

## Global Litigation

**New legal ground is expected to be broken this year in areas of importance to companies and their directors, officers and executives. We see those developments coming from around the globe and defining the litigation landscape in 2013.**

The U.S. Supreme Court is poised to rule on numerous cases — ranging from class actions and tort litigation to government enforcement and intellectual property — that will significantly affect the business community. In addition to examining these cases, we focus on the myriad issues that continue to linger after 2011 and 2012 Supreme Court and appellate court rulings, including those affecting class actions, product liability disputes and securities litigation.

Meanwhile, government enforcement activity on both sides of the Atlantic likely will exceed its intensity level in 2012. The U.S. Department of Justice, Securities and Exchange Commission and other authorities will vigorously pursue enforcement priorities under the Foreign Corrupt Practices Act, with respect to insider trading, and in response to increasing numbers of whistleblower complaints. All indications are that these same levels of enforcement intensity will define activity outside the U.S. in 2013.

On the antitrust front, we predict a continuation of the ambitious enforcement agenda witnessed over the last four years. U.S. regulatory authorities are expected to maintain their focus on issues at the intersection of intellectual property and antitrust, as well as criminal enforcement. We expect EU officials to concentrate on matters affecting the pharmaceutical, financial services, and high technology industries.

We also discuss developments in international litigation and arbitration, including jurisdictional challenges to cross-border arbitration proceedings, continuing disputes over sovereign debt and cross-border judgment enforcement; patent and technology issues; and ongoing consumer and government actions in the e-commerce sector.

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## The US Supreme Court Term: Business Cases to Watch

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The Supreme Court is poised to rule on numerous cases in 2013 — ranging from affirmative action and class actions to tort litigation, government enforcement and intellectual property — that will significantly affect the business community. In addition, the Court will rule in marquee cases on the Voting Rights Act and same-sex marriage.

### Affirmative Action

On October 10, 2012, the Supreme Court heard argument in *Fisher v. University of Texas at Austin*, presenting the issue of whether the 14th Amendment's Equal Protection Clause prohibits the University of Texas at Austin (UT) from using race in undergraduate admissions decisions.

Under UT's admissions policy, race sometimes is a factor in the evaluation of applicants. Nine years ago, in a 5-4 decision in *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's use of race as one of a number of factors in its admissions policy. In the *Fisher* case, the litigant challenging the UT policy argues that it is invalid under *Grutter* — and, alternatively, that *Grutter* should be overruled. The author of the *Grutter* opinion, Justice Sandra Day O'Connor, retired and was replaced by Justice Samuel Alito. This shift in Court personnel could affect how the Court considers and resolves the case.

The *Fisher* case is important to the business community because businesses recruit extensively from UT and other public universities. A group of 57 leading American companies filed an *amicus curiae* brief supporting UT. The companies explained that they "are directly affected by the admissions policies at UT and similar colleges and universities" and that they "care deeply about what kind of education and training those institutions offer their students" (see [Regulatory/Affirmative Action in Employment](#)).

### Class Action Litigation and Arbitration

The Court has granted *certiorari* in five cases that significantly could impact class action litigation and arbitration.

Two cases address issues involving class action arbitration. In *Oxford Health Plans v. Sutter*, the Court will consider the authority of arbitrators to order class arbitration — an event with profound implications for the dynamic of the dispute. In a prior case, the Supreme Court held that class action arbitration is so fundamentally different from bilateral arbitration that a party cannot be compelled to submit to it unless there is a contractual basis for concluding it has agreed to do so. The U.S. Courts of Appeals have split over whether broad contractual language requiring arbitration is sufficient to infer consent to class action arbitration. In *American Express Co. v. Italian Colors Restaurant*, the Court will examine a U.S. Court of Appeals for the Second Circuit ruling invalidating an arbitration agreement that barred class arbitration because the court believed individual arbitration of the plaintiff's federal law claim would be economically infeasible.

Two other cases will allow the Court to provide additional clarity on the requirements of class action litigation in light of its decision in *Wal-Mart Stores, Inc. v. Dukes* (2011). In *Dukes*, the Court emphasized a plaintiff's burden in proving commonality in the class

before obtaining class certification. Now, in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, the Court will decide whether, before certifying a class in a securities case, plaintiffs relying on the fraud-on-the-market theory must prove that the misrepresentation was material. And, in *Comcast v. Behrend*, the Court will address whether a district court may certify a class without first resolving whether the plaintiff has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis (see “[Securities Litigation: Recent and Upcoming Supreme Court, Appellate and District Court Developments](#)”).

The fifth class action case concerns the Class Action Fairness Act of 2005 (CAFA), a federal statute that created new safeguards against abusive class actions in federal court. In *The Standard Fire Insurance Co. v. Knowles*, the Court will decide whether a plaintiff in a putative class action can avoid removal to federal court under CAFA by stipulating that he seeks damages for the class of less than the \$5 million jurisdictional minimum for CAFA removal. The question before the Court will be whether such a stipulation improperly undermines the federal removal provision of CAFA and violates the due process rights of absent class members (see “[Class Action Outlook: A Busy Year Ahead](#)”).

### **Extraterritoriality of Alien Tort Statute**

In the last three decades, plaintiffs have used the previously obscure Alien Tort Statute (ATS), which was first enacted in 1789, to sue corporations for alleged complicity in human rights abuses in other countries. In *Kiobel v. Royal Dutch Petroleum*, the Court will decide whether these causes of action may be brought for claims regarding conduct outside the United States involving foreign plaintiffs and foreign defendants.

In *Kiobel*, plaintiffs from Nigeria are seeking to sue foreign oil companies in U.S. courts alleging that the companies violated international law in aiding torture by the Nigerian government. Last term, the Court heard argument on the scope of the ATS, including whether corporations can be sued under the statute. At oral argument last February, it became clear that a number of justices were troubled by a fundamental question — whether Congress intended the ATS to apply to conduct outside the United States. The Court ordered the parties to address this threshold issue and heard re-argument in the case in early October.

If the Court decides that the ATS does not apply to such extraterritorial claims, it will dramatically narrow plaintiffs’ use of the statute in litigation against corporations.

### **Statute of Limitations in Government Enforcement Cases**

The statute of limitations for government enforcement actions is fundamental to the initiation and resolution of many government cases. In *Gabelli v. Securities and Exchange Commission*, the Court will consider the default five-year statute of limitations applicable to civil penalty actions brought by the federal government (28 U.S.C. § 2462). In *Gabelli*, the SEC seeks penalties for alleged unlawful conduct that occurred more than five years before the SEC filed suit. The Court will review the Second Circuit’s holding that the five-year limitations period does not begin until the SEC discovers or should have discovered the claim. The case will have important implications for the permissible timing of government actions for claims sounding in fraud, both in SEC actions and in other contexts.

## Intellectual Property

The Court will consider three intellectual property cases of significance to companies that own patents, copyrights or trademarks.

The first case involves so-called “reverse-payment agreements” between brand-name drug manufacturers and potential generic competitors.<sup>1</sup> The case is of enormous significance to the pharmaceutical industry. In many instances, brand-name manufacturers have sued potential generic competitors under the Hatch-Waxman Act for patent infringement. In *Federal Trade Commission v. Watson Pharmaceuticals, Inc.*, the Court will determine whether, as the government contends, federal competition law renders settlements of Hatch-Waxman litigation presumptively unlawful if the settlement includes a payment from the brand-name manufacturer to a generic competitor as well as an agreement on the date the generic competitor will enter the market. In contrast, most U.S. Courts of Appeals have held that such Hatch-Waxman settlements are lawful if (1) the settlement agreement does not exceed the exclusionary scope of the patent, (2) the litigation to enforce the patent was not a sham, and (3) the patent was not procured by fraud. The second case raises a question at the intersection of copyright and international trade. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court will try a second time to decide whether the first-sale doctrine — which allows a purchaser of a copyrighted good in the United States to resell the good without the copyright owner’s permission — applies to copyrighted material manufactured and acquired abroad and then imported into the United States. In 2010, the Court split 4-4 on this issue, with Justice Elena Kagan recused. The case is important to businesses on both sides of the issue. Content owners argue that applying the first-sale doctrine to overseas goods will weaken intellectual property protection and further a gray market in copyrighted goods. Retailers and auction sites, meanwhile, argue that not applying the first-sale doctrine to goods manufactured and acquired abroad will unjustifiably inhibit legitimate sales (see [“Antitrust and Competition: Antitrust Enforcement on Both Sides of the Atlantic”](#)).

“*Federal Trade Commission v. Watson Pharmaceuticals, Inc.* is of enormous significance to the pharmaceutical industry.”

The third case presents the question whether human genes are patentable. In *Association for Molecular Pathology v. Myriad Genetics, Inc.*, the Court will review the Federal Circuit’s holding that isolated DNA sequences are patentable subject matter because they have been manipulated chemically to produce molecules different from the native DNA molecules in the human body (see [“Intellectual Property and Technology: Patent and E-Commerce Issues to Watch in 2013”](#)). The outcome of this case will have a profound impact on businesses that conduct genetic research. It also may have far-reaching implications for scientific advancement, including in the field of personalized medicine.

In addition to these three pending intellectual property cases, the Court already has decided one significant trademark case this term concerning the issue of federal court jurisdiction when a trademark owner, during the course of litigation, agrees not to assert a claim against an accused infringer. In *Already, LLC v. Nike, Inc.*, Nike filed a trademark suit, and the accused infringer filed a countersuit. Ultimately, Nike unconditionally and irrevocably committed to not asserting trademark claims against the defendant. It moved to dismiss its claims with prejudice and to dismiss Already’s counterclaim without prejudice. The district court dismissed the case on the ground that there no longer was a case or controversy, and the Second Circuit affirmed. The Supreme Court unanimously agreed, confirming that a trademark owner’s unequivocal assertion of non-enforcement moots the competitor’s action to declare the trademark

<sup>1</sup> Skadden is representing one of the parties in this case.

invalid when the competitor faces no realistic prospect of trademark enforcement. In a concurrence by Justice Kennedy, four Justices cautioned that the case should be read narrowly and that there are limits to voluntary cessation as a strategy for terminating trademark litigation (see “[Intellectual Property and Technology: Patent and E-Commerce Issues to Watch in 2013](#)”).

### Other Cases

In addition to the opinions with a direct impact on the business community, the Supreme Court also will decide important cases regarding voting rights and same-sex marriage. In *Shelby County v. Holder*, the Court will consider whether Congress’ reauthorization of the Voting Rights Act in 2006 exceeded its constitutional power because Congress lacked an adequate basis for continuing the requirement that certain covered jurisdictions with a history of voting rights abuses “pre-clear” changes in their voting laws. In *United States v. Windsor*, meanwhile, the Court will consider whether the federal Defense of Marriage Act’s requirement that spousal benefits under federal law not be available to same-sex marriages is unconstitutional. And, in *Hollingsworth v. Perry*, the Court will consider the constitutionality of California’s Proposition 8, which sought to invalidate a California Supreme Court decision approving same-sex marriage. (Both cases include questions about standing, which may prevent the Court from reaching the merits).

The Court will decide the cases in the current term by the end of June 2013.

## Antitrust and Competition: Antitrust Enforcement on Both Sides of the Atlantic

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### United States

While leadership changes are afoot both at the Antitrust Division of the U.S. Department of Justice (DOJ) and at the FTC (see [Global M&A/“Antitrust and Competition: Surveying Global M&A Enforcement Trends”](#)), those changes are unlikely to have a significant impact on the agencies’ enforcement stance in 2013. Both the FTC and the DOJ have undertaken ambitious enforcement agendas over the last four years and are likely to continue to do so. Notably, both agencies have commenced significant efforts related to the intersection of intellectual property and antitrust, and the DOJ continues to pursue significant global cartel activity in the financial services and auto parts industries. As businesses continue to look for ways to monetize their intellectual property, they will need to sharpen their focus on applicable antitrust laws. And companies that are the subjects of criminal antitrust investigations are now more likely than ever to face follow-on litigation in the U.S., Europe and elsewhere.

### Intellectual Property

- “Reverse-payment” patent settlements will remain in the spotlight. On December 7, 2012, the U.S. Supreme Court granted *certiorari* in *FTC v. Watson Pharmaceuticals, Inc.*, a case brought by the FTC challenging the legality of so-called

“reverse-payment” settlements between brand-name and generic drug makers.<sup>2</sup> The Court will hear the FTC’s appeal from a U.S. Court of Appeals for the Eleventh Circuit decision upholding the legality of such settlements under the antitrust laws; the FTC is expected to urge the Court to instead adopt the U.S. Court of Appeals for the Third Circuit’s ruling finding that such settlements are presumptively unlawful.<sup>3</sup> A decision on the merits is likely by summer 2013 (see “The US Supreme Court Term: Business Cases to Watch”).

- The antitrust agencies continue to monitor patent enforcement and licensing activities, particularly in high-technology industries. The DOJ and the FTC recently held a joint workshop exploring how activities of patent assertion entities — those that purchase patents from existing owners and then seek to license the intellectual property to (or litigate against) manufacturers who already are using the patented technology — impact innovation and competition. In addition, reaffirming its “longstanding commitment to safeguard the integrity of the standard-setting process,” the FTC recently announced that, in appropriate cases, it “can and will” challenge a patent holder’s attempt to obtain injunctive relief against willing licensees of standard-essential patents on FRAND (“fair, reasonable and nondiscriminatory”) terms. More of this enforcement activity is, according to Chairman Jon Leibowitz, “on the way soon.”<sup>4</sup> Indeed, on January 3, 2013, the FTC announced a consent order with Google pursuant to which Google will not seek injunctions or exclusionary orders to enforce patent rights that are essential to certain technology standards if Google has committed to license those on FRAND terms.<sup>5</sup>

### Criminal Enforcement

- Criminal enforcement will continue to be a focus of the DOJ. We are likely to see the expansion of current investigations and an increase in penalties. There were several notable active investigations in 2012, including those involving LIBOR, EURIBOR, auto parts and batteries. Barclays admitted misconduct and agreed to pay \$160 million

<sup>2</sup> See *Fed. Trade Comm’n v. Watson Pharms., Inc.*, 677 F.3d 1298 (11th Cir.) Watson Pharmaceuticals, Inc. is represented by Skadden.

<sup>3</sup> The Third Circuit decision is *In re K-Dur Antitrust Litigation*, 686 F.3d 197 (3d Cir. 2012). Petitions for *certiorari* were filed by the *K-Dur* defendants and were considered by the Supreme Court at the same conference as the *FTC v. Watson* petition, but the Court neither granted nor denied *certiorari* and likely will hold those petitions pending the outcome of *FTC v. Watson*.

<sup>4</sup> See Skadden, Arps, Slate, Meagher & Flom LLP, Statement of the Fed. Trade Comm’n at 1, 2, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 (Nov. 26, 2012), avail. at <http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf>; see also *Global Competition Review*, “Leibowitz says to expect more enforcement over essential patents.” (Dec. 10, 2012), available at <http://www.globalcompetitionreview.com/news/article/32778/leibowitz-says-expect-enforcement-essential-patents/>.

<sup>5</sup> See “FTC Ends Google Investigation With a ‘Slap on the Wrist’” (Jan. 4, 2013), available at [http://www.skadden.com/insights/ftc\\_ends\\_google\\_investigation](http://www.skadden.com/insights/ftc_ends_google_investigation). The FTC’s investigation of Google did not result in any formal action against the company with respect to Google’s search practices. The FTC closed its investigation with a voluntary commitment by Google to modify some of these practices.

While the DOJ is continuing to improve its investigatory techniques, it also is trying to increase corporate fines and individual sentences through aggressive prosecution and litigation.

to the DOJ to resolve the antitrust violations related to LIBOR and EURIBOR.<sup>6</sup> The DOJ can be expected to continue to follow through on its current investigations and, in doing so, uncover additional cartels in related areas or component parts (see “Government Enforcement: A Continued Push to Prosecute in the US, the UK and China”). The “cross-sell” of “do you have anything else to admit?” has become as common in the U.S. leniency program as “do you want fries with that?” It generally offers more than just a bargain price for the “combo,” and can actually lower the already inevitable fine for the first violation and result in amnesty for the investigatory area(s) for which the firm provides new evidence. This situation, known as “leniency plus,” provides a significant incentive for companies to conduct a thorough investigation and, if possible, uncover additional wrongdoing. The DOJ subsequently is able to expand its investigation into the new area(s), most often a related product/service or component part. There also has been increased coordination among government enforcement agencies around the globe in dawn raids (e.g., auto parts and auto shipping) as well as the coordination of ongoing investigations. Finally, while the DOJ is continuing to improve its investigatory techniques, it also is trying to increase corporate fines and individual sentences through aggressive prosecution and litigation. The DOJ pursues trials for specific deterrence and general deterrence but, most importantly, to increase its ability to negotiate favorable pleas. In *AU Optronics*, a significant case in 2012, the DOJ obtained three-year sentences for individuals and \$500 million in corporate fines. However, the DOJ had asked for \$1 billion based on a statutory provision providing for up to twice the gain of all participants in an antitrust conspiracy, and may appeal.

### Follow-On Litigation

- Companies face more than criminal fines for antitrust cartel behavior. Private litigation, often class actions, inevitably follows criminal investigations, and such follow-on litigations are now becoming common beyond the United States. The Foreign Trade Antitrust Improvements Act (FTAIA) generally excludes foreign commerce from the Sherman Act, but allows suits to be brought in the U.S. if the conduct involves import commerce or has a “direct, substantial and reasonably foreseeable effect” on domestic commerce. The meaning of “direct” is one of the key issues in *Agrium, Inc. v. Minn-Chem, Inc.*, known as the “Potash” case.<sup>7</sup> The case is particularly interesting given that the DOJ weighed in and advocated for “direct” to mean “reasonably proximate causal nexus,” which is the interpretation that the U.S. Court of Appeals for the Seventh Circuit adopted *en banc*. The potash producers now are

<sup>6</sup> Note that Barclays simultaneously agreed to pay \$200 million to the U.S. Commodities Futures Trading Commission (CFTC) and approximately \$93 million to the U.K. Financial Services Authority (FSA). See A. Alper and K. Ridley, “Barclays paying \$453 million to settle Libor probe,” Reuters, (June 27, 2012), available at <http://www.reuters.com/article/2012/06/27/us-barclays-libor-idUSBRE85Q0J720120627>. On Dec. 19, 2012, the DOJ announced that it had reached agreement with UBS on a guilty plea for UBS’s Japanese subsidiary in connection with the LIBOR probe, and that the bank had agreed to pay \$1.2 billion in combined fines to the Department of Justice and the CFTC. UBS will additionally pay approximately \$260 million to the FSA and will disgorge approximately \$64 million to the Swiss Financial Market Supervisory Authority. In addition, two UBS traders will face criminal conspiracy charges. See Dept. of Justice Press Release, “UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-Running Manipulation of LIBOR Benchmark Interest Rates,” (Dec. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1522.html>; see also E. Weinberger, “UBS Hit With \$1.5 Billion Fine After Admitting Role in LIBOR Scandal,” Law360, (Dec. 19, 2012), available at [http://www.law360.com/competition/articles/402081?nl\\_pk=e3a2bfad-0bea-4ae8-a750-edbcfa37ad30&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=competition](http://www.law360.com/competition/articles/402081?nl_pk=e3a2bfad-0bea-4ae8-a750-edbcfa37ad30&utm_source=newsletter&utm_medium=email&utm_campaign=competition).

<sup>7</sup> *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc), petition for cert. filed 81 U.S.L.W. 3309 (U.S. Nov. 23, 2012) (No. 12 650).

asking the U.S. Supreme Court to review the Seventh Circuit's decision. The outcome will not only affect the extraterritorial reach of the U.S. courts in civil actions, but also could broaden the extraterritorial reach of the DOJ in criminal prosecutions.

### European Union

In 2012, the EU's competition law enforcement, much like the U.S. DOJ and FTC, focused on three key industries: pharmaceuticals, financial services and high-technology. Decisions by the EU Commission defining important aspects of the law relevant to each of these sectors are expected to be issued in 2013. In the area of private enforcement, the long-awaited EU legislation on collective redress also is expected to be adopted this year.

#### Pharmaceuticals

- Following its pharmaceutical sector inquiry in 2008 and 2009 and subsequent monitoring of patent settlements in the EU, the EU Commission has opened a number of investigations in relation to patent settlement agreements involving a reverse payment from the originator to generic firms. Four investigations are currently pending, two of which have proceeded to the issuance of a Statement of Objections in July 2012. In at least one of these investigations, it is expected that the EU Commission will issue a formal decision in 2013, which would be the first EU Commission decision establishing its enforcement policy in relation to reverse-payment settlements. The EU Commission already has indicated publicly that it supports a standard of review for reverse-payment settlements with a presumption of an anti-competitive effect, similar to the position of the FTC in the U.S. and the standard adopted by the Third Circuit in *In re K-Dur Antitrust Litigation*, see *supra* note 2.

#### Financial Services

- The financial services sector continues to be a focus of competition enforcement in the EU, with various high-profile investigations pending before the EU Commission. These include two antitrust investigations relating to credit default swaps, and the investigation of the alleged manipulation of the LIBOR and EURIBOR rates, which EU Competition Commissioner Joaquin Almunia considers a "top priority." The LIBOR probe also has resulted in the U.K. authorities arresting three individuals in connection with their own LIBOR investigation (see "Government Enforcement: A Continued Push to Prosecute in the US, the UK and China").
- Increased focus on the financial services sector also is reflected in the EU Commission's expansive application of its presumption of parental liability for infringements by owned entities, which extends to financial holdings. In August 2011, the EU Commission issued a Statement of Objections against Goldman Sachs, holding it liable for cartel conduct of a portfolio company held by Goldman Sachs' private equity arm, even for periods in which Goldman Sachs held a minority interest. The issuance of a formal decision is expected in 2013, which is likely to clarify the EU Commission's position on parental liability of financial holdings and private equity firms for conduct of their portfolio companies.

#### High-Technology

- Significant enforcement activities also are expected in 2013 relating to the high-technology sector, including the interplay between intellectual property and competition law. There is significant legal uncertainty in the EU in this area. For

example, with respect to standard essential patents, there is no clear obligation for the patent holder to license the patent under FRAND terms. There also is no clear definition of what FRAND licensing entails, including how licensing fees should be calculated and whether the patent owner could seek injunctive relief based on its patent, despite having entered into FRAND commitments. The latter issue is the subject of an antitrust investigation opened by the EU Commission against Samsung in January 2012.

### Collective Redress

- After holding a public consultation on an EU Commission working document on collective redress in early 2011, the EU Commission appears set to issue legislation in 2013 on collective redress in private civil litigation, after an EU Parliament report in June 2012 backed the EU Commission's plans for legislation in this area. Collective redress and, in particular, the choice between an opt-out mechanism and opt-in modes of collective action, has been a hotly contested topic for years within the business community, within different EU Commission directorates, and between the EU Commission and the European Parliament. The EU legislation on collective redress is expected to encourage private enforcement by endorsing and enabling collective actions by consumers and businesses while attempting to avoid the extremes of "U.S.-style litigation," which the EU Commission has stated firmly it does not want to adopt. It is anticipated that separate legislation will be issued in relation to document disclosure issues regarding immunity and leniency applications on the one hand, and collective redress on the other, with the former expected in spring 2013.

\* \* \*

It is evident that the U.S. and European antitrust agencies share many similar enforcement priorities. In light of the increased investigative coordination between the U.S. and European antitrust agencies, and particularly given the onset of private litigations in Europe, Asia-Pacific and Latin America, a holistic approach toward antitrust strategy in preparing for and defending against multiple government investigations and private litigations around the globe is critical.

## Class Action Outlook: A Busy Year Ahead

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For those who may have hoped that 2012 would be the year in which class action lawyers threw in the towel — discouraged by broad judicial interpretations of the Class Action Fairness Act and the Supreme Court's ratcheting up of class action requirements in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) — it was not meant to be.

While nationwide classes based on state law are still moribund, a number of traditionally conservative courts around the country have embraced smaller, single-state consumer fraud and employment discrimination class actions, suggesting that 2013 may bring more class actions. Here are some key trends to keep an eye on in 2013.

- **Consumer Products.** Recent rulings by the U.S. Courts of Appeals for the Sixth and Seventh Circuits may set troubling precedents for class actions involving allegedly

defective consumer products. In two recent cases involving allegedly defective washing machines, these courts sanctioned sprawling class actions, even though the vast majority of class members experienced no problems with their products. See *In re Whirlpool Corp. Front-Loading Washer Products. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012); *Butler v. Sears, Roebuck & Co.*, --- F.3d ---, Nos. 11-8029, 12-8030, 2012 U.S. App. LEXIS 23284 (7th Cir. Nov. 13, 2012). Writing for the Seventh Circuit panel, Judge Richard Posner declared that the decision whether to certify is primarily one of “efficiency” and that the presence of uninjured class members is no barrier to class treatment. *Butler*, 2012 U.S. App. LEXIS 23284, at \*4. A petition for *certiorari* is pending in *Whirlpool*, and one in *Butler* is likely forthcoming. Meanwhile, California continued to be a hotbed for consumer class actions in 2012 as well. See, e.g., *Keegan v. Am. Honda Motor Co.*, No. CV 10-09508 MMM (AJWx), 2012 U.S. Dist. LEXIS 91394 (C.D. Cal. June 12, 2012) (certifying consumer fraud claims under California law in defective car case where a majority of class members experienced no issues with their vehicles’ rear suspension); *Johnson v. General Mills, Inc.*, 278 F.R.D. 548, 550-51 (C.D. Cal. 2012) (reaffirming propriety of certifying consumer fraud claims arising out of defendants’ alleged misrepresentations that YoPlus yogurt products promote digestive health, even though many class members’ yogurt products did not contain “an explicit statement regarding digestive health”). Plaintiffs’ lawyers will no doubt rely on these developments and rulings as they attempt to certify unwieldy class actions in the future. Thus, absent Supreme Court intervention, automobile, appliance and food manufacturers can expect more class actions in 2013.

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- **Daubert Challenges.** *Daubert* challenges may begin to play a larger role at the class certification stage, depending on the outcome of a pending Supreme Court ruling in *Comcast Corp. v. Behrend* (No. 11-864). In *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court left open the question of whether an expert’s testimony that is proffered as a form of classwide proof at the class certification stage must satisfy the requirements of *Daubert*. In the wake of *Dukes*, federal appeals courts have split on this question. Most have acknowledged that some level of scrutiny of expert evidence in support of class certification is necessary, but they have disagreed about whether courts must make a “conclusive,” or merely “limited” or “tentative” assessment, of the evidence under *Daubert*. Compare, e.g., *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012) (“When an expert’s report or testimony is ‘critical to class certification,’ we have held that a district court must make a conclusive ruling on any challenge to that expert’s qualifications or submissions before it may rule on a motion for class certification.”), with, e.g., *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 613 (8th Cir. 2011) (a full-scale *Daubert* analysis is not required because such an approach is inconsistent with the “tentative, preliminary, and limited” nature of a class certification proceeding). The Supreme Court’s ruling in *Comcast*, which likely will be handed down in the next several months, will resolve this question once and for all (see “The US Supreme Court Term: Business Cases to Watch”).
- **Employment Discrimination.** The full impact of *Dukes* on employment discrimination class actions remains in flux, as demonstrated by the Seventh Circuit’s ruling in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012). Notwithstanding the Supreme Court’s recent rejection of such a suit in *Wal-Mart Stores v. Dukes*, the Seventh Circuit concluded that a suit with similar allegations could receive class treatment for a single “issue.” Judge Posner again wrote for the Court, holding that the plaintiffs’ theory that Merrill Lynch’s employment policies have a disparate impact on African-American financial advisors was amenable to classwide

treatment. This approach to class certification likely will prompt a new wave of efforts by the plaintiffs' bar to seek certification of classes that traditionally have not been approved for class treatment on the theory that one or more issues could be tried on a classwide basis in a so-called "issues trial." Such issues trials, which generally have been rejected by federal courts, tend to be unfair because they allow plaintiffs to try abstract questions before a jury without having to deal with the facts of their cases or with critical elements of their claims, such as causation.

- **Commonality Requirement.** At the same time, many federal and state courts have been faithful to *Wal-Mart Stores v. Dukes*, giving rigorous scrutiny to class action proposals and applying the Supreme Court's reinvigorated commonality requirement. See, e.g., *In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, No. MDL-1703, 2012 WL 1015806, at \*12 (N.D. Ill. Mar. 22, 2012) (explaining that the court could not "simply adopt [] plaintiff's assumptions" that the evidence will apply uniformly to the class); *Corwin v. Lawyers Title Ins. Co.*, 276 F.R.D. 484, 490 (E.D. Mich. Aug. 1, 2011) (while plaintiff identified "questions common to the absent class members and the plaintiff that must be decided before liability is established," class treatment was inappropriate because "the critical inquiry without which liability cannot attach requires individualized determination"); *Price v. Martin*, 79 So. 3d 960, 975 (La. 2011) (reversing an order certifying class because "inescapable is the fact that for this action, or any other action, to proceed as a class action, there must be 'significant proof,' subject to 'rigorous analysis,' of a common question — one where the 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke'" (citing *Dukes*, 131 S. Ct. at 2551). And the import of *Dukes* has extended far beyond these basic requirements, affecting courts' assessments of such other class certification elements as ascertainability and standing of class membership. See, e.g., *Janes v. Triborough Bridge & Tunnel Auth.*, No. 06 Civ. 1427, 2012 WL 177420, at \*4 (S.D.N.Y. Jan. 23, 2012) ("No class may be certified that contains members lacking Article III standing." (citation and internal quotation marks omitted); *Stone v. Advance America*, 278 F.R.D. 562, 570 (S.D. Cal. 2011) (rejecting class as unascertainable based on *Dukes*' instruction that courts consider the merits of a claim to the extent they overlap with class certification requirements).
- **Class Action Fairness Act.** Against this backdrop, there are efforts to expand CAFA even more to allow for a greater number of class actions to be removed from state to federal court. In particular, the National Association of Manufacturers (NAM) recently filed an amicus brief urging a novel interpretation of CAFA in *The Standard Fire Insurance Co. v. Knowles*, No. 11-1450 — a case that was heard by the Supreme Court on January 7, 2013. The question raised by the parties in *Standard Fire* is whether a class action plaintiff can defeat removal to federal court under CAFA by stipulating on behalf of the entire class to seek less than \$5 million, which is the cutoff for state court class actions. NAM's amicus brief argues that the real question is whether a defendant has the right under CAFA to remove all class actions from state court provided diversity jurisdiction exists — irrespective of the amount in controversy. The gist of the argument is that CAFA's \$5 million amount-in-controversy requirement applies only to class actions filed in federal court in the first instance — not to CAFA's separate provision authorizing removal of class actions from state court. Whether the Supreme Court will embrace this argument when it issues its ruling (likely before June 2013) is unclear (see "[The US Supreme Court Term: Business Cases to Watch](#)"). However, even if the Court were to accept this interpretation of CAFA, removal to federal court is no panacea to class action abuse, as illustrated by recent developments in the Sixth and Seventh Circuits.

## Product Liability Issues to Watch in 2013

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The primary targets of product liability plaintiffs in 2013 include the makers of medicines and medical devices; manufacturers of food, beverages, tobacco and cosmetics; companies that sell consumer products, especially appliances and consumer electronics; and automobile manufacturers. Asbestos plaintiffs also continue their quest to find solvent companies with a plausible connection to asbestos, with the primary sellers of asbestos-containing products having been bankrupted by prior litigation. Ten issues to watch include:

- **Federal Preemption.** In the wake of *Pliva v. Mensing*, 131 S. Ct. 2567 (2011) — in which the Court held that state law failure-to-warn claims against makers of generic medicines were preempted by the federal requirement that generic warnings be identical to those of the name-brand medicines — plaintiffs have tried to cast their claims against manufacturers of generics as design defect claims. The Supreme Court is poised to decide whether a state law “design defect” claim that a generics manufacturer should not have placed the medicine on the market is preempted by federal law. See *Mut. Pharm. Co. v. Bartlett*, 81 U.S.L.W. 3305 (U.S. Nov. 30, 2012). At the same time, Congress has pending before it bills to reverse *Pliva* and remove federal preemption of failure-to-warn claims involving generic medicines. See Patient Safety and Drug Labeling Improvement Act, H.R. 4384, 112th Cong. (2012); Patient Safety and Generic Labeling Improvement Act, S. 2295, 112th Cong. (2012).
- **Similar Regulatory Defenses.** Manufacturers — particularly those in the food, beverage and cosmetic sectors facing challenges to labeling that complies with FDA regulations — can be expected to use the FDA’s action or conscious choice not to act as a means of preventing other federal causes of action, such as the Lanham Act. See *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012) (dismissing Lanham Act claim because defendant complied with the Federal Drug and Cosmetic Act, which does not allow private enforcement). Such defendants also can be expected to argue that where the FDA has not reached a decision, a plaintiff’s claims should be dismissed under the primary jurisdiction doctrine, so that the regulators (rather than courts) decide the issue in the first instance. See *Astiana v. The Hain Celestial Group, Inc.*, 2012 U.S. Dist. LEXIS 165368 (N.D. Cal. Nov. 19, 2012) (dismissing without prejudice state law claims based on the need for the FDA to be the first to decide what “natural” means with respect to cosmetics).
- **First Amendment Defense of Off-Label Promotion.** Numerous makers of medicines and medical devices have been sued for purportedly violating state fraud and consumer protection laws by promoting their products for uses that have not been approved by the FDA. It is lawful for a doctor to prescribe a medicine for an off-label use; indeed, the off-label use of particular medicines is often the standard of care in specialties like pediatrics, where studies are particularly difficult to conduct. The Second Circuit’s decision in *United States v. Caronia*, 2012 U.S. App. LEXIS 24831 (2d Cir. Dec. 3, 2012), will ensure that manufacturers will continue to raise First Amendment defenses to product liability claims based on the promotion of lawful off-label use.
- **First Amendment Challenges to Labeling Restrictions.** Last year, tobacco companies were successful in challenging an FDA requirement that would have appropriated vast portions of cigarette packaging to display grotesque images

illustrating health warnings. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). Product manufacturers can be expected to continue to challenge government-compelled speech and government appropriation of their product packaging and advertising. And the Supreme Court can be expected to take up such cases to address these issues.

- **Safe Harbors From Punitive Damages.** Defendants can be expected to press for state law to recognize “safe harbors” from punitive damages where the defendant has complied with applicable regulations. For example, a federal court presiding over product liability claims involving cancer drugs recently held that the law of New Jersey — where the manufacturer resided — should govern on the issue of punitive damages. *Zimmerman v. Novartis Pharmaceuticals Corp.*, 2012 U.S. Dist. LEXIS 126002 (D. Md. Sept. 5, 2012). Because New Jersey prevents punitive damages from being levied against a company that complied with regulations unless it can be proven that the company knowingly misled the agency about material information, the court held that punitive damages were unavailable. Ordinarily, such safe-harbor provisions are adopted by statute, and one can expect state legislative efforts to adopt such statutes in 2013. See *Ariz. Rev. Stat. § 12-689* (LexisNexis 2012).
- **Learned Intermediary Doctrine.** The learned intermediary doctrine will continue to be adopted in the majority of U.S. states. Last summer, Texas joined 35 other states in holding that a sufficient warning to a doctor (the “learned intermediary”) satisfies a manufacturer’s duty to warn in product liability cases involving medicines and medical devices. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140 (Tex. 2012).
- **Fight to Expand the Duty to Warn.** The struggle by plaintiffs to expand the pool of available defendants in asbestos litigation often leads to fights to expand fundamental legal principles. One of these principles is that a manufacturer has a duty to warn about risks posed by its product, but not the products of others. Last summer, the Washington Supreme Court fundamentally expanded liability, holding that manufacturers who made respirators that did not contain asbestos nonetheless had a duty to warn about the risks of asbestos exposure. *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012). This victory, which allowed suits against defendants who were not in the chain of distribution of asbestos-containing products, will no doubt empower plaintiffs to try to similarly expand the duty to warn in other jurisdictions.
- **Increasing Use of Lone Pine.** “Lone Pine” orders are used in mass tort cases to require plaintiffs to submit statements and/or evidence supporting the basic elements of their claims, including exposure, injury and causation. Defendants increasingly are successful in persuading courts to include such orders in the early case management stage of mass tort litigation. The failure of plaintiffs to supply necessary information within the court-ordered deadlines can lead to evidentiary sanctions and even dismissal.
- **Local Regulation of Products.** Municipalities such as New York and San Francisco, as well as much smaller communities, increasingly are flexing their muscle to attempt to ban or otherwise restrict access to products that they view as health and safety risks. New York City’s recent large soda ban is just one example. Localities’ attempts to restrict “energy drinks” is another. Manufacturers can expect increasing attempts by localities to regulate products. Key defenses will be federal and state preemption, as well as the Commerce Clause.

- **Increasing Arbitration of Personal Injury Claims.** The Supreme Court made it plain in 2012 that personal injury and wrongful death claims can be subject to agreements to arbitrate. See *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012). In 2013, one can expect to see increased efforts to compel arbitration of product liability claims that fall within the scope of arbitration agreements.

## Government Enforcement: A Continued Push to Prosecute in the US, the UK and China

### US: White Collar Trends for 2013

Hardly a week went by in 2012 without headlines of a significant investigation or settlement under the Foreign Corrupt Practices Act, prominent insider trading arrests and prosecutions, or allegations of corporate financial improprieties sparked by whistleblower complaints. The trends were clear and reinforced the DOJ's commitment to these enforcement priorities. We see these same trade winds blowing in 2013 and perhaps even intensifying in the president's second term.

### Foreign Corrupt Practices Act

The impact of heightened FCPA enforcement by the DOJ's Criminal Division during the 45-month tenure of Assistant Attorney General Lanny Breuer, the longest-serving head of the division in 50 years, will continue to be felt in 2013.

In a November 2012 speech, Breuer said this "global anti-corruption mission has seeped into the Criminal Division's core. And there is no turning back." The figures bear that out. During Breuer's tenure, the DOJ Frauds Section has more than doubled the number of prosecutors assigned to FCPA cases. In his speech, Breuer stressed two statistics regarding the growth of FCPA prosecutions: Since 2009, the DOJ has collected more than \$2 billion in criminal penalties and secured convictions of more than three dozen individuals. His remarks indicated that both metrics — the magnitude of fines and the number of individuals held responsible — will continue to drive the enforcement program in this area.

Also in November of last year, the DOJ and SEC issued the long-awaited FCPA guidance in a 120-page publication.<sup>8</sup> Few believe that the FCPA "Resource Guide" will decrease the number of new investigations and proceedings instituted by the government. Instead, the greater value of the guidance may be in providing additional transparency to the process by which DOJ and SEC attorneys evaluate investigations and cases on their burgeoning docket.

This year, we will be watching for trends in the DOJ's resolutions of corporate criminal investigations. In the decade since its prosecution of Arthur Andersen put the firm out of business (with the Supreme Court later reversing the firm's criminal conviction), the DOJ has made wide use of deferred prosecution and nonprosecution agreements to

<sup>8</sup> See <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

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resolve corporate investigations without a criminal charge. In late 2012, however, some in the media began to question, and some editorials criticized, the DOJ's use of such agreements to resolve high-profile inquiries, even though large monetary payments and significant corporate reforms were secured. We hope to see the DOJ continue to view noncriminal resolutions as appropriate ways to avoid harsh collateral consequences for company employees and shareholders.

### Whistleblowers

The False Claims Act (FCA) continued to generate a record \$4.9 billion in recoveries in 2012. The DOJ reported that \$3.3 billion of those recoveries resulted from whistleblower actions. The government's rate of intervention in private whistleblower suits has remained relatively constant, but the number of total *qui tam* claims overall continues to rise each year in the wake of FCA amendments providing additional incentives to private litigants. The DOJ has every incentive to make 2013 another record-breaking year.

By comparison, the SEC whistleblower program is in its infancy, but we expect its impact to grow rapidly. The Dodd-Frank Act authorized the SEC program to reward high-quality information that leads to an SEC enforcement action resulting in more than \$1 million in sanctions. In August 2012, the SEC announced a nearly \$50,000 award, the first under a new program to reward individuals who provide evidence of securities fraud. In its annual report on the whistleblower program, the SEC reported receiving more than 3,000 tips in 2012, with the most common complaint categories being corporate disclosures and financials (18.2 percent), offering fraud (15.5 percent) and manipulation (15.2 percent). With awards ranging from 10 to 30 percent of the money collected, we expect the number of SEC whistleblower claims to climb in 2013 and become a more significant component of the agency's enforcement program.

### Insider Trading

The government's relentless targeting of insider trading is poised to continue in 2013. The prosecutions of Raj Rajaratnam and more than 70 others resulting from the well-publicized wiretaps obtained by the U.S. Attorney's Office for the Southern District of New York are concluding, with an unbroken string of convictions. Although no new wiretaps have become public, the government surely will be looking to use that investigative tactic again, assuming the courts allow it. We expect to see decisions from the U.S. Court of Appeals for the Second Circuit this year on a series of appeals that challenged the government's use of wiretaps in the insider trading context. In any case, Southern District prosecutors brought one case to trial in late 2012 without the benefit of wiretap evidence and won a conviction, and they have made additional recent arrests without supporting wiretap evidence. As these efforts move forward, there is a danger of blurring the lines between legitimate research and insider trading if prosecutors and regulators fail to exercise restraint in applying the precedents that have developed on the elements of truly criminal conduct.

### The UK Criminal Enforcement Evolution

U.K. criminal enforcement evolved and strengthened in 2012, with significant investigations and proceedings, policy developments, and proposed regulatory and criminal justice system reform.

“The U.S. government's relentless targeting of insider trading is poised to continue in 2013.”

As political demands for tougher regulatory responses to financial crime grew in 2012, the two primary regulators of serious corporate crime and misconduct, the Serious Fraud Office (SFO) and the FSA, continued to bring increasingly complex cases, often in conjunction with overseas enforcement authorities and regulators. Significantly, the Crown Prosecution Service (CPS), which prosecutes all general crime, also took up significant prosecutions of financial crimes in 2012.

In October 2012, the U.K. Ministry of Justice published the results of a consultation to introduce deferred prosecution agreements (DPAs). The government envisages that DPAs primarily will be used to provide incentives for corporations to cooperate with government investigations in fraud and economic crime matters. The model for DPAs has some similarities to U.S. law and practice but involve earlier and greater judicial oversight than U.S. DPAs. In particular, the DPA approval process would begin with a nonpublic “first appearance” before the “sentencing” judge for the judge to assess whether a potential DPA would be “in the interests of justice” and “fair, reasonable and proportionate.”

### Serious Fraud Office

**Organizational and Policy Changes.** In April 2012, David Green QC became director of the SFO, bringing in a new senior management team. Green has indicated that the SFO will focus on criminal prosecutions and not on civil settlements or prospective compliance guidance. In relation to the U.K. Bribery Act, the SFO announced policy revisions in October 2012 that superseded prior guidance regarding corporate hospitality, facilitation payments and corporate self-reporting. Most significantly, the SFO stated that while a company’s voluntary disclosure of potential wrongdoing is one factor in whether to initiate a corporate prosecution, “self-reporting is no guarantee that a prosecution will not follow.”

**Enforcement Proceedings.** The SFO achieved some success in prosecution of individuals in 2012, while several corporate investigations were resolved by civil recovery agreements. The SFO also suffered public setbacks in its investigations into the collapse of Iceland’s Kaupthing Bank.

In relation to corporate entities, the SFO reached “civil recovery” (or disgorgement) settlements with two companies. In January 2012, the agency obtained a civil recovery order against Mabey Engineering Holdings Ltd. for £131,000, representing dividends from a criminal benefit obtained by operating subsidiary Mabey & Johnson Ltd. from contracts in Iraq in contravention of U.K. sanctions laws. In what appears to be an industry-related investigation following the Macmillan Publishing settlement in 2011, in July 2012 Oxford University Press settled with the SFO and paid £4.2 million. Both settlements were negotiated and agreed to by the SFO prior to the new director’s appointment. Whether Green will pursue civil recovery settlements is unclear.

As to individuals, in January 2012, Andrew Rybak and Ronald Saunders were sentenced after a trial to five and three years’ imprisonment, respectively, for the illicit sale of confidential information to oil and gas companies bidding on projects in Iran, Russia, Egypt, Singapore and the United Arab Emirates. The SFO also achieved a conviction of Polly Peck International CEO Asil Nadir for theft from the company between 1987-1990 of £29 million and was sentenced to 10 years’ imprisonment. Nadir absconded during the original trial in 1993 and, until his trial in 2012, remained a fugitive living in Northern Cyprus.

In the SFO's investigations regarding Kaupthing Bank, a court ruled that raids of the homes and business premises of property tycoons Robert and Vincent Tchenguiz were unlawful. The agency subsequently discontinued all investigations into suspected criminality surrounding the bank's collapse. The Tchenguiz brothers have launched a civil suit against the SFO for loss and damage to their businesses and already have recovered £3 million in costs.

### Crown Prosecution Service

**Enforcement Proceedings.** The CPS oversaw three of the U.K.'s highest-profile criminal investigations in 2012, and we expect its efforts in relation to complex criminal matters to continue in 2013. In February 2012, James Ibori, the former governor of the Delta State of Nigeria, pleaded guilty to conspiracy to defraud public funds and money laundering in excess of £50 million. Ibori's wife, sister, mistress and attorney previously had pleaded guilty to connected charges of money laundering. In April, Ibori was sentenced to 13 years' imprisonment. The CPS also obtained a conviction in the prosecution of Kweku Adoboli, the trader in UBS's Global Synthetic Equities Division in London who traded beyond authorized limits in exchange-traded funds and caused a loss to the bank of approximately \$2.3 billion. In connected regulatory enforcement actions, UBS was fined \$47.6 million by the U.K.'s FSA for failures of systems and controls, and the Swiss Financial Market Supervisory Authority (FINMA) imposed capital restrictions and other supervisory measures on the bank.

Finally, the CPS is supervising the prosecution of cases investigated by the Metropolitan Police concerning alleged phone hacking and improper payments to public officials by journalists. Since January 2011, in three separate investigations, more than 100 people (mainly journalists) have been arrested and 20 charged with various offences.

### Financial Services Authority

**Organizational and Policy Changes.** In 2012, the FSA appointed a new head of both Enforcement and Financial Crime, promoting Tracey McDermott from the ranks. In 2013, the FSA is expected to split into two distinct agencies: Enforcement of financial crime will be the responsibility of a new body, the Financial Conduct Authority; banking and regulatory functions will be handled by the Prudential Regulation Authority (PRA) (see [Financial Regulation/"Restructuring the UK Regulatory Framework: What the Financial Services Industry Can Expect"](#)).

The FSA published the findings of its thematic review into anti-bribery and corruption systems and controls in investment banks. Since August 2011, the FSA has visited 15 firms, including eight major global investment banks and a number of smaller operations, to examine how firms mitigate bribery and corruption risk. The FSA found systems and controls failures involving readiness for the Bribery Act, including inadequate or no risk assessments, lack of top-level management oversight and inadequate controls around third-party risk. The FSA will consider further regulatory action against firms that fail to heed regulator remediation advice and issued guidance.

**Enforcement Proceedings.** Similar to the focus of US authorities on insider trading, the FSA brought several insider trading enforcement actions in 2012.

In January 2012, the FSA announced its decision to fine U.S. hedge fund Greenlight Capital Inc. and its owner, David Einhorn, £7.2 million for engaging in civil market abuse. Einhorn traded in Punch Taverns Plc stock after learning of an anticipated significant equity fundraising by the company in a telephone call with its management. The FSA asserted that although Einhorn had not sought to obtain inside information from company management, his trades were nevertheless based on material nonpublic information.

In a case involving parallel investigation by the SEC and DOJ, James Sanders, a director of Blue Index (a specialist Contract for Difference (CFD) brokerage), his wife, Miranda Sanders, and James Swallow, a Blue Index co-director and compliance officer, pleaded guilty to insider trading between October 2006 and February 2008. In June 2012, the defendants were sentenced to four years', 10 months' and 10 months' imprisonment respectively. Inside information relating to U.S. securities was passed by a senior partner in a large U.S. accounting firm to a relative of Miranda Sanders.

The banking sector continued to be a focus of FSA enforcement action throughout the year. The agency settled a number of enforcement actions against U.K. and foreign banks based on systemic failures of money laundering controls. Coutts was fined £8.75 million, and other foreign registered banks, Habib Bank AG Zurich and Turkish Bank (U.K.) Ltd., similarly were fined for money laundering controls violations. Bank of Scotland was fined £4.2 million for inadequate books and records in its mortgage business.

The most significant fines against the banks have come in context of the ongoing LIBOR investigations, which are being conducted jointly by the FSA and SFO in the U.K. and the SEC, Commodity Futures Trading Commission and the DOJ in the United States (see ["Antitrust and Competition: Antitrust Enforcement on Both Sides of the Atlantic"](#)). In June 2012, Barclays settled its LIBOR cases with the FSA and was fined £59.5 million, as part of a multijurisdictional settlement valued at approximately \$450 million. In December, UBS was fined £160 million by the FSA for manipulating the LIBOR rate between 2005-10, in a multijurisdictional settlement that also involved U.S., Swiss and Japanese regulators and totalled approximately \$1.5 billion. Other banks face corporate enforcement proceedings by the FSA and criminal proceedings against executives, which will be led by the SFO. Arrests of traders in the LIBOR investigation in December will undoubtedly be followed by others in 2013 in both the U.K. and the United States.

### **China Continues to Present Enforcement Risks**

Recent events have highlighted the increasingly complex and difficult regulatory environment for both foreign companies operating in China and Chinese companies operating in the United States. We expect these trends to continue in the coming year.

One of the primary regulatory risks facing U.S. companies in China has been the potential for liability under the FCPA, and recent developments indicate that this likely will remain the case. As noted earlier in this article, the DOJ and the SEC recently released the much-anticipated FCPA "Resource Guide," which largely reaffirms the government's commitment to its established positions on the FCPA's scope, enforcement considerations and sanctions. Given that the FCPA remains "a critically important statute for combatting corruption around the globe" and "a continuing priority" for the DOJ and

“The diversifying regulatory risk environment in China cannot be wished away, but it can be managed.”

SEC, there is little reason to expect dramatic change in the U.S. government's aggressive enforcement posture on the FCPA as it relates to China. Indeed, FCPA enforcement activity targeting conduct in China continued last year, and U.S. regulatory focus likely will deepen as the world's two largest economies continue to interact.

There also are signs that U.S. regulatory focus is expanding into areas that previously had received less attention. Last year there was a spate of high-profile, non-FCPA regulatory activity against Chinese companies by the SEC, the Committee on Foreign Investment in the U.S. (CFIUS) and the Department of the Treasury's Office of Foreign Assets Control (OFAC), among others, in addition to increasing private litigation against Chinese firms. Just in the latter half of 2012, the Obama administration prohibited the acquisition of wind farm facilities by Chinese-owned companies on national security grounds,<sup>9</sup> Congress expanded its inquiries into the political ties of Chinese telecommunications companies, OFAC imposed sanctions on the Bank of Kunlun for dealings with certain Iranian banks,<sup>10</sup> and, most dramatically, the SEC leveled charges against the Chinese affiliates of all Big Four accounting firms for withholding certain audit work papers that the firms asserted was in compliance with local Chinese law.

This rising tide of enforcement activity has real implications for companies in both countries, as foreign business partners can expose U.S. firms to vicarious liability under increasingly expansive interpretations of U.S. regulatory jurisdiction, and companies can find themselves caught between the conflicting demands of local law in each country. All of this portends a wave of increasingly complex and disparate regulatory and litigation activity as the various U.S. regulators pursue their separate enforcement missions, often in uncoordinated fashion. This trend will place a premium on companies' abilities to view their regulatory risks globally, anticipate potential regulatory issues in multiple jurisdictions, bring expertise and resources to bear quickly to contain emerging problems, and orchestrate coordinated approaches to handle multiple simultaneous matters pending before different regulators in multiple jurisdictions. Dedicated teams of specialists on the ground in each jurisdiction with an understanding of local language, custom and regulatory practice will be required; and firms that are able to implement strong compliance programs and other preventative measures — both internally and with their foreign business partners — to catch potential issues before they develop into actual violations will be rewarded. Due diligence and other pre-transaction assessments will need to screen for a widening array of potential regulatory concerns and will demand that companies respond rapidly to contain and remediate emerging problems before they widen. The diversifying regulatory risk environment in China cannot be wished away, but it can be managed.

<sup>9</sup> See <http://www.whitehouse.gov/the-press-office/2012/09/28/order-signed-president-regarding-acquisition-four-us-wind-farm-project-c>.

<sup>10</sup> See <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20120731.aspx>.

## International Litigation and Arbitration: Jurisdictional Challenges, Cross-Border Enforcement Developments and Sovereign Debt Disputes

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### When Can US Courts Vacate an Arbitral Tribunal's Decisions for Lack of Arbitral Jurisdiction? The Debate Heats Up

Whether arbitrators have power to determine challenges to their own jurisdiction — known as “competence/competence” — was an intensely debated issue in the U.S. courts in 2012 and is likely to remain so in 2013. A number of recent appellate decisions have examined the role of the courts in reviewing arbitrators’ jurisdictional decisions as well as the effect of an agreement by the parties to arbitrate under rules that include a competence/competence provision conferring on the arbitrators the power to decide objections to their jurisdiction.

The U.S. framework for determining the standard of judicial review of an arbitral decision concerning arbitral jurisdiction (sometimes referred to as “arbitrability”) was established by the U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options*, the Supreme Court held, in a case governed solely by the “domestic arbitration” provisions of the Federal Arbitration Act, that the scope of judicial review is determined by whether the parties agreed to submit questions of arbitrability to the arbitrator. *Id.* at 943. If so, the reviewing court will apply the same deferential standard of review applicable to any other matters that the parties agreed to arbitrate. If, on the other hand, the parties did not agree to submit the arbitrability question to arbitration, then the question of whether the dispute is arbitrable is subject to independent review by the courts. *Id.* The Supreme Court cautioned, however, that courts should not assume that the parties have agreed to arbitrate arbitrability without “clear” and “unmistakable” evidence of their intent to do so, and in this regard, held that merely submitting a jurisdictional objection to the arbitrator does not indicate a clear willingness to have the arbitrator decide the question of arbitrability. *Id.* at 945-46.

In *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274 (3rd Cir. 2003), a panel of the Third Circuit, which included then-Circuit Judge Alito prior to his elevation to the U.S. Supreme Court, held that *First Options* also applies to international arbitral awards where enforcement is sought under the New York Convention. In that case, the Third Circuit held that where a party alleged that the arbitration agreement had been forged, the court should make an independent determination of arbitrability. *Id.* at 289.

In 2012, the U.S. Courts of Appeals had the opportunity to apply these principles and consider how they interact with the arbitral rules chosen by the parties:

- In January, the D.C. Circuit vacated a \$185 million damages award previously rendered by an UNCITRAL tribunal under the United Kingdom-Argentina Bilateral Investment Treaty (the U.K.-Argentina BIT). See *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012). The UNCITRAL tribunal had held that Argentina’s 2001-02 legislation, redenominating energy tariffs from dollars to pesos, was a violation of the U.K.-Argentina BIT. Argentina argued the UNCITRAL tribunal lacked jurisdiction because the claimant had failed to litigate its grievances in the Argentine courts for 18 months as required by the U.K.-Argentina BIT. The D.C.

Circuit agreed, holding that, in ignoring this jurisdictional limitation, the UNCITRAL tribunal had exceeded its powers. It furthermore held that the “parties would likely have expected a court to determine whether a claimant’s failure to abide by the 18-month pre-arbitration procedure would affect arbitrability,” *i.e.*, there was no “clear and unmistakable evidence,” for *First Options* purposes, that the arbitrators had the power to decide this jurisdictional issue. A *certiorari* petition before the U.S. Supreme Court was still pending at the end of 2012.

- In June, the Sixth Circuit, in *Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC*, No. 11-5232, 2012 WL 2401722, vacated an AAA arbitrator’s award against a counterclaim defendant who claimed that he was not a proper party to the arbitration. The lower court had concluded that the counterclaim defendant had waived the challenge by failing to put this jurisdictional objection to the arbitrator. Reversing, the Sixth Circuit ruled that under *First Options*, the counterclaim defendant had preserved his objection sufficiently, adding that the courts must determine the threshold question of whether there was an arbitration agreement between the counterclaimant and the nonsignatory. Absent such agreement, the question of arbitrability was for the court to decide. *Id.* at \*4-5.
- In July, the Second Circuit, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People’s Democratic Republic*, No. 11-3536-cv, 2012 WL 2866275, affirmed an international award issued under the UNCITRAL rules. The Lao government argued that one of the two claimants was not a signatory to the relevant arbitration clause, and thus not a proper party. The Second Circuit held however that Laos’ agreement to arbitrate under the UNCITRAL rules, which provide that the arbitral tribunal has the power to rule on jurisdictional objections, constituted a “clear and unmistakable intent” to arbitrate arbitrability, and thus, in accordance with *First Options*, it would not independently review the issue. *See* 2011 WL 3516154, at \*\*17-21 (S.D.N.Y. 2011), rehearing and en banc review denied (Oct. 18, 2012). At the end of 2012, it was possible that Laos would seek *certiorari* before the U.S. Supreme Court.
- Also in July, the Fifth Circuit in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, affirmed an AAA award, rejecting a claim that the dispute was beyond the defined scope of the arbitration agreement. It held that by expressly incorporating the AAA rules into their agreement, the parties had clearly and unmistakably agreed to arbitrate this “scope” issue, meaning the arbitrators’ decision on scope was conclusive. *See id.* at 674-75.
- Finally, in August, the Second Circuit in *Schneider v. Thailand*, 688 F.3d 68 (2d Cir. 2012), upheld a €30 million UNCITRAL award in favor of a German investor, following the Thai government’s alleged breaches of the Germany-Thailand BIT. Thailand argued that the tribunal lacked jurisdiction because the investor’s enterprise (a toll-way project) was not an “approved investment,” as defined by the investment treaty. The Second Circuit held that this question was reserved under the terms of the Germany-Thailand BIT to the arbitrators. It added that its view was fortified by the UNCITRAL rules, which stated (in relevant part) that “the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.” This, for *First Options* purposes, was “clear and unmistakable evidence” that the relevant jurisdictional question was for the arbitrators.

Each of these U.S. decisions appears to turn on the issue of whether the party challenging the award unequivocally agreed to submit to the arbitral rules that contain a competence/competence provision. In both *Petrofac* and *Thai-Lao*, submission to the rules by the party challenging the award was undisputed, while in *Crossville Medical Oncology* and *China Minmetals*, the jurisdictional dispute centered on whether the objecting party had agreed to arbitrate at all, let alone under any particular rules.

The BIT cases arguably raise a more nuanced issue. *BG Group* turns on whether the arbitration agreement should be viewed as having certain conditions, nonfulfillment of which would destroy jurisdiction based on the terms of the relevant treaty. Argentina argued that its submission to arbitration was conditioned upon the claimant following a certain pre-arbitration procedure, that it had failed to do so and that, under *First Options*, the parties to the relevant arbitration agreement (contained in an investment treaty) had chosen to allow the courts to have ultimate power to review this issue. *Schneider*, by contrast, concerned an issue that (again based on the terms of the particular treaty) appeared to have been entrusted to the arbitrators.

Regardless of whether the Supreme Court grants *certiorari* in *BG Group*, parties and courts need to consider carefully the individual terms of every arbitration agreement and applicable institutional arbitration rules to determine in each case whether and what issues of jurisdiction are to be determined exclusively before the arbitration tribunal, and whether any such issues may be raised afresh before the courts.

*BG Group* turns on whether the arbitration agreement should be viewed as having certain conditions, nonfulfillment of which would destroy jurisdiction based on the terms of the relevant treaty.

### Attempts to Use New York Courts for Cross-Border Judgment Enforcement Against International Banks: The *Koehler* Controversy

For the past three years, New York courts have been embroiled in a battle between judgment creditors and international banks over the proper scope of the judgment enforcement mechanisms, resulting from the 2009 decision by the New York Court of Appeals — New York’s highest state court — in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009).

In *Koehler*, the New York Court of Appeals (answering questions certified to it by the Second Circuit) held that a New York court, when exercising post-judgment enforcement powers under New York’s Civil Procedure Law and Rules, could validly order a bank to deliver to a judgment creditor the property of a judgment debtor (*e.g.*, stock certificates), even though the assets are held by the bank outside New York, so long as the court has personal jurisdiction over the bank in New York. Bank of Bermuda’s Bermuda branch, which held the certificates, had consented to the jurisdiction of the courts of New York at the onset of the litigation, a fact emphasized by the New York Court of Appeals.<sup>11</sup>

In the years since *Koehler*, judgment creditors have sought to use the decision to reach judgment debtors’ assets held in foreign bank branches that, unlike Bank of Bermuda in *Koehler*, do not consent to personal jurisdiction in New York. They have done so by serving petitions to turn over assets on the foreign banks’ New York branches, arguing that the presence of a New York branch allows the New York courts to exercise jurisdiction over the entire bank’s worldwide operations.

<sup>11</sup> See *Koehler*, 12 N.Y.3d at 536; see also *Koehler v. Bank of Bermuda Ltd.*, 2005 WL 551115, at \*12 (S.D.N.Y. Mar. 9, 2005).

In defending against such claims, bank garnishees have sought to invoke a long-standing rule of New York law known as the “separate entity rule.” Under this rule, bank branches that are not separately incorporated nevertheless are treated as separate jurisdictional entities from their sister branches in other countries for judgment enforcement and other purposes. Accordingly, serving process on a New York branch of a foreign bank would not be sufficient to establish jurisdiction over the bank’s foreign branches where a judgment debtor may have assets.

On numerous occasions over the last few years, New York’s state courts have held that the separate entity rule remains intact and cannot be abrogated absent legislative action or a clear statement to that effect by the New York Court of Appeals. For instance, in *Global Technology, Inc. v. Royal Bank of Canada*, No. 15015½011, 2012 WL 89823 (N.Y. Sup. Ct. Jan. 11, 2012), a New York trial court held that “under the separate entity rule, service of the petitioner’s restraining notice upon respondent’s branch in Manhattan did not restrain [the judgment debtor’s] bank accounts in Canada.” *Id.* at \*13.<sup>12</sup> Even more recently, in October 2012, a New York Supreme Court judge set aside a series of information subpoenas aimed at finding overseas assets allegedly controlled by French, Canadian and Swiss banks with branches in New York, holding, among other things, that the “separate entity” rule rendered such efforts improper. *See Ayyash v. Koleilat*, Index No. 151471/12 (N.Y. Sup. Ct. New York County, Oct. 22, 2012).

### District Court Views

In contrast, certain federal district court judges sitting in Manhattan have been more equivocal about the survival of the separate entity rule after *Koehler*. For instance, in a January 2011 decision, one district judge took the view that “*Koehler* indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings.” *JW Oilfield Equipment, LLC v. Commerzbank, AG*, 764 F Supp 2d 587, 595 (S.D.N.Y. 2011). The court based its decision, in part, on an apparent concession by Commerzbank that the separate entity rule had been preempted in certain instances. *Id.* Nine months later, another district judge cited *JW Oilfield* approvingly and rejected contrary precedents from the New York state courts.<sup>13</sup> Indeed, as *Global Technology* observed in January 2012, “federal courts are deeply divided from New York trial-level courts on this issue.”<sup>14</sup>

Shortly after *Global Trading*, Judge Loretta Preska, Chief Judge of the Southern District, disagreed with prior federal decisions and instead joined the New York state trial courts in holding that the separate entity rule remains the law of New York. *Shaheen Sports, Inc. v. Asia Ins. Co.*, Nos. 98 Civ. 5951, 11 Civ. 920, 2012 WL 919664, at \*3–8 (S.D.N.Y. Mar. 14, 2012). In *Shaheen Sports*, a judgment creditor petitioned for turnover of the judgment debtor’s assets by Habib Bank Limited. The petitioner served Habib’s New York branch even though it alleged that the judgment debtor’s assets were held by a Habib branch in Pakistan. The court declined the petitioner’s invitation to discard the separate entity rule and refused to order Habib to turn over assets held by the Pakistani branch.

<sup>12</sup> See also, e.g., *Samsun Logix Corp. v. Bank of China*, No. 105262/10, 2011 WL 1844061 (N.Y. Sup. Ct. May 12, 2011); *Parbulk A.S. v. Heritage Maritime S.A.*, Index No. 651285/11 (N.Y. Sup. Ct. June 7, 2011), slip op. at 3-4.

<sup>13</sup> *Eitzen Bulk A/S v. Bank of India*, No. 09 Civ. 10118, 2011 WL 4639823 (S.D.N.Y. Oct. 5, 2011) (Hellerstein, J.).

<sup>14</sup> *Global Technology*, 2012 WL 89823, at \*1.

Chief Judge Preska took the view that if the New York Court of Appeals intended to abrogate the long-standing separate entity rule, “it is not unreasonable to expect that ... it would have said so.” *Id.* at \*5. She also pointed out that there are “significant policy principles underlying the separate entity rule,” including “the intolerable burden that would otherwise be placed on banking and commerce if mere service of a writ to a New York branch could subject foreign bank branches to competing claims” in New York and the foreign jurisdiction. *Id.* (citations omitted).

\* \* \*

Whether the appellate courts in New York will act in *Shaheen Sports* or another case to definitively address the viability of the separate entity rule after *Koehler* awaits determination. It seems likely that the issue eventually will reach the New York Court of Appeals for further adjudication.

### Continuing Disputes Over Sovereign Debt

The recent sovereign defaults in several Latin American states and the specter of a similar fate for some Western nations once again have brought into focus the many legal and practical issues that arise when a sovereign fails to make payment on its bonds or other debt obligations.

The most prominent example has been the Argentine bond default of 2001-02, which led holders of Argentina’s 1994 bonds to bring legal proceedings in the federal courts of New York (the agreed exclusive forum for disputes as specified in many of Argentina’s sovereign bonds). Several creditors, having obtained judgments against Argentina, have attempted to attach state-owned (or allegedly state-owned) assets in an effort to enforce those judgments, leading to a host of decisions under the Foreign Sovereign Immunities Act about whether particular classes of assets (*e.g.*, state airlines, central bank deposits, state-administered pension funds — even the presidential jet) enjoy immunity from execution. While most of these decisions have been made in New York (by the U.S. District Court for the Southern District of New York or, on appeal, by the U.S. Court of Appeals for the Second Circuit), others have been made in California or overseas, with one recent attachment order (concerning the historic ship *Libertad*) made by the courts of Ghana.

In 2005 and 2010, in an effort to restructure its sovereign debt, Argentina made certain exchange offers, inviting its predefault bondholders to exchange their defaulted debt for new instruments to be issued by Argentina. The exchange offers met with a more-than 90 percent acceptance rate, with a small minority electing to continue their efforts at judgment enforcement. One of the steps taken by these holdouts was to challenge Argentina’s right to make payments under the 2005 and 2010 exchange instruments. They argued that observance by Argentina of its obligations under these exchange instruments, without also making a “ratable payment” to the holdouts, would violate the *pari passu* clause of the original predefault bonds, which states:

The [1994 bonds] will constitute ... direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.

In December 2011, Judge Griesa of the Southern District held that the *pari passu* clause applied and issued a mandatory injunction requiring Argentina, any time it made a payment under an exchange instrument, to make a ratable payment to the holdouts. In October 2012, a three-judge panel of the Second Circuit affirmed the finding of the district court, but held that certain issues, including the meaning of ratable payment and the effect of the district court's order on third parties, required further clarification, thus remanding these issues to the district court.

In November 2012, the district court held that the ratable payment rule meant that, any time a payment (of any size) is made on an exchange instrument, a simultaneous payment must be made equaling all of the debt currently due to the holdouts, *i.e.*, all principal and interest outstanding under the 1994 bonds (such principal obligations having been accelerated according to the terms of the 1994 bonds). Both this and the Second Circuit decisions are subject to further appeal.

### **The *Abaclat* Case**

Not all holdout bondholders have elected to take their claims to the courts. In the case of *Abaclat v. Argentina*, a group of approximately 60,000 Italian holdouts have brought arbitral proceedings against Argentina pursuant to the Italy-Argentina Bilateral Investment Treaty (BIT) before the International Centre for Settlement of Investment Disputes (ICSID), a specialist investor-state arbitration forum governed by the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention). The *Abaclat* claimants allege that their bond instruments constitute protected investments under the BIT and the ICSID convention, and Argentina has violated its treaty obligations.

In 2011, an ICSID tribunal held (by majority) that it had jurisdiction over the dispute in that the *Abaclat* claimants' bonds were an investment susceptible of protection against the potential violations of the BIT, including the fair and equitable treatment, most favored nation and umbrella clauses of the BIT. The *Abaclat* claims are now progressing toward a merits hearing. Two older ICSID cases involving Italian bondholders against Argentina may come to a final award over the next few months.<sup>15</sup>

The *Abaclat* case remains highly controversial in some quarters, not only because it represents the largest mass arbitration before ICSID, but also because the relationship between international law obligations (in a treaty) and the private law contractual obligations (such as those contained in a bond instrument) have not yet been fully articulated. For example, while the nonpayment of a debt obligation certainly would breach a private law obligation, it is not yet clear in what circumstances this could be held to constitute a treaty obligation.

The *Abaclat* tribunal has suggested that some state measures targeted at creditors (*e.g.*, the enactment of moratoria that purport to suspend or nullify creditors' rights) may constitute a treaty breach. In addition, certain past BIT cases have suggested that a state economic restructuring, if done in a manner that discriminates against classes of investors, may violate treaty rights. In *Saluka Investments v. Czech Republic* (UNCITRAL 2006), for example, state actions, taken in the midst of a debt crisis in the financial

<sup>15</sup> *Giordano Alpi and others v. Argentine Republic* (ICSID Case No. ARB/08/9) and *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8).

“The *Abaclat* case remains highly controversial in some quarters because the relationship between international law obligations and the private law contractual obligations have not yet been fully articulated.”

sector, improperly discriminated against foreign investors, thus creating liability under the Netherlands-Czech BIT.

\* \* \*

As many governments continue to struggle with their outstanding indebtedness, it remains possible that holdout litigation, or proceedings akin to the *Abaclat* case, may recur in another setting. Without an international insolvency regime applicable to sovereigns, litigation in the national courts and potential ICSID arbitration will continue over sovereign debt enforcement.

## Intellectual Property and Technology: Patent and E-Commerce Issues to Watch

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### Patent and Technology Issues to Watch

With the epic smartphone patent battle between Apple and Samsung making headlines, patent law met popular culture in 2012 in a way that rarely occurs. What was happening behind the scenes in patent law, however, promises to have much more lasting ramifications than will the outcome of that single lawsuit.

**The America Invents Act (AIA).** The AIA, which is the most significant revision to U.S. patent law since the 1950s, was rolled out in phases starting in late 2011. However, the most fundamental change imposed by the AIA — the move to a “first-to-file” patent system — will not come into effect until March 2013. Moreover, the rules implementing various Patent & Trademark Office (PTO) procedures for challenging patents are in a state of flux, and the statute itself may face amendment as questions about the viability of certain provisions are revealed. For example, the AIA allows for challenges to a patent via a postgrant review process, which becomes available upon issuance of the patent, and an *inter partes* review process, which becomes available nine months after issuance. The current wording of the AIA, however, limits the postgrant review process to patents issued on applications filed on or after the March 2013 date when the first-to-file system goes into effect. Because those patents likely will not be issued for a number of years, a situation has been created in which newly issued patents cannot be challenged for nine months, when the *inter partes* review becomes available. A bill has been introduced to remedy this gap.

**Theft of Trade Secrets Clarification Act of 2012 (the Act).** On December 28, 2012, President Obama enacted the Theft of Trade Secrets Clarification Act of 2012, which clarifies the scope of Section 1832 of the Economic Espionage Act of 1996 (EEA) and attempts to reverse the U.S. Court of Appeals for the Second Circuit’s recent decision in *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012). Significantly, the Act clarifies that the EEA protects wholly internal proprietary information if the information relates to products or services that are used in interstate or foreign commerce.

As amended, Section 1832(a) will require that the trade secret relate to a product or service that is used or intended for use in interstate or foreign commerce. The offense will no longer be limited to theft of trade secrets related to a product that is produced for or placed in interstate or foreign commerce. The intended consequence of the amendment will be to reject the Second Circuit's interpretation of the scope of the EEA. *See, e.g.*, 158 Cong. Rec. H6849 (daily ed. Dec. 18, 2012) (statement of Rep. Smith) (noting the "dangerous loophole" created by the *Aleynikov* decision and calling on Congress to "take action in response to the Second Circuit's call and ensure that we have appropriately adapted the scope of the EEA to the digital age").

The broader scope, combined with the recent publicity of the *Aleynikov* case, likely will spur an increase in criminal indictments under the EEA as companies increasingly recognize the Act as a powerful weapon in defense of trade secrets. For companies seeking such protection, referring matters to federal authorities for prosecution under the amended EEA may be an attractive alternative to litigating claims in state court. Likewise, the amended EEA creates an incentive for companies to re-examine the techniques they use for competitive intelligence gathering and the care with which they handle third-party proprietary information.

Patent law met popular culture in 2012 in a way that rarely occurs.

**U.S. Supreme Court Outlook.** In 2012, the Supreme Court continued its nearly decade-long run of patent decisions, ruling on patentable subject matter (*Mayo v. Prometheus*), patent-use codes for drug products (*Novo Nordisk v. Caraco*) and the scope of evidence in appeals from the PTO (*Kappos v. Hyatt*). Decisions are expected from the Supreme Court in still more patent cases in 2013 (see "[The US Supreme Court Term: Business Cases to Watch](#)"). The following are the most noteworthy:

- *AMP v. Myriad Genetics*. The Supreme Court has granted *certiorari* in this case on the question of whether isolated DNA is patent-eligible subject matter. The Federal Circuit ruled that isolated DNA is patentable subject matter because it is man-made, not found in nature and distinct from naturally occurring DNA. In its decision, the Federal Circuit relied in part on the PTO's nearly 30-year history of issuing patents related to DNA molecules. This decision clearly will be important to the life sciences industry, but its application may be more far reaching if the Supreme Court speaks to the degree of deference that courts should afford the PTO in determining patent-eligible subject matter.
- *Already, LLC v. Nike, Inc.* This case, which was decided by the Supreme Court on January 8, 2013, involved the question of whether a covenant not to sue for trademark infringement divests a district court of Article III jurisdiction over a challenge to that trademark. Nike first sued Already for trademark infringement, and when Already counterclaimed seeking to cancel the mark, Nike withdrew its infringement claim and agreed not to pursue litigation. The Supreme Court upheld the decision of the Second Circuit, which in turn had affirmed the district court's dismissal of Already's claim for lack of case or controversy. The Supreme Court reasoned that a trademark owner's unequivocal assertion of non-enforcement moots a challenge to the validity of the mark by a competitor that no longer faces the threat of enforcement action. While four justices joined in a concurrence urging a limited reading of the decision, it is expected that litigants in patent actions will attempt to extrapolate from the holding. Current precedent allows a patent holder to divest a court of jurisdiction over a declaratory judgment counterclaim of invalidity by agreeing not to sue the claimant for infringement, thus eliminating the required case or controversy, and the Supreme Court's decision in favor of Nike underscores that precedent.

### E-Commerce: Industry Continues to Face Two-Front Battle

Enforcement action and litigation by government authorities against e-commerce companies continued in 2012, and this trend shows no signs of slowing down in 2013.

**Government Actions.** Taxing authorities across the country continue to assert claims against online travel service companies (OTCs) for alleged failure to collect and remit hotel occupancy tax owed on the amount each charges customers and retains as compensation for its online travel services related to the reservation of hotel rooms. To date, the OTCs have won 20 of the 28 cases in which judgment has been ordered, and obtained a ruling that no back taxes are owed in four of the remaining eight cases. In 2012, the scorecard was even more lopsided — of the 15 cases in which judgment was entered, the OTCs won 13 outright and obtained a ruling that no back taxes were owed in one of the two remaining cases. In each win, the court ruled in favor of the online companies and determined the companies do not operate hotels and are not liable for tax on the amount they charge customers and retain as compensation for their online services.<sup>16</sup>

Taxing authorities' efforts to impose sales tax on nonresident e-commerce companies also continued. Relying on representative nexus taxing theories, states continue to assert tax jurisdiction over e-retailers, requiring that each pay sales tax on sales to in-state customers even where the e-retailer itself does not have a physical presence in the state. While the validity of such taxing theories still is in question, states have been successful in convincing various e-retailers to begin collecting and remitting tax pursuant to them. In an effort to render those taxing theories moot, lobbying efforts are being made by, and on behalf of, traditional brick-and-mortar retailers for federal legislation (most notably, the Marketplace Fairness Act) to impose a uniform law governing the applicability of sales tax statutes that would require all e-commerce companies to collect sales tax on all transactions. Such congressional action is largely opposed by e-retailers.

Government authorities also continued to take action to protect the privacy of online consumers. For example, the FTC approved settlements in 2012 with a number of online companies resolving privacy issues. Facebook settled charges that it deceived customers regarding the privacy of their information, agreeing to make changes to its business practices and to permit periodic third-party audits of those practices. Meanwhile, Google agreed to pay a \$22.5 million civil penalty to resolve charges relating to its practice of circumventing privacy settings to place advertising tracking cookies on consumers' computers. Finally, in settling charges that it (1) deceived consumers by misrepresenting its data collection practices, and (2) failed to adequately protect the data collected, Compete, Inc. agreed to abstain from making future representations, implement a comprehensive security program and conduct periodic, independent audits of its practices regarding consumer privacy.

<sup>16</sup> Notable 2012 wins included *City of Columbus v. Hotels.com, L.P.*, Nos. 10-4531/4545, 2012 U.S. App. LEXIS 18949 (6th Cir. Sept. 10, 2012); *City of Birmingham, et al. v. Orbitz, Inc. et al.*, Case No. 1100874, 2012 Ala. LEXIS 43 (Ala. Sup. Ct. Apr. 13, 2012); *Expedia, Inc. v. City of Anaheim*, BC 230457 (Ct. App. Nov. 1, 2012); *City of Santa Monica v. Expedia, Inc., et al.*, BC 236166 (Ct. App. Nov. 1, 2012); *City of Goodlettsville v. Priceline.com Inc.*, Case No. 3:08-cv-00561 (M.D. Tenn. Feb. 21, 2012); *Leon County, et al. v. Expedia.com, et al.*, Case No. 09CA4319 (Fla. 2d Jud. Cir. Ct. Apr. 19, 2012); and *In the Matter of the Tax Appeal of Travelocity.com LP, et al.*, T.A. No. 11-1-0021 (and Consolidated Cases) (Tax Appeal Court, State of Hawaii, Oct. 22, 2012). The only adverse ruling came in *District of Columbia v. Expedia*, Case No. 2011 CA 002117 B (Wash. D.C. Sup. Ct. Sept. 24, 2012).

**Consumer Claims.** Consumers also took action against online companies in 2012 to protect their privacy interests. For example, in *In re Hulu Privacy Litigation*, the U.S. District Court for the Northern District of California ruled that a consumer class action could proceed against Hulu.com for alleged violations of the Video Privacy Protection Act. Specifically, the court allowed claims to proceed on allegations that a website illegally shared viewing histories and other private information with third-party advertisers, ruling that the Video Privacy Protection Act (VPPA) applied to such websites that allow users to stream video over the Internet. A similar suit (*In re Netflix Privacy Litigation*) alleging violations of the VPPA was brought by consumers against Netflix. Netflix reached an agreement to settle claims arising from allegations that it unlawfully retained and disclosed viewing histories and other private information for \$9 million. The settlement agreement received preliminary approval from the court on July 5, 2012. However, in *Low v. LinkedIn Corporation*, the U.S. District Court for the Northern District of California dismissed claims brought pursuant to the Stored Communications Act against LinkedIn alleging illegal disclosure of browsing history to advertisers. The court ruled the consumers lacked a claim under the VPPA because the allegedly disclosed information did not relate to an electronic communication service and/or a remote computing service.

Consumers also continued to pursue consumer fraud claims against online companies. One such action, *Schnabel v. Trilegiant Corp.*, No. 11-1311 (2d Cir. Sept. 7, 2012), produced an important ruling applying the “shrinkwrap” principle in contract law to online agreements. The court ruled that an arbitration clause was unenforceable where the clause was not disclosed on the Web page where consumers enrolled in the discount shopping program, but rather was sent to consumers in an email after enrollment. Specifically, the court ruled the arbitration clause was unenforceable because it was “both temporally and spatially decoupled” from the consumers’ enrollment in the program.

## Securities Litigation: Recent and Upcoming Supreme Court, Appellate and District Court Developments

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### Recent and Upcoming Supreme Court Decisions in Securities Cases

The U.S. Supreme Court continues to show interest in securities and class action issues. In 2012, for example, the Court unanimously decided *Credit Suisse Sec. (USA) v. Simmonds*, 132 S. Ct. 1414 (2012), holding that the statute of limitations governing the recovery of “short-swing” profits from corporate insiders under Section 16(b) of the Securities Exchange Act can begin to run regardless of whether the insiders filed a public disclosure of their transactions under Section 16(a). The Court noted that the Securities Exchange Act’s plain text provides that the period for recovering short-swing profits commences on the “date such profit was realized.” 15 U.S.C. § 78p(b). The Court was evenly split 4-4 (Chief Justice John Roberts took no part in the consideration of the case) regarding whether Section 16(b) provided a statute of repose rather than a limitations period.

Last year, the Court also heard argument in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, No. 11-1085 (2012), on whether a securities fraud plaintiff alleging fraud on the market must establish materiality in order to obtain class certification. A decision is anticipated by the end of June 2013 (see “The US Supreme Court Term: Business Cases to Watch”).

### Supreme Court Could Rule on Evidentiary Standard for Expert Testimony at the Class Certification Stage

In the antitrust context, the Supreme Court could decide a question left open by the Court’s recent holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), with potential implications for the certification of securities class actions. The forthcoming ruling in *Comcast Corp. v. Behrend*, No. 11-864, could resolve whether expert testimony offered to support classwide damages at the certification stage must withstand a reliability assessment under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (see “Class Action Outlook: A Busy Year Ahead”). The Supreme Court heard argument on November 5, 2012, and a ruling is expected by the end of June 2013. The result could impact securities class actions by directing district courts in their scrutiny of expert testimony regarding classwide damages.

“The Supreme Court’s 2013 *Comcast* ruling could impact securities class actions by directing district courts in their scrutiny of expert testimony regarding classwide damages.”

### New York State Court Rejects Extraterritorial Securities Lawsuits Already Excluded From Federal Court by the US Supreme Court’s *Morrison* Decision

On December 27, 2012, New York’s Appellate Division issued highly anticipated rulings in *Glenhill Capital LP v. Porsche Automobil Holding* and *Viking Global Equities LP v. Porsche Automobil Holding*, dismissing the U.S. component of several hedge funds’ litigation against Porsche concerning Porsche’s allegedly secret plans to acquire Volkswagen. The court found that New York state courts are not the proper forum for the particular fraud claims at issue, which were brought by a mix of foreign and domestic funds against foreign defendants over shares traded on a foreign exchange. In 2010, the U.S. Supreme Court held in *Morrison v. National Australia Bank*, 130 S. Ct. 2869, that such “foreign-cubed” claims cannot, as a matter of law, be brought under federal securities statutes because they are beyond the territorial reach of Section 10(b) of the Securities Exchange Act. Applying *Morrison*, a federal court in Manhattan dismissed the claims against Porsche in parallel litigation. That decision is on appeal to the U.S. Court of Appeals for the Second Circuit and a decision is expected this year. The plaintiff funds then filed a similar action in New York state court under state law, which was at issue in the December 27 opinion. Although New York’s Appellate Division did not rely on *Morrison* in its ruling that the state litigation must be dismissed, the court determined under the *forum non conveniens* doctrine that the only connections between the alleged fraud and New York were inadequate to create a sufficient nexus to New York, particularly because the underlying transactions occurred overseas and many parties, witnesses and documents also were overseas. The court also credited Germany’s interest in the alleged fraud, which is the subject of a pending parallel case filed there.

### Credit Crisis Litigation Trends Continue to Evolve

Although the number of securities class actions decreased slightly in 2012 as compared to 2011, the decline in traditional class actions was offset by a significant rise in residential mortgage-backed security (RMBS) actions and actions related to

collateralized debt obligations (CDOs) brought by large institutional investors. As statutes of limitation and statutes of repose run out on causes of action under the federal securities laws, credit crisis litigation plaintiffs are increasingly asserting common law claims. On the securities class action front, there is anecdotal evidence that institutional shareholders are becoming more inclined to opt out of major class action litigation settlements, raising the specter of prolonged litigation and settlement negotiations with individual shareholders. M&A-related claims also continue to be a source of activity, and plaintiffs have shown an increased willingness to keep these litigations alive after the deals close.

### **In 2012, Circuit Courts Heard or Decided Several Significant Cases**

Several key issues were deliberated or decided at the Circuit Court level last year, including in cases relating to the scope and applicability of statutes of repose; the standards for certifying class actions; the adequacy and actionability of various corporate disclosures; and the scope of *Morrison*. Not surprisingly, most of the significant developments are taking place in the Second Circuit.

Two cases addressing statutes of repose have been heard but not decided by the Second Circuit. The first, *FHFA v. UBS Americas Inc.*, No. 12-3207 (2d Cir. argued Nov. 26, 2012), turns upon the distinction between statutes of limitation and statutes of repose. In *FHFA*, the Second Circuit recently heard oral argument on whether FHFA's claims are time-barred by the statutes of repose found in Section 13 of the Securities Act and relevant state "Blue Sky" statutes. FHFA argued that its claims were timely because Congress purportedly extended the statutes of repose applicable to federal and state statutory claims when it enacted the 2008 Housing and Economic Recovery Act (HERA). UBS countered that FHFA's claims were time-barred because HERA, by its unambiguous terms, only extends statutes of limitation, not statutes of repose. UBS further asserted that HERA's plain language only applies to FHFA's state law contract and tort claims, not its federal claims or statutory claims.

The second statute-of-repose case, *In re IndyMac Mortgage-Backed Securities Litigation*, Nos. 11-2998-cv and 11-3036-cv (2d Cir. argued Dec. 5, 2012), promises to have a significant impact on the behavior of plaintiffs in securities actions. The Second Circuit is now considering two main issues: first, whether the statute of repose, as the district court found, is an absolute bar and cannot be abridged by the class action tolling principles enunciated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); and second, whether *American Pipe* tolling applies to an intervenor's claims where, as in this case, the original named plaintiff lacked standing to sue on behalf of the intervenor in the first place.

The Second Circuit also heard several appeals with potentially wide-ranging effects on class standing and class certification in securities cases. First, in a class standing case, *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), the Second Circuit considered whether class plaintiffs can represent investors in offerings other than the ones in which named plaintiffs bought securities. The case was a putative securities class action involving RMBS certificates issued in 17 offerings under one common shelf registration statement. The Second Circuit concluded that in all 17 offerings, the overlapping "concerns" involved mortgage origination standards. Thus, it only allowed the plaintiff to assert claims with respect to offerings involving

originators that had made at least some of the loans underlying the certificates purchased by the plaintiff. Defendants have petitioned the Supreme Court for *certiorari*.

In another class action-related case, *In re AIG Securities Litigation*, 689 F.3d 229 (2d Cir. 2012), the Second Circuit addressed the interplay between class certification and proposed settlements. Back in 2010, the district court held that it could not certify a settlement class because plaintiffs had previously failed in their efforts to certify a class on the merits. The Second Circuit reversed, holding that if a Rule 23 requirement would be resolved by the settlement itself, a court need not consider that element in certifying a class for settlement purposes.

The Second Circuit also is poised to weigh in on class certification in *Credit Suisse Securities (USA) LLC v. Vazurele Ltd.*, No. 12-2790-cv (2d Cir. filed July 13, 2012). In *Vazurele*, plaintiffs claim that the offering materials in this RMBS case misrepresented the underwriting standards employed by IndyMac in violation of the Securities Act. In certifying a class, the district court rejected Credit Suisse's argument under Rule 23(b)(2) that individual questions of investor knowledge about IndyMac's underwriting practices would predominate. The appeal presents two main issues. First, Credit Suisse claims that by certifying a class encompassing all investors, the district court made it impossible to have a classwide determination of investor knowledge, which it says increased over time as more information about IndyMac's underwriting became publicly available. Second, Credit Suisse contends that the district court erroneously shifted the burden of proof at class certification by, in effect, requiring it to prove the merits of its statutory knowledge defense.

In addition, the Second Circuit weighed in on the importance of updating corporate disclosures to reflect evolving risks. Following *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011), the Second Circuit, in *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114 (2d Cir. 2012), ruled that the plaintiff had adequately pled a Securities Act violation under Sections 11 and 12(a)(2). In so holding, the court focused in part on the issuer's failure to update "generic cautionary language" to reflect evolving conditions. Specifically, the plaintiff adequately alleged facts from which to infer that the defendant, a semiconductor manufacturer, knew of quality-control problems that could necessitate a widespread recall; thus, the court concluded, the plaintiff had adequately pled that the defendants failed to disclose a so-called adverse "known trend or uncertainty," as required by Item 303 of Regulation S-K.

Also on the disclosure front, both the Second Circuit and the U.S. Court of Appeals for the Sixth Circuit addressed the extent to which opinions are actionable misstatements under the federal securities laws. In *City of Omaha, Nebraska Civilian Employees' Retirement System v. CBS Corp.*, 679 F.3d 64 (2d Cir. 2012), in affirming the district court's dismissal, the Second Circuit held that statements regarding goodwill were opinions that are not actionable if they were believed at the time they were made. Consistent with its decision in *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011) (a case involving Section 11 and 12 claims), the court ruled that subjective accounting judgments — like the valuation of goodwill — cannot support a securities fraud claim unless the statements in question are both objectively and subjectively false.

The Sixth Circuit, in *Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Services LLC*, 2012 WL 5990337 (6th Cir. Dec. 3, 2012), ruled that credit rating

agencies cannot be sued for allegedly misrepresenting the credit quality of the securities they were asked to rate unless they knew their opinions were false. Based on publicly available information regarding the rating agencies' business practices, the plaintiff argued that the rating agencies could not have believed in the correctness of their RMBS ratings. The court found that this general criticism of the agencies' business practices, which it labeled "amorphous," was not enough to raise an inference that the agencies made actionable misrepresentations "on any particular occasion." The court also ruled, as a threshold matter, that the rating agencies did not owe a legal duty to RMBS investors. In so holding, the court has now joined the U.S. Courts of Appeals for the First and Second Circuits in rejecting efforts by plaintiffs to hold rating agencies liable for their opinions under a common law negligent misrepresentation theory.

### **The Aftermath of *Janus***

District courts are still grappling with how to interpret *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), particularly in relation to claims asserting Section 10(b) liability against corporate insiders.

One recurring issue is whether, in the wake of *Janus*, plaintiffs may use the group pleading doctrine to state claims against corporate officers. At least within the Second Circuit, courts appear to be divided. In *In re UBS AG Sec. Litig.*, 2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012), the court held that group pleading "cannot survive" *Janus*. In *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359 (S.D.N.Y. July 13, 2012), the court held that it is "not inconsistent with *Janus*" to presume that certain corporate insiders have joint authority to issue written statements by issuer. In *In re Pfizer Inc. Sec. Litig.*, 2012 WL 983548 (S.D.N.Y. Mar. 22, 2012), the court ruled that corporate officers could be held liable for statements appearing in Pfizer press releases, even though disclosures "were not explicitly attributed to the Individual Defendants."

With respect to corporate insider liability post-*Janus*, district courts have adopted several divergent approaches to the issue, including (1) a fact-intensive inquiry that looks to whether attribution can be implied from the surrounding circumstances; (2) a bright-line test that asks whether the officer signed the disclosure in question; and (3) a framework in which *Janus* does not restrict claims against insiders.

As for underwriter liability, courts in 2012 rejected several invocations of *Janus* to avoid liability, reasoning that the plaintiffs in these cases had adequately pled attribution and facts suggesting control over the statements.<sup>17</sup> Courts also have wrestled with how to address attribution-related issues involving accounting firms. One emerging question is how to address attempts to sue not only the firm that issues the audit opinion but also affiliated entities. In *Ho v. Duoyuan Global Water, Inc.*, 2012 WL 3647043 (S.D.N.Y. Aug. 24, 2012), the court held that an accounting company's umbrella organization could

<sup>17</sup> In *Scott v. ZST Digital Networks, Inc.*, 2012 WL 4459572 (C.D. Cal. Aug. 7, 2012), the court denied a motion to dismiss where the plaintiff alleged that the underwriter was "architect of the fraud" and had its name "featured prominently on the offering documents." In *In re National Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828 (S.D. Ohio 2012), the court held at summary judgment that a private placement memorandum could be deemed a "shared product" between issuer and underwriter, where facts showed that underwriters were actively involved in preparing materials "and exercis[ed] control over their content." In *In re Allstate Life Ins. Co. Litig.*, 2012 WL 176497 (D. Ariz. Jan. 23, 2012), allegations that "the names of [underwriters] were placed 'prominently and in bold type on the first page of the Official Statements'" were held to be sufficient under *Janus*.

not be held liable for an associated firm's allegedly improper audit of a Chinese company, where the plaintiff failed to show that Grant Thornton International "had ultimate authority over [Grant Thornton Hong Kong's] misstatements." In *Munoz v. China Expert Tech., Inc.*, No. 07 Civ. 10531 (AKH), slip op., (S.D.N.Y. Nov. 7, 2011), ECF No. 183, the court denied a motion to dismiss claims against the New York-based affiliate of a Hong Kong accounting firm, where the plaintiff alleged facts from which to infer that the U.S. firm exercised control over what was said in an audit opinion issued by the Hong Kong affiliate.

### Other District Court Developments

The Southern District of New York continues to hear large multidistrict litigations. Most of the wave of shareholder, derivative and other lawsuits filed after Facebook's May 17, 2012, initial public offering have been centralized there as *In re: Facebook Inc. IPO Securities and Derivative Litigation*, MDL No. 12-2389 (S.D.N.Y. filed Oct. 5, 2012). The suits allege, among other things, that Facebook misled investors by concealing from its offering materials poor mobile revenue forecasts that it had selectively disclosed to certain investment bank analysts. Meanwhile, suits against U.S. dollar LIBOR panel members, consolidated in 2011 before Judge Naomi Buchwald in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 1:11-md-2262-NRB (S.D.N.Y. filed Aug. 12, 2011), have proceeded to a motion to dismiss antitrust claims, but other claims remain undecided, and others may yet be filed.

### Developments in Derivative Litigation

Although the derivative action is expected to remain an important basis for shareholder litigation, plaintiffs have met with mixed success in pursuing such claims in 2012. For example, in *Lambrecht v. O'Neal*, No. 1285, and *Sollins v. O'Neal*, No. 1589 (2d Cir. Dec. 4, 2012), the Second Circuit affirmed the dismissal of so-called double derivative lawsuits brought by former shareholders of Merrill Lynch. The suits alleged that Merrill's directors and officers breached fiduciary duties arising out of losses from collateralized debt obligations. The plaintiffs also alleged that directors breached their fiduciary duties in paying bonuses to employees in December 2008. One plaintiff made a pre-suit demand. The court held that the Bank of America board acted in good faith in refusing that demand. The other plaintiff alleged that demand was futile. The court held that Bank of America directors were disinterested and independent and therefore capable of considering demand.

The Delaware courts, for their part, are increasingly skeptical of complaints filed by plaintiffs who failed to conduct proper pre-suit diligence, but at the same time appear to be more welcoming of subsequent derivative complaints filed by others. In *La. Muni. Pol. Emps.' Ret. Sys. v. Pyott*, No. 5795 (Del. Ch. June 11, 2012), following Allergan's settlement with the Department of Justice for alleged off-label marketing activities, a derivative lawsuit was filed in federal court in California and dismissed for failure to plead demand futility. Meanwhile, defendants in the Delaware Court of Chancery moved to dismiss a duplicative suit on *res judicata* grounds. The Delaware court refused to apply *res judicata*, holding that the California court had determined only the standing of the California plaintiffs. In refusing to apply *res judicata* or collateral estoppel, the court noted that Delaware plaintiffs had made a books-and-records demand under Section 220 of Delaware General Corporation Law, and therefore drafted a more detailed complaint than the California plaintiffs.

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Indeed, the books-and-records demand increasingly is seen as a prerequisite to a derivative demand under Delaware law. In *Klein v. Walton*, No. 7455 (Del. Ch. July 16, 2012), Chancellor Leo Strine Jr. stayed a derivative suit pending the outcome of one shareholder's Section 220 books-and-records demand. The court stated that the shareholder who makes a Section 220 demand should get lead plaintiff status over earlier filed plaintiffs. Similarly, in *South v. Baker*, No. 7294 (Del. Ch. Sept. 25, 2012), Vice Chancellor J. Travis Laster dismissed a derivative suit for failure to plead demand futility, but that dismissal was with prejudice to the named plaintiffs only. The court held that when a shareholder "rushes" to file a *Caremark* claim without first using Section 220 to conduct an investigation, there is a presumption of inadequacy of representation, and dismissal will be without prejudice to the right of other shareholders to file a similar suit.

### **Mortgage-Backed Securities and Put-Back Litigation 2013**

The credit crisis continues to be the source of a wide range of litigation against issuers and underwriters of MBS, as well as credit-rating agencies and others. This year, approaching limitation periods on 2005- to 2007-vintage MBS resulted in the filing of a considerable number of lawsuits. These lawsuits are generally of two types: misrepresentation claims and contractual claims, each of which saw important rulings in 2012 that will present challenges to parties and courts in the new year.

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. As discussed above, the Second Circuit recently held that class standing extends to MBS deals not purchased by the named plaintiff, but which implicate the "same set of concerns" as the plaintiff's MBS, such as MBS issued pursuant to the same shelf registration and backed by loans originated by common lenders. Now, federal courts are reconsidering prior standing rulings, which may result in increased exposure for defendants. We also expect significant rulings from the Second Circuit in 2013 concerning statutes of limitation and repose. These rulings have the potential to dramatically reshape the scope of pending MBS actions.

There were a number of important developments last year relating to contractual put-back litigation. 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. In 2012, parties litigated the meaning of various contractual provisions bearing on the availability and scope of damages. Courts divided on the impact of "sole remedy" provisions, which foreclose the availability of money damages. Courts are similarly divided on the availability of "rescissory damages," which plaintiffs seek in the alternative to cure or replacement remedies. We expect to see further decisions addressing these issues and the scope and extent of damages as these cases progress in 2013. Indeed, we are awaiting the results of one "put-back" trial in the S.D.N.Y.

We anticipate that in 2013 the courts will provide significant guidance regarding whether put-back claims brought on pre-2007-vintage MBS are time-barred. Thus far, courts have divided on the date on which such claims are deemed to have accrued, with at least one court holding that the relevant date is the date of purchase and another holding that the key date is the date on which the repurchase demand was made. 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.

### CDO Litigation Developments

Plaintiffs also filed a significant number of CDO-related claims in 2012. In this particular area, one central allegation continues to be that issuers, arrangers and underwriters marketed CDOs as being of high quality, despite possessing knowledge that the underlying collateral was in a distressed state and depreciating in value. As part of a continuing trend, courts refused to credit such allegations on several occasions in cases where plaintiffs could not link the defendants' purported wrongdoing to the specific CDOs at issue. This focus on particularity was illustrated recently by a decision from the Southern District of New York titled *Woori Bank v. RBS Securities Inc.*, No. 12 Civ. 4254, 2012 WL 6703352 (S.D.N.Y. Dec. 27, 2012). In dismissing the plaintiff's claim for common law fraud, the court held that, for all of its rhetoric, "this case lacks the usual telltale signals that have allowed courts in similar situations to find that the particularity requirements of Rule 9(b) were satisfied." See also *Landesbank Baden-Württemberg v. Goldman, Sachs & Co.*, 821 F. Supp. 2d 616 (S.D.N.Y. 2011) (refusing to infer falsity or scienter where plaintiff had "fail[ed] to allege any connection between the mortgages reviewed in the Clayton Report and those collateralizing" the CDO at issue), *aff'd*, No. 11-4443, 2012 WL 1352590 (2d Cir. Apr. 19, 2012).

In contrast, plaintiffs with more detailed complaints, based on internal company documents and the like, fared better in 2012. For instance, in a number of cases, courts sustained CDO-related complaints where plaintiffs alleged that arrangers were purportedly secretly betting against the same collateral that they were marketing to plaintiffs through the CDOs. See *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624 (S.D.N.Y. 2012); *Space Coast Credit Union v. Barclays Capital, Inc.*, No. 11 Civ. 2802 (LLS), 2012 WL 946832 (S.D.N.Y. Mar. 20, 2012).