign events, "has already threatened international comity by prompting objections by foreign governments."

The *Kiobel* plaintiffs sought panel rehearing and/or *en banc* review by the Second Circuit. Rehearing was denied by a 2-1 vote. *En banc* review also was denied, but only because the judges were evenly divided, 5-5. The *Kiobel* plaintiffs then sought *certiorari* review before the U.S. Supreme Court, arguing that the Second Circuit's decision conflicted with a prior decision of the Eleventh Circuit holding that corporations could be held liable under the ATS.

In October 2011, the Supreme Court granted *certiorari*, thus allowing for the issue of corporate liability under the ATS to be determined for all cases pending in the United States. At the same time, the Supreme Court will hear the case of *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), an appeal from an October 2010 decision of the U.S. District Court for the District of Columbia, which held that the Torture Victims Protection Act of 1992, 28 U.S.C. §1350 (TVPA), only permits claims against "individuals" and thus does not permit claims to be brought against corporations. The issue presented in that case is "[w]hether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons." If *Mohamad* is reversed, the plaintiffs would potentially be able to pursue claims against the Palestinian Authority and the Palestine Liberation Organization for damages based on alleged misconduct by security officials located in the West Bank.

***Jivraj*: UK Supreme Court Permits Parties to Specify the Personal Attributes and Nationality of Arbitrators**

The UK Supreme Court recently rejected a unique challenge to an arbitration clause under the European employment directive, preserving the right of parties to select arbitrators based on their nationality or other personal attributes. The case, which in this instance focused on an arbitrator's particular religious affiliation, serves as a useful reminder to practitioners in all jurisdictions that arbitration clauses can be attacked in unexpected ways.

Commercial arbitration clauses commonly give parties the right to nominate at least one member of the arbitral tribunal. In a typical case involving a three-person arbitral tribunal, the claimant and respondent each nominate one tribunal member, and they jointly appoint a third (presiding) member — with an arbitration institution having power to nominate the presiding arbitrator in the event the party-nominated arbitrators are deadlocked.

These clauses also typically require the presiding arbitrator, or chair, to be of a “neutral” nationality, and it is not unusual for arbitration clauses to be even more specific in designating the requisite background of an arbitrator, aside from nationality. Commercial arbitration agreements can require arbitrators to be admitted to a particular bar or to have a given level of experience or expertise.

A clause requiring that an arbitrator have a particular religious affiliation arose for consideration in the much-publicized case of *Jivraj v. Hashwani*, [2011] UKSC 40, which was decided last year by the Supreme Court of the United Kingdom. In that case, two businesspeople entered into a real estate joint venture agreement containing an arbitration clause requiring arbitration in London. By its terms, the clause required all arbitrators to be members of the Shia Imami Ismaili Muslim community.

After a dispute arose, one party purported to commence arbitration, naming as its party-appointed arbitrator a retired English judge, Sir Anthony Colman, even though he was not an adherent of Ismailism. The other party failed to make any arbitral appointment, leading the claimant to seek an order from the High Court of England designating Colman as sole arbitrator pursuant to Section 18 of the Arbitration Act 1996 (UK), which empowers an English court “to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made.” The respondent objected on the basis that Colman failed to meet the religious criteria in the arbitration clause.

In response, the claimant argued that the religious criteria were invalid and discriminatory. Specifically, the claimant argued that the clause violated the Employment Equality (Religion or Belief) Regulations 2003 (implementing a European anti-discrimination directive). These regulations ban discrimination against “employees” based on (among other things) “religious belief.”

Although a first-instance judge rejected that challenge, the English Court of Appeal subsequently held that the clause was invalid, essentially viewing the arbitrators as

“employees” and the appointing party as an “employer,” which would make restricting appointments to members of the Ismaili community unlawfully discriminatory. The court further held that membership of the Ismaili community was not “a genuine occupational requirement for the job” and therefore did not meet one of the exceptions contained in the regulations. The respondent party then appealed to the UK Supreme Court.

In July 2011, the UK Supreme Court unanimously reversed the Court of Appeal decision and held that the arbitration clause in *Jivraj* was valid because an arbitrator is not an “employee.” Thus, an arbitration clause requiring that an arbitrator possess a particular affiliation or qualification was not subject to challenge under the regulations (which by this stage had been revoked and restated in the Equality Act 2010 (UK)). Because it was “plain that the arbitrators’ role is not one of employment under a contract personally to do work,” it followed that an arbitrator was not an “employee” for purposes of European anti-discrimination law. Thus, the appointment of an arbitrator from outside the Ismaili community was invalid.

The *Jivraj* decision was hailed by the European arbitration community as preserving the freedom of parties to choose arbitrators with attributes they deem suitable to resolving the dispute. Some of the world’s leading arbitral institutions (including the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA)) had intervened in the case and had argued, successfully, for a reversal of the decision of the Court of Appeal. Their action underscores that *Jivraj* has implications beyond the narrow confine of “religious” arbitration, because it preserves the ability of parties and arbitral institutions to choose and appoint arbitrators based on their nationality — as is currently permitted under the ICC, LCIA, American Arbitration Association and UNCITRAL rules.

Arbitration Claims Against Sovereigns: Developments in Parties’ Efforts to Recover Money Owed by Government Entities for Treaty Breaches

While there exists a well-developed body of law to address investor claims of expropriation and unfair treatment against foreign governments, as well as arbitral institutions equipped to adjudicate such claims, a number of noteworthy cases last year demonstrate that collection of the resulting award remains a critical issue.

Typically arising under Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs), investor claims are usually arbitrated before the International Centre for Settlement of Investment Disputes (ICSID) or tribunals established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

In many instances, states have complied voluntarily with awards rendered against them. In other cases, however, investors have been forced to seek formal enforcement of awards through the courts of states in which the losing party has assets. This is generally done in one of two ways:

- In the case of ICSID awards, Article 54 of the ICSID Convention states that “[e]ach Contracting State shall recognize an award rendered pursuant to this

Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” Thus, the courts of the various 157 ICSID member states are required to give immediate effect to ICSID awards and to give them the same status as final judgments.

- In the case of arbitral awards rendered under the UNCITRAL rules (or otherwise rendered outside the ICSID Convention framework), enforcement must be sought pursuant to the national laws or treaties governing enforcement of international arbitral awards (such as the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards). If the New York Convention applies, courts are required to recognize and enforce the award, subject to a relatively narrow set of exceptions.

The mere recognition and enforcement of an arbitral award is not sufficient to guarantee recovery. The winning party must locate and attach assets of the sovereign, while overcoming any claims of “sovereign immunity” over such assets. Within the United States, for example, the Foreign Sovereign Immunities Act permits a “foreign state’s” assets to be attached as part of post-judgment execution in certain limited circumstances, including where enforcement is sought pursuant to an arbitral award rendered against the sovereign, provided that (i) the assets in question are being “used for commercial activity” within the United States; and (ii) the assets are not subject to other specific exclusions (e.g., the assets are not “military” assets or assets used for “central banking” purposes). See 28 U.S. Code Sections 1610(a) and 1611.

In several recent noteworthy cases, the recipients of arbitration awards against foreign states attempted such enforcement. Examples include:

- **Walter Bau AG v. Thailand.** In 2009, a Geneva-based UNCITRAL tribunal awarded €29.21 million in damages to a German company based on the tribunal’s finding that Thailand had expropriated its investment in a highway construction project. The German company then commenced enforcement proceedings in various jurisdictions, including New York, Switzerland and Germany, culminating in an order by the courts of Munich in July 2011, grounding a 737 jet allegedly owned by the Thai government. In August 2011, the Thai government reportedly issued a bank guarantee for €39 million as security for the full amount of the award, pending a final decision by the German courts on whether to enforce the award.
- **Funnekotter v. Zimbabwe.** In 2008, an ICSID tribunal awarded a total of €8.2 million in damages to a group of Dutch farmers whose assets were expropriated by the Mugabe regime. In 2010, in accordance with the ICSID Convention, this award was entered as a judgment of the U.S. District Court for the Southern District of New York. However, the award still has not been paid.
- **Democratic Republic of Congo v. FG Hemisphere Associates.** In 2003, FG Hemisphere Associates obtained two ICC awards, totaling more than \$104 million, from tribunals in Zurich and Paris against the Democratic Republic of the Congo (DRC), based on the DRC’s nonpayment of debts associated with the financing of an electric power transmission facility. Hemisphere then commenced proceedings in numerous jurisdictions, including Hong Kong, where

it sought to attach monies owed to the DRC by a Hong Kong-listed company, China Railway. In June 2011, however, the Court of Final Appeal of Hong Kong held that it would follow the People's Republic of China's policy of "absolute" state immunity, thereby immunizing any sovereign property from seizure in Hong Kong. The fact that the assets in question arguably arose from commercial activities was irrelevant.

The mixed results in these cases are a continuing reminder of the special risks involved when dealing with sovereigns, especially when entering into joint ventures or long-term investments in high-growth markets.