



June 2007 e-BULLETIN

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BAKER BOTTS STRENGTHENS LITIGATION PRACTICE – FORMER HARRIS COUNTY PROSECUTOR JOINS FIRM

Former Harris County Prosecutor Focuses on Complex Commercial Matters, Business Disputes

HOUSTON, May 2, 2007 -- Victor Vital, who has built a significant trial practice by successfully representing clients in complex commercial matters and business disputes, has joined Baker Botts L.L.P. as a partner in the Firm's Litigation Department. Vital will be based in Baker Botts' Dallas office.

A former Harris County prosecutor, Vital handles business cases that involve a variety of claims such as breach of contract, fraud, breach of fiduciary duty, tortious interference, misappropriation of trade secrets, defamation and other business torts. He has also defended businesses against complex product liability claims. He has tried more than 100 cases in a variety of forums, including arbitration, state court, federal court and bankruptcy court.

"Victor's experience in business litigation, representing clients in a broad number of forums, further strengthens our litigation team," said Baker Botts Managing Partner Walt Smith. "Victor's legal skills will offer creative, timely and strategic advice to help our clients solve complex legal issues."

Prior to joining Baker Botts, Vital was a partner in the Dallas office of Haynes and Boone LLP. He has been published in a variety of legal and business journals concerning commercial litigation and general trial practice. He is currently editor of a quarterly newsletter entitled Commercial Litigation for the Texas Association of Defense Counsel (TADC).

"Victor's record in representing clients in complex business litigation speaks volumes about the skills he brings to Baker Botts," said Robb Voyles, chair of Baker Botts' Litigation Department. "In representing energy companies, financial firms and Fortune 100 companies, Victor has the depth of knowledge in business litigation to help us to continue to provide our clients the service they have become accustomed to from Baker Botts."

Vital earned his law degree with honors from the Thurgood Marshall School of Law in 1995. He was executive editor of the Thurgood Marshall Law review.

He is a member of the National Bar Association, Commercial Law Section (Executive Board and Editorial Board); Texas Association of Defense Counsel, Board of Directors; Dallas Bar Association; Dallas Association of Young Lawyers (DAYL); DAYL Foundation, Fellow; J.L. Turner Legal Association, Board of Directors; and the American Bar Association, Section of Litigation.

About Baker Botts L.L.P.

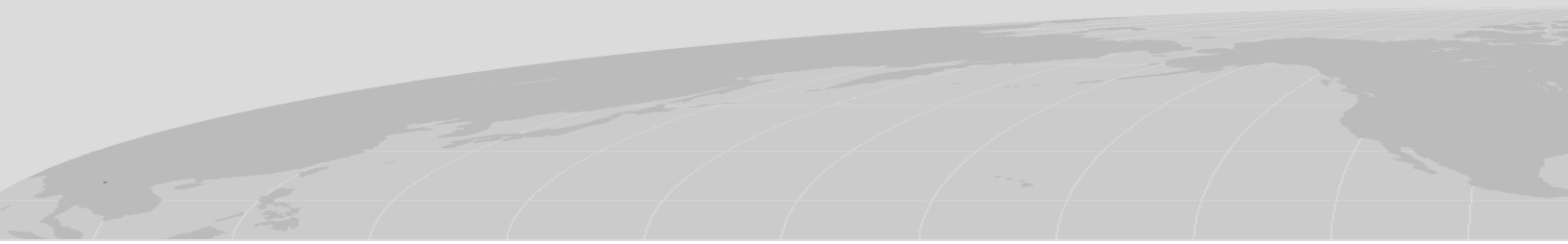
Baker Botts L.L.P., founded in 1840, is a leading international law firm with offices in Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Riyadh and Washington. With approximately 750 lawyers, Baker Botts provides a full range of legal services to regional, national and international clients.

For additional information visit www.bakerbotts.com

DAVIS WRIGHT TREMAINE SEATTLE OFFICE RELOCATES

SEATTLE, WA, JUNE 11, 2007 – The national law firm Davis Wright Tremaine LLP announced today the relocation of its 500-person Seattle office to a newly designed space at 1201 Third Avenue. With approximately 170,000 square feet and eight floors equipped with the latest technologies, the new offices provide the firm with an enhanced platform for providing great service to its clients.

Partner-in-charge of the Seattle office Susan G. Duffy and real estate partner Dennis McLean led Davis Wright's relocation planning over the past three years. "This has been a very interesting project," said Duffy. "It's been fun thinking about how the delivery of legal services has changed since we last built offices and anticipating the changes that lie ahead. We have tried to be smart in our use of new technologies and to seize opportunities to support principles of sustainability. This effort has also provided a great opportunity to combine efficient use of space with an aesthetic that reflects our firm culture."



In 2004 Davis Wright (with assistance from its real estate affiliate CenturyPacific LP) negotiated a 12-year lease term from Wright Runstad to occupy space in 1201 Third Avenue that would be vacated by Washington Mutual Bank when it moved to its new building in late 2006. As it had 21 years previously, Davis Wright turned to renowned architects NBBJ to help design its new offices. "NBBJ has a wonderful way of designing spaces that are both timely and timeless," Duffy noted. Lydig Construction served as the general contractor for the project. "Lydig bent over backwards to work with us on a very tight construction schedule," Duffy added. The new offices provide the physical space necessary to support planned and, potentially, unplanned growth. "We originated in Seattle," noted Duffy, "and we plan to always have the strength in both expertise and numbers to allow us to play a significant role in the issues of major importance to the Northwest."

About Davis Wright Tremaine

Davis Wright's Seattle attorneys serve a broad base of clients ranging from Fortune 500 companies to early stage ventures. Davis Wright Tremaine is a national business and litigation law firm with more than 480 attorneys in nine offices located in Seattle and Bellevue (Wash.), Portland (Ore.), Los Angeles, San Francisco, New York, Washington D.C., Anchorage (Alaska) and Shanghai, China.

The firm's new address effective June 11, 2007:

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For more information visit www.dwt.com

GIDE LOYRETTE NOUEL STRENGTHENS CASABLANCA, ALGIERS AND TUNIS PPP / CONSTRUCTION / LARGE SCALE PROJECTS TEAM

05 June 2007


Gide Loyrette Nouel is pleased to announce that **Hugues de La Forge** is joining the Casablanca Office as a senior associate to strengthen the Firm's North African legal teams specialising in PPP, construction and large-scale projects.

He will be based in Casablanca, handling client matters involving North Africa in conjunction with the Algiers and Tunis Offices and in co-operation with the Paris Office Project Finance, Construction and Real Estate teams.

Hugues spent more than 9 years working for Bouygues Construction both as a lawyer for the public works subsidiary (1998-2004) and then as assistant to the Director of Legal Affairs for the *Bâtiment International* entity (2005-2006). He has a postgraduate degree (*DEA*) in public law from the University of Paris V (1996) and lectured public law at Cairo University (1996-1997).

Hicham Naciri, the partner responsible for the Casablanca Office, said: "*we are delighted that such an experienced lawyer is joining our team. Hughes' expertise will strengthen and consolidate our existing skills, especially in the area of large-scale tourism projects in which we are so actively involved.*"

The Casablanca Office has recently been advising major developers and investment funds (including the US corporation, Colony Capital; the South-African group, Kerzner International; Diar, based in Qatar; the Egyptian group, Orascom Hotels Development; etc.) on their development of residential and holiday complexes in Morocco.



The Algiers and Tunis Offices act for numerous international companies involved in large-scale tourism and infrastructure projects (the Chinese entities CITIC and CRCC with regard to the building of the east-west highway in Algeria; a major United Arab Emirates investor in Tunisia, etc.).

Gide Loyrette Nouel is the only international law firm to be based in 3 North African countries.

For additional information visit www.gide.com

HOGAN & HARTSON ADDS LEADING INTELLECTUAL PROPERTY COUNSEL TO MOSCOW OFFICE

MOSCOW, June 5, 2007 – Hogan & Hartson is pleased to announce that Julianna Tabastajewa has joined the firm's Moscow office as counsel to strengthen the firm's intellectual property and intellectual property litigation practices. She will also expand the firm's life sciences practice in Russia.

Over the course of her more than 15-year career, Tabastajewa has established a recognized practice focusing on intellectual property protection and litigation, pharmaceutical law, competition law, media law, and franchising. She also has extensive experience in domestic litigations and arbitrations in Russia.

Throughout her career, Tabastajewa has represented major Russian and international companies in sophisticated copyright, trademark, patent, and domain disputes, including several successful precedent cases for Volkswagen AG, Audi AG, and KNAUF Gips KG.

Tabastajewa has contributed significantly to new domain regulations in the Russian Federation and has written extensively on the subject. She is also actively involved in intellectual property legislation development initiatives in Russia as an expert of the Anti-piracy Committee of the State Duma (legislative assembly) of the Russian Federation. She is currently working in the Russian Franchising Association on the new Franchise Act of the Russian Federation. Tabastajewa also advises media, pharmaceutical, and medical device companies on related issues in Russia.

"Julianna is significant addition to the IP practice of this firm," said Peter Pettibone, managing partner of the firm's Moscow office. "Specifically, she enhances the trademark practice and our IP litigation and enforcement capabilities in Russia."

Prior to joining Hogan & Hartson, Tabastajewa served as head of the intellectual property and information technology department in the Moscow office of a Munich-based international law firm for over nine years. Tabastajewa has a Ph.D. degree; her Ph.D project thesis was "Legal Defense against Unfair Competition in the Area of Intellectual Property in Russia."

Tabastajewa has been recognized for her accomplishments as an IP/IT lawyer by the *European Legal 500*.

For additional information visit www.hhlaw.com



MORGAN LEWIS & BOCKIUS ADDS SENIOR SEC ENFORCEMENT OFFICER TO NATIONAL SECURITIES PRACTICE IN MIAMI

Miami, FL – May 21, 2007: Global law firm Morgan, Lewis & Bockius LLP is pleased to announce that Ivan Harris, former Assistant Regional Director of Enforcement for the SEC's Southeast Region, has joined the firm's national securities practice as a partner. Mr. Harris will be a member of the firm's Litigation Practice and will be resident in Miami. Mr. Harris joins the nearly 30 former SEC attorneys at Morgan Lewis nationally, and is the second senior enforcement attorney from the SEC's Southeast Regional Office to join the firm. Christian Bartholomew, who was the Senior Trial Counsel for the Southeast Regional Office, joined the firm in 2000.

Mr. Harris brings to Morgan Lewis's national securities practice a rare combination of cutting-edge experience from both the enforcement and regulatory side of the investment industry's hottest sector: hedge funds. He joins Morgan Lewis from his position as regulatory counsel at a financial services firm that operates a hedge fund adviser. Before moving in-house two years ago, Mr. Harris spearheaded several of the SEC's most significant hedge fund investigations.

"Hedge funds are one of the most rapidly growing and lightly regulated investment vehicles. As the SEC continues to scrutinize their activities, Ivan has a unique profile as someone who has been on the inside of a hedge fund, and before that, lead investigator of a cutting-edge hedge fund enforcement action by the SEC," said James D. Pagliaro, leader of the global Litigation Practice at Morgan Lewis.

In 2005, Mr. Harris led the SEC's investigation of one of the largest hedge-fund fraud actions ever brought by the SEC, against Palm Beach-based KL Financial Group, which raised almost \$200 million before its assets were frozen and it was put in receivership in an emergency SEC action. In 2003, Mr. Harris was also responsible for the first SEC case involving a hedge fund's illegal short-selling ahead of a secondary stock offering. The SEC has recently made such violations, and related so-called "PIPE" cases, an enforcement priority.

In addition to his hedge fund background, Mr. Harris led several precedent-setting enforcement matters when he was at the SEC, including corporate financial fraud, insider trading, broker-dealer, and investment adviser cases. Mr. Harris also developed a particular expertise in international cases by investigating financial fraud and Foreign Corrupt Practices Act matters in concert with regulators throughout Europe and Central and South America.

"We are thrilled that Ivan is joining our SEC enforcement and regulatory compliance team," said Christian Bartholomew, a partner, leader of the firm's Washington, D.C. litigation group and leader of its SEC enforcement practice in the Southeast region. "Ivan is a real triple-threat: He is a hedge fund lawyer with both in-house and SEC experience; a former senior SEC enforcement official known for bringing cases of national and international importance; and a partner on the ground in Miami who will help seal our dominant position as the go-to firm in the Southeast for SEC matters," Mr. Bartholomew said.

Mr. Harris will also work closely with the firm's Investment Management Practice in leveraging his hedge fund experience.

Mr. Harris is a 1994 graduate of Duke University Law School and holds bachelor's degrees from the Wharton School of Business and the College of Arts & Sciences at the University of Pennsylvania.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,300 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C.

For more information about Morgan Lewis, please visit www.morganlewis.com



MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA VICTORI ADD PARTNER TO ECUADOR OFFICE

Lima, Peru, June 2007.- Muñiz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados is pleased to announce that Dr. Gonzalo Noboa Baquerizo has joined its office in Guayaquil, Ecuador, as Senior Partner of Noboa, Peña, Larrea & Torres Abogados, members of Muñiz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados.

Dr. Gonzalo Noboa Baquerizo graduated in law from “Universidad Católica de Santiago”, in Guayaquil, and earned a Doctoral Degree in Jurisprudence from “Universidad Católica de Santiago” and a Master’s Degree in Business Administration from “Universidad Tecnológica Equinoccial”, Ecuador.

Dr. Noboa was a partner of “Estudio Noboa” in Guayaquil and currently serves as First Vice President of the Guayaquil Civic Board. In the academic field, he teaches Civil Law at “Universidad Católica de Santiago”, Guayaquil.

The Firm currently has 170 renowned lawyers with broad professional experience that has contributed to consolidate the Firm as the largest law office in Peru and the eleventh largest law office in Latin America.

It should be pointed out that Estudio Muñiz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados has offices in Lima, Trujillo, Arequipa, Ica and Chinchipe, Peru, and also in Quito and Guayaquil, Ecuador. Through all these offices, legal advisory services are provided to a large number of local and multinational companies in different sectors of the economy, in more than nineteen specialized areas.

For additional information visit www.munizlaw.com.pe

TOZZINI FREIRE TEIXEIRA E SILVA – PORTE ALEGRA OFFICE RELOCATES

Our Porto Alegre office has moved to a new address. Located in the most modern and sophisticated building in town, the new premises provide an excellent infrastructure and atmosphere to better serve the firm’s clients.

With 200 on staff, our Porto Alegre office is prepared to assist domestic and foreign companies with interests throughout the southern region of Brazil.

With this expansion, we reinforce our presence in one of the most important markets in the country, keeping the firm’s philosophy of combining local presence and tailored services with the advantages of a countrywide structure.

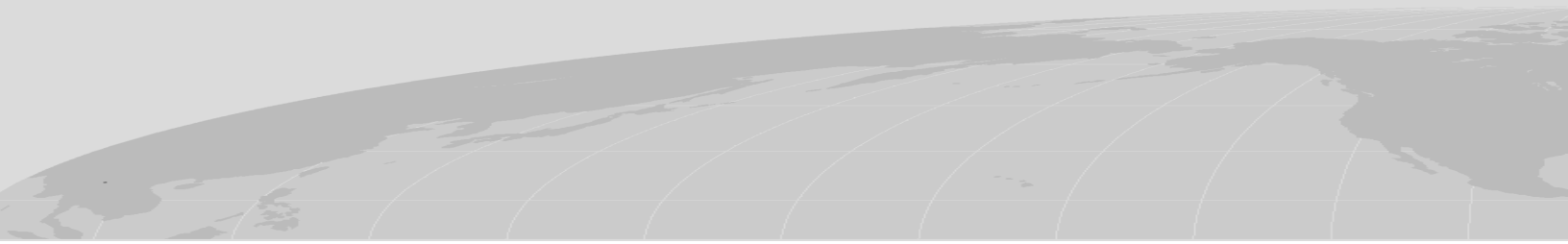
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For additional information visit www.tozzinifreire.com.br



DEAL MAKING NEWS – GIDE LOYRETTE NOUEL Advise PAI Partners on Acquisition Controlling Interest in Kaufman & Broad SA

Gide Loyrette Nouel advised the French investment fund, PAI Partners, in relation to its take-over of Kaufman & Broad S.A. PAI Partners entered into an agreement with US real estate promoter, KB Home, and another agreement with the CEO of Kaufman & Broad S.A., Guy Nafilyan, to acquire a controlling interest in the French company, Kaufman & Broad S.A.

The lawyers acting for PAI Partners in this transaction were Didier G. Martin, Frederic Nouel, Serge Tatar (partners) and Antoine Tezenas du Montcel (associate).

DEAL MAKING NEWS – HOGAN & HARTSON Advises Archstone-Smith on \$22 Billion Acquisition by Tishman Speyer and Lehman Brothers

WASHINGTON, D.C., May 30, 2007 – Hogan & Hartson LLP announced today that it is advising Archstone-Smith, a NYSE-listed apartment operations and investment company headquartered in Englewood, Colo., on its merger with a partnership comprised of Tishman Speyer and Lehman Brothers (the Partnership). The transaction, which was publicly announced on Tuesday, is valued at approximately \$22.2 billion, including the assumption and refinancing of Archstone-Smith's outstanding debt, and represents the largest public to private merger and acquisition transaction in the multifamily REIT sector.

Under the terms of the merger agreement, the Partnership will acquire all outstanding common shares of beneficial interest in Archstone-Smith for \$60.75 per share in cash. The purchase price per share represents a 22.7% premium over the share price on May 24, 2007, immediately prior to published reports regarding a potential acquisition.

Completion of the transaction, which is currently expected to occur in the third quarter of 2007, is contingent upon customary closing conditions and the approval of Archstone-Smith's shareholders, who will be asked to vote on the proposed transaction at a special meeting that will be held on a date to be announced.

Hogan & Hartson was the sole legal advisor to Archstone-Smith on this matter. The lead partners include Warren Gorrell, Bruce Gilchrist, and David Slotkin. Other primary partners involved are: Alex Park and Henry Kahn (corporate); Prentiss Feagles and Cristina Arumi (tax); Lee Berner and Nancy Clodfelter (real estate); Helen Atkeson (public finance); and Bill Neff (benefits). Additional partners involved include Siobhan Rausch (tax), Alethia Nancoo (public finance), Gordon Wilson (finance), Scott Reisch (environmental), and counsel Valerie Brennan (intellectual property).

Hogan & Hartson associates include: Greg Parisi, Jeanie Park, Edward Smith, Seth Frederiksen, Dane Choe, Elizabeth Ghauri, and Shane Anderson (corporate); Nicole Brown (tax); Shaune Langston, Anthony Ryan, and Melissa Sternfield (real estate); Carin Carithers (benefits); Nichelle Billips (public finance); Cara Dilts (finance); and Jennifer McClister (environmental).

For additional information visit www.hhlaw.com



DEAL MAKING NEWS – LOVELLS Acts for Bank of China International on the First IPO in the PRC History

Lovells has advised sponsor BOCI on the first initial public offering by a Chinese bookstore chain, Sichuan Xinhua Winshare, raising US\$300 million after partial exercise of the over-allotment option.

The H-share offer comprised a Hong Kong public offer and international placing of 369.4 million new shares, representing 15% of the enlarged issued share capital of Sichuan Xinhua Winshare, and raised gross proceeds of US\$300 million after partial exercise of the over-allotment option. The company was listed on the Hong Kong Main Board on 30 May.

The Hong Kong public offer was 121 times over-subscribed allowing the deal to be priced at the top of the range.

Sichuan Xinhua Winshare has three lines of business, namely (1) the operation of retail outlets for books and audio-visual products, (2) the distribution of textbooks and supplementary materials, and (3) the provision of ancillary support and services to book publishers. A member of the state-owned Xinhua Bookstores group, this will be the first PRC book store operator to list in Hong Kong and will offer exposure to China's highly regulated book publishing and distribution industry at a time when it is undergoing extensive market-opening reforms.

The Lovells team was led by Hong Kong-based partner Jamie Barr, and included consultant Terence Lau and Registered Foreign Lawyer Iris Lin. The team was also supported by Colin Law and Paloma Wang, now of O'Melveny & Myers.

Lovells also advised Morgan Stanley and UBS as joint sponsors on the US\$1.9 billion IPO of Country Garden and US\$1 billion China Molybdenum IPO in April.

Commenting on the deal, Head of Asia Corporate Practice Jamie Barr said:

"Coming immediately after the Country Garden and China Moly IPOs, this significant industry first IPO demonstrates the strength and depth of our Asia Equity Capital Markets practice. Few firms can lay claim to advising on three major IPOs with a total value of over US\$ 3 billion for leading investment banks in the space 6 weeks."

For additional information visit www.lovells.com

DEAL MAKING NEWS – MORGAN LEWIS & BOCKIUS – ITC Finds Infringement of Lumileds' Patents, Expands Order Barring Imports

SAN FRANCISCO, May 21, 2007: The U.S. International Trade Commission has issued a notice favoring Morgan Lewis client Philips Lumileds in a critical patent enforcement investigation that will significantly impact the global market for ultra-high-brightness light emitting diodes (LEDs).

The ITC's decision, issued on May 9, states that all of Taiwan-based Epistar's ultra-high-brightness LEDs that were subject to the investigation infringe the two asserted claims of a Lumileds patent. The ITC decision expands upon an earlier decision by an administrative law judge in January concluding that Lumileds' patents were valid and enforceable, but only finding infringement of one of the accused product families. The ITC's decision is expected to have a dramatic impact on the burgeoning market for ultra-high brightness LEDs used in such products as automotive brake lights, traffic signals, and LCD displays.

In connection with the May 9 decision, the ITC has issued an exclusion order prohibiting the importation of any Epistar product that infringes the Lumileds patent and certain products that include these LEDs. Michael J. Lyons, a partner in the Palo Alto office of Morgan Lewis, called the ITC's decision "a significant victory that underscores the importance of Lumileds' patented technology that has revolutionized the LED industry."



Lumileds filed a complaint against Epistar in November 2005. The ITC instituted an investigation that included an extensive hearing before an administrative law judge (ALJ) in August 2006, an initial determination by the ALJ in January 2007, and now the final decision of the full Commission. After the 60-day Presidential review period, the exclusion of Epistar products ordered by the Commission will begin. Lumileds also has a related action against Epistar pending in U.S. District Court for the Northern District of California in which Lumileds seeks both damages and a permanent injunction barring future infringement.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,300 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C.

For more information about Morgan Lewis, please visit www.morganlewis.com.

DEAL MAKING NEWS – RODYK & DAVIDSON Acts for China Shipbuilding Giant Yangzijiang Shipbuilding in Singapore's \$1Billion IPO

Rodyk acted for one of China's biggest shipbuilders, Yangzijiang Shipbuilding, in a Rule 144A global offering and listing on the SGX. Yangzijiang, which is based in the coastal province of Jiangsu near Shanghai, raised S\$1 billion, Singapore's largest IPO this year. The proceeds from the IPO will be used to partially fund the construction of a new yard to complement Yangzijiang's existing facility in Jiangyin city – China's fourth largest shipyard. Partner Valerie Ong led the IPO team, supported by partner Terence Lin, associate Yang Kai Hsien and Chinese Law consultant Chen Yimin.

For additional information visit www.rodyk.com



DEAL MAKING NEWS – WILMERHALE Continued Success for Broadcom – Federal Jury Finds Qualcomm Infringes Three Broadcom Patents

May 29, 2007

Following a 13-day trial and two and a half days of deliberations, Broadcom Corporation, a global leader in semiconductors for wired and wireless communications, announced that a unanimous federal jury today found that certain Qualcomm Incorporated cellular baseband chips and software infringe claims of three Broadcom patents, and awarded Broadcom \$19.64 million in damages for Qualcomm's past infringement. The jury also found that the three patents are valid and that Qualcomm's infringement was willful, allowing the court to increase the damages up to three times the amount awarded by the jury.

This is the latest in a series of favorable court and governmental decisions for Broadcom in its ongoing legal battles with Qualcomm over patent infringement issues. Broadcom plans to ask the court to issue a permanent injunction barring Qualcomm from further infringement of the three patents.

The WilmerHale team of IP and IP Litigation lawyers that have represented Broadcom during the course of this case includes: William Lee, Michael Diener, James Lampert, Dominic Massa, Richard O'Neill, James Quarles, Mark Selwyn, Donald Steinberg, Cynthia Vreeland, Joseph Mueller, Beth Reilly, Elizabeth Rogers, Colin Rushing, Victor Souto, Mariia Vento, Brad Bedingfield, Heath Brooks, Lawrence Cogswell, Danielle Conley, Lauren Fletcher, Luba Greenwood, Juliana Mirabilio, Gregory Noonan, Clark Petscheck, Amy Schofield, and Ang Xia. Legal Assistants on the team include: Linda Byam, Lanta Chase, Nattha Chutintranond, Rebecca McNew, Robert Ooi, Ellen Richardson, and Gina Ecolino.

For additional information visit www.wilmerhale.com



AUSTRALIA – CLAYTON UTZ – Third Party Claims on Insurance Monies in New South Wales Don't Extend to Claims Made Policies

NSW has a law giving third parties so-called direct access to insurance moneys, creating a charge over those moneys. How far does this go? Not as far as you might think, following a decision by the NSW Court of Appeal.

Under section 6(1) of the *Law Reform (Miscellaneous) Provisions Act 1946* (NSW), plaintiffs can get a charge (a type of claim) on the insurance money payable under a contract of insurance, but for many years it's been unclear if they can do so if the contract of insurance was made after the event giving rise to the defendant's liability.

The Court has cleared this up by holding that they cannot (*The Owners - Strata Plan No.50530 v. Walter Construction Group Limited (In Liquidation)* [2007] NSWCA 124).

This is because, it said, the section sets out a process by which the charge arises:

- first, a person has to enter the contract of insurance
- then the event giving rise to the person's liability occurs, at which point the charge arises.

If the contract of insurance didn't exist at the time the event triggering the liability occurred, section 6(1) can't create a charge over the insurance moneys payable under it. Basically, said the Court, you can't put a charge over property which at the relevant time didn't exist, and there's no-one against whom any rights could be asserted.

There has been some doubt about whether section 6 applies to claims made or claims made and notified policies. This decision goes some way to removing that doubt, but also reveals the limitations of the section.

It doesn't however shut off all avenues for plaintiffs. If a plaintiff is suing a company which goes into liquidation, he or she might be able to use the *Corporations Act* to get priority. There are also similar provisions under the *Bankruptcy Act* and the *Insurance Contracts Act*, although all of these provisions have their own limitations.

For insurers writing these policies, the decision means that direct access isn't available under section 6.

It's unclear at this stage whether the decision will be appealed - or if the section will be rewritten to protect plaintiffs suing defendants with claims made or claims made and notified policies. This is certainly an area that requires some further consideration, as there is a lack of uniformity across jurisdictions.

For additional information visit www.claytonutz.com

Disclaimer

Clayton Utz News Alert is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this bulletin. Persons listed may not be admitted in all states.



BRAZIL – TOZZINI FREIERE TEIXEIRA E SILVA Central Bank of Brazil Sets New Deadline for Information on Capital Held Abroad

A new deadline has been set for individuals and corporate entities resident, domiciled or headquartered in Brazil to provide the Central Bank of Brazil (BACEN) with information concerning any type of assets held abroad, including currency.

In view of the foregoing, information relating to the year 2006, based on assets held on December 31, 2006, shall be provided until June 29, 2007, through BACEN's website (www.bcb.gov.br)

Failure to comply with the obligations indicated above may subject the party to penalties up to approximately US\$ 120,000.00.

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Impact of the New Property Rights Law on Banking Practices in the PRC

By Li Jinnan * and Ren Gulong**

The Property Rights Law of the People's Republic of China (the "Property Rights Law") was promulgated by the National People's Congress on March 16, 2007, and will become effective on October 1, 2007. Promulgation of the Property Rights Law will have substantial impact on the banking industry as the Property Rights Law makes considerable changes to the Security Law of the People's Republic of China (the "Security Law")¹.

I. Expansion of Scope of Security Interest on Properties Rights

The Property Rights Law expands the scope of property that can be used for creating security interests; i.e., more types of property can be mortgaged, pledged or otherwise encumbered. In addition to those stipulated in the Security Law², the followings are explicitly included as categories of properties for creating security interests: (1) rights to manage contracted land obtained through fixed bidding, auction or open consultation; (2) existing and future equipments, raw materials, semi-finished goods and finished goods; (3) buildings, ships and aircraft that are under construction; (4) account receivables; and (5) unit interest in funds which are legally transferable. The Property Rights Law further provides that any property can be mortgaged as collateral unless it is otherwise prohibited by law. Furthermore, ceiling pledge is recognized under the Property Rights Law³. This expanded scope of pledge and the additional categories of property eligible for security interest will allow banks to develop more financing options to improve the cash flow in the capital market.

II. Realization of Security Interests Becomes Easier

Under the Security Law, a security holder can only exercise to realize its security interests when the secured party fails to perform its obligations when due⁴. According to the Property Rights Law, in addition to the situation above, a security holder may also exercise to realize its security interests upon the occurrence of any triggering events, which are agreed by the parties to the security agreement. Since this new regulation gives the parties more freedom to negotiate how the security interests can be realized, banks as security holders may initiate more mechanisms to protect their interests in secured transactions.

¹ The Security Law was promulgated by the standing committee of the National People's Congress on June 30, 1995, and became effective as of October 1, 1995.

² Under Security law, properties over which security may be created are provided in Articles 34, 63, 75 and 84. Such properties include real estate, machine and equipment, negotiable instruments, shares, intellectual properties, etc.

³ Under the Security Law, ceiling mortgage is recognized but there is no provision of ceiling pledge. Though in practice, some banks accept ceiling pledge as a security, legal risk exists for the enforceability of such security under the Security Law.

⁴ Generally, three parties are involved in a secured transaction, i.e., the security holder, the secured party and the security provider. A simple example is that, a bank who is the lender under a loan agreement is the security holder, the borrower under that loan agreement is the secured party, and the party who provides security for the borrower's obligation to the lender is called security provider.

In addition, Article 195 of the Property Rights Law provides that, where there is no agreement between the mortgagee and the mortgagor concerning the methods for realizing security interests, the mortgagee may apply to the court to realize its security interests through an auction or sell the mortgaged property. This might indicate that the mortgagee does not need to file litigation with the court if no agreement is reached between the mortgagee and the mortgagor, which is otherwise required under the Security Law⁵.

III. Effective Times of Security Interest and Security Contract can be Different

The Security Law does not differentiate between the effective time for a security contract and the effective time for the security interest under the corresponding contract⁶. The Property Rights Law made a change on the effective times. Article 15 of the Property Rights Law provides that property contracts (including security contracts) are effective upon their conclusion unless otherwise indicated by law or stipulated in the agreement itself; and lack of the registration of the contract does not invalidate the contract. This differentiation between the effective time of security contract and security interest clarifies their legal relationship and will help to further protect the interests of the bank as a security holder under a secured transaction.

IV. Other Significant Changes

In addition to the major changes mentioned above, the Property Rights Law has made many other changes to the Security Law with respect to security interests. The banks should consider the following:

- (1) The time period for applying to the court for the realization of a mortgage has been reduced. Before the Property Rights Law is passed, a security holder could apply to the court to realize security interests within two years after the expiry of the statute of limitation for breach of primary obligations⁷. After the Property Rights Law is effective, however, the two-year extension will no longer be applicable and a mortgagee will have to apply to the court for the realization of a mortgage within the statute of limitation for breach of primary obligations⁸.

⁵ Article 53 of the Security Law provides that: "When the deadline of a debt payment expires, the mortgagee can be paid off, with the agreement of the mortgagor, by converting the value of the collateral into money or by proceeds acquired through an auction, or sales of such collateral; If the mortgagor and the mortgagee fail to reach an agreement, the mortgagee can file litigation with the people's court."

⁶ Article 41 of the Security Law provides that: "The mortgage shall be registered when falling into the categories listed in Article 42 and the mortgage agreement becomes effective as of the date of such registration." Article 64 of the Security Law provides that: "The pledge agreement goes into effect as of the date of the transfer of the property being pledged." According to these provisions, the security agreement becomes effective at the same time as the security created under the security agreement becomes effective.

⁷ See Article 12 of the Supreme People's Court's Interpretation on Application of the PRC Security Law. The Interpretation was issued by the Supreme People's Court on December 8, 2000 and effective on December 13, 2000.

"Master obligations" means the obligations under the master agreement for which the security is provided, e.g., if a security is provided for a loan agreement, the borrower's repayment obligation under the loan agreement is called "master obligations".

⁸ Article 202 of the Property Rights Law provides that: "The mortgagee shall exercise its security interests within the litigation period for the master obligations (for which the mortgage is provided); otherwise, the mortgagee's security interests will not be protected by the people's court."

- (2) Collateral provided by a third party security provider will be considered *pari passu* with a guarantee⁹ according to Article 176 of the Property Rights Law. For the purpose of realizing the creditor rights, the security holder may either enforce the third party collateral or the guarantee. Under the Security Law, a guarantor would be responsible only for the obligations not secured by the collateral¹⁰.
- (3) More properties may be retained as a lien. Under the Security Law, the liens are limited to properties under storage contract, transportation contract and contract manufacturing contract.¹¹ The Property Rights Law enlarges the application of lien to any movables legally possessed by the creditor under the legal relationship created by the primary obligations. For enterprises other than individuals, security interests arising from other legal relationships are also recognized.¹²

V. Unresolved Issues under the Property Rights Law

- (1) The registration system for security needs to be established or clarified

A general principle is provided in the Property Rights Law for the uniform registration of real estate, including security interests over real estate. However, registration of other types of interests, such as security over movables and pledges over rights, no uniform registration system is established.

Neither the Security Law nor the Property Rights Law provides the uniform registration system for security interest over movables. Under current practice, there are many registration authorities, the registration content is complicated, and for security interest over certain movables, registration is not possible as there is no institution to accept such registration. To ensure that the security holder's rights over movables is effectively perfected and will not be challenged by a third party, the registration system needs to be further improved with relevant laws.

The lien created in the rights is not legally effective until it is registered pursuant to the Property Rights Law. The Property Rights Law authorizes different authorities to register pledges over rights. For example, pledges over the unit interest of private equity fund shall be registered at a securities registration and settlement institution, while pledges over receivables shall be registered at a credit certification institution. How these authorities will register the pledge and what the requirements and procedures will be implemented need to be further clarified by additional regulations.

⁹ Under PRC law, there are four types of security, i.e., guarantee, mortgage, pledge and lien. Guarantee is a security provided by a person without property being involved, while the other three types all involve property, which for the purpose of this article, is call "Collateral".

¹⁰ Article 28 of the Security law provides that: "If the same creditor's rights are secured by both guarantee and collateral, the guarantor assumes guarantee responsibilities over the creditor's right that is not secured by the collateral."

¹¹ Article 84 of the Security Law provides that: "If a debtor fails to pay the debts incurred during the execution of storage contracts, transport contracts and processing contracts, the creditor may retain the property there-under as a lien."

¹² Article 230 of the Property Rights Law provides that: "If a debtor fails to pay the debts when due, the creditor may retain as a lien the debtor's movable properties which are under the creditor's legal possession, and the creditor shall have priority over such movable properties." Article 231 further provides that: "The movable properties retained shall be under the same legal relationship except for situations that both the debtor and creditor are enterprises."

(2) Restrictions on the independence of security interests may hinder the liquidity

The Property Rights Law emphasizes the ancillary character of security interests by explicitly excluding the ability of the parties to create security interests independent of the master agreement¹³. According to the Property Rights Law, the independence of security interests will only be recognized under circumstances that are explicitly provided by law. This challenges the right of a bank as security holder to claim the validity of a security interest or to transfer a security interest when the master agreement itself (a loan agreement, for example) is invalid. The legislators' intent towards the independence of security interests may hinder the liquidity of security interests.

(3) The co-existence of the Property Rights Law and the Security Law may create difficulties in the application of law

The Property Rights Law does not invalidate provisions regarding security over properties in the Security Law. It is provided that where the provisions of the Security Law conflict with those of the Property Rights Law, the latter will prevail. The co-existence of the Property Rights Law and the Security Law may create difficulties in their application. For example, according to the Property Rights Law, a security agreement becomes effective upon its conclusion unless otherwise provided by law or the agreement. On the other hand, the Security Law provides that a security agreement becomes effective as soon as it is registered at relevant registration authorities. Future judicial practice is required to clarify the conflicts of these laws.

(The article was originally written in Chinese, the English version is a translation.)

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¹³ Article 172 of the Property Rights Law provides that: "A security agreement is the accessory agreement, dependent to the master agreement. The security agreement shall be invalid if the master agreement becomes invalid, unless otherwise provided by the law."

NETHERLANDS – NAUTADUTILH – Standards and Patents: District Court Rejects Ambush Tactics

In a recent decision (Philips v. LG Electronics, 25 April 2007), The Hague District Court held that Philips cannot rely on an essential patent, embodying an invention incorporated in the JPEG data compression standard, if LG can prove that Philips failed to notify this patent at the time the JPEG standard was set by the CCITT. However, the court added, Philips can rely on its patent if it is willing to grant a license to LG under reasonable, non-discriminatory conditions.

In a case brought on 17 February 2006, Philips accused LG Electronics of infringing one of its patents for a method and circuit for bit-rate reduction. Philips claimed that the sale of mobile phones incorporating a digital camera operating in conformity with the JPEG standard, in particular with the so called "baseline method", constituted a direct and indirect infringement of its patent. To prove the infringement, Philips relied on the description of the baseline method as set forth in Annex F to Recommendation T.81 of the International Telegraph and Telephone Consultative Committee (CCITT). According to Philips, the method described in this standard falls within the claims of its patent. LG raised both validity and non-infringement defences and claimed that the CCITT's baseline method does not necessarily fall within the scope of Philips' patent's claims.

Partial invalidity

With respect to the validity challenge, the district court confirmed (for the second time) that legal certainty for third parties is not compromised when the patentee relies on a dependent claim where the main claim of a patent has been invalidated for lack of novelty. Drafting a dependent claim, the court argued, is done primarily (or even solely) to anticipate the potential invalidity of the main claim and to prevent the patentee from losing its monopoly when the claims are drafted so broadly that they could be exposed to a successful novelty or inventive step attack. This approach is a welcome clarification in a debate sparked by the Supreme Court's decision in *Spiro v. Flamco* (NJ 1998/2), which appeared to apply a very strict test for the partial invalidity of patents, as a result of which some thought that patents would almost always be invalidated entirely, where partial invalidation would have been more reasonable and appropriate.

"Standardisation estoppel"

The court concluded that Philips' patent was at least partially valid and that compliance with the JPEG standard would be tantamount to infringement of the patent. LG submitted, however, that Philips had taken part in the development and acceptance of the JPEG standard in study groups of the CCITT, the International Standards Organisation and the British Standards Institution. It also claimed that all participants in these study groups were obliged to notify relevant patents and had to be prepared to grant a reasonable, non-discriminatory licence to anyone applying this standard.

According to LG, Philips was aware of this obligation but nevertheless failed to notify its patent. The court agreed that if it could be established that Philips participated in the relevant studygroups for development for the JPEG standard and was aware of the obligation to notify any essential patents for this standard (which Philips did not dispute), it could no longer rely on its patent. LG was subsequently ordered to provide further evidence that Philips had indeed participated in the relevant study groups. However, the court ruled that Philips would nevertheless be allowed to rely on its essential patent if it were prepared to offer a reasonable, non-discriminatory licence to LG, which the latter need not accept. The court subsequently ordered both parties to provide more information on their willingness to grant or obtain such a licence.

In addition, since there was a prima facie case of infringement, the court ordered a temporary injunction preventing LG from manufacturing mobile telephones in accordance with the JPEG standard for the duration of the proceedings.

Comments

Although not all details of this case are public, it appears that Philips received very lenient treatment from the court. It is entirely reasonable that a party participating in the standardization process, under an obligation to notify patents in this process, cannot suddenly rely on a patent it has kept stashed away once the standard has been implemented. However, the court's finding that in such cases the ambusher can be let off the hook if it grants a reasonable licence is not entirely convincing. Couldn't patent holders be encouraged to keep quiet about an essential patent in the standardisation process if the only possible downside at a later stage is that they could be obliged to grant a licence, which they would have to do anyway? This would prevent the standard-setting bodies and all participants from making informed choices when setting standards. If patents are notified, participants will undoubtedly also consider, or even favour, the inclusion of unpatented solutions in the standard. It would perhaps have been more appropriate for the court to hold that a party participating in a standardisation process that fails to notify an essential patent should not be allowed to rely on this patent, unless it had a good reason for its failure to notify.

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FOCUS

AMENDMENTS TO ENFORCEMENT RULES OF THE INCOME TAX ACT

Josephine Peng/Leo Tsai

The 30 May 2006 amendments to the Income Tax Act (ITA) include features to (i) simplify the tax treatment of undistributed earnings by adopting an after-tax net profit basis as per the Business Entity Accounting Act (BEAA); (ii) impose separate tax at source on dividends and net earnings received by enterprises of which their head-quarters are located outside of Taiwan; and (iii) empower the Ministry of Finance (MOF) to establish regulations on the allocation of an enterprise's costs, expenditures, and/or losses between taxable and tax-exempt income (more details please see separate article). Hence the MOF announced amendments to the ITA Enforcement Rules on 5 March 2007.

The ITA provides that from May 2007, when a profit-seeking enterprise declares its undistributed earnings for fiscal year 2005 onwards, it should adopt "the after-tax net profit as determined in accordance with BEAA" as the basis for computing its undistributed earnings, instead of "the amount of taxable income as assessed by the tax collection authorities" before the 30 May 2006 amendment. This eliminates not only the previous complicated calculation of undistributed earnings, but also the temporary and permanent differences between the results of financial accounting and tax accounting.

In line with the above, the ITA Enforcement Rules provide that when a profit-seeking enterprise makes up losses from previous years, it must use undistributed earnings from the then current year for which it is filing, to genuinely make up cumulative losses that was incurred prior to the closing date of the preceding fiscal year, as calculated according to the BEAA. In addition, the Enforcement Rules define "losses from the following year as audited and certified by a certified public accountant" as after-tax net losses audited and certified by a CPA, as reflected in the financial statements for the fiscal year following the fiscal year under consideration. In other words, when an enterprise declares in year 2007 its undistributed earnings for year 2005, it may not only use those earnings to offset its losses carried over from previous years up till and including year 2004, but also use said earnings to offset the loss for year 2006 if its audited financial statements show a net loss for year 2006.

The Enforcement Rules also provide that if in fiscal year 2005 or any subsequent year, a profit-seeking enterprise has retained earnings that are subject to restrictions on appropriation as referred to in Subparagraphs 5 and 7, Paragraph 2, Article 66-9 of the ITA, and that the grounds for such restrictions subsequently cease to exist, then before the close of the fiscal year following the year in which such grounds cease to exist, the enterprise should include any amount of such retained earnings that remain undistributed as a part of its undistributed earnings arising in the year in which the restrictions cease to apply, in calculating its liability for the 10% additional tax on undistributed earnings. As a result, if an enterprise has retained earnings that were barred from distribution prior to fiscal year 2005, then even if the restriction later ceases to apply, such earnings would not be retroactively subject to undistributed earnings tax. In other words, only those earnings that were subject to the restrictions on appropriation arose in or after fiscal year 2005 would potentially become taxable if the restriction ceases to apply.

Paragraph 3, Article 24 of the ITA provides that if a foreign profit-seeking enterprise invests in another profit-seeking enterprise within Taiwan, the dividends or net earnings that it receives are subject to withholding tax at source, regardless of whether or not the foreign enterprise has a fixed place of business in Taiwan. Article 70 of the ITA Enforcement Rules has been amended accordingly to explicitly provide that regardless of whether such a foreign enterprise has a fixed place of business in Taiwan, Article 73-2 of the ITA regarding the offset of 10% undistributed earnings tax against the amount of income tax withheld from such dividends or net earnings, should apply.

INTELLECTUAL PROPERTY AND THAILAND'S TRADE COMPETITION ACT: CAN AN OWNER REFUSE TO IMPORT OR REFUSE TO SELL AT A LOWER PRICE?

By: [John Fotiadis](#)

Tilleke & Gibbins International Ltd.

May 2007

There has been much discussion recently concerning the compulsory licensing by Thailand of certain patented drugs under Article 31 of the WTO TRIPS Agreement. Thailand has granted a license to generic manufacturers to produce a cheaper version of certain drugs over the objection of the drugs' patent owners. Now at least one of these patent owners may choose not to import its other patented drugs into Thailand.

While many focus on the issue of compulsory licensing under TRIPS, a broader question is being discussed in the background. Does IP ownership constitute a monopoly? If so, does refusal to import licensed goods or do high prices of IP constitute a violation of Thailand's Trade Competition Act (TCA)?

By virtue of the protection of the IP law, someone who owns a patent in a particular product has the exclusive right to produce or sell such patented product. This applies to other IP as well, e.g., music and films. But how far does that exclusive right go? For example, does the owner of a song have the right to license that song at whatever price they wish, or even to refuse to publish the song within Thailand? Should a patented pharmaceutical be entitled to the same treatment?

In the past, even legal monopolies granted by the Thai government have been held subject to the TCA and charged with violations for unfair conduct thereunder. UBC, which held a legal monopoly in the cable TV market, was charged with unfairly refusing to provide service to certain customers. Surathip Group, which held a legal monopoly in the alcoholic beverages market, was charged with unfair product tie-ins intended to restrict competition.

It is equally possible for a patent or IP owner to use its exclusive legal rights to effect anti-competitive behavior, behavior which is expressly prohibited by the TCA. For example, a patent owner cannot tie-in sales of its patented product with its other products. It similarly cannot require that its licensees use their products exclusively. In sum, IP ownership is not excluded from the application of the TCA. However, the TCA restrictions are specific and not uniformly applicable.

It is important to note at the outset that the TCA is directed solely at the conduct of Thai entities, excluding from its coverage any misconduct by foreign entities which do not maintain any presence in Thailand. This is in keeping with Thailand's historical interpretation of law to apply only within Thailand (which contrasts with the extraterritorial effect applied to the interpretation of US laws, for example).

Furthermore, there are different types of restricted conduct depending on the applicable TCA section for each kind of circumstance. Thailand's TCA restrictions on unfair trade apply in three distinct circumstances: (1) when two or more companies work together in restricting fair trade; (2) when one market-dominant company acts to limit fair trade; or (3) when a Thai

distributor acts together with a foreign supplier to require Thai purchasers to buy exclusively from the Thai distributor.

Market dominance also has a specific meaning. By ministerial regulation issued January 18, 2007, "market dominance" is defined as either being one operator with 50% or more of market share and total sales in the past year equal to or exceeding THB 1 Billion; or the top three operators having a market share of at least 75% and total sales in the prior year of over THB 1 Billion.

Section 25 of the TCA prescribes that a market-dominant player cannot set or maintain price levels which are "either unsuitable or unfair". It also prohibits a market-dominant player from reducing import of its products without justifiable reason in order to reduce the amount to less than market demand. However, the same express restrictions do not appear in Section 27 as relates to two or more co-conspirators nor to any single operator who is not a market-dominant player.

It can, therefore, be argued that (1) foreign manufacturers without a presence in Thailand, and/or (2) non market-dominant players, are not restricted by the TCA from either (a) setting unfair prices for their products or IP; or (b) limiting/restricting the quantity of such products that are imported to Thailand.

Section 29 of the TCA also offers a general catch-all set of restrictions which applies to all business operators. This Section which applies to all entities (with a Thai presence) prohibits conduct which limits "the engagement in business of another business operator" by either preventing the other operator from engaging in such business or forcing them to go out of business. However, it is unlikely that the restriction of imports or unfair pricing would be deemed affected by this Section 29 which seeks to address more direct interference with business by unfair competitors.

While the primary purpose of the TCA is to avoid anti-competitive behavior, only certain kinds of behavior are restricted and even these are separately defined according to the kind of party perpetrating same under what circumstances. With respect to IP owners, they too are subject to the TCA. However, this does not mean that in every circumstance they are prohibited from charging whatever price they wish for their IP licenses, nor that they are prohibited in all cases from even refraining to grant such licenses or import such licensed goods.

Each case and each circumstance must be reviewed as against the TCA to determine if the particular conduct is prohibited or not. Some limiting factors include whether the party has a Thai presence, or whether they are a market-dominant player. In sum, there is no blanket application of all TCA restrictions to all IP owners of whatever size, origin or type. ♦



Environmental Advisory Bulletin

Corps and EPA Issue Post-*Rapanos* Guidance for Wetlands Determinations

By [Richard M. Glick](#)
[June 2007]

One year after a fractured U.S. Supreme Court decided *Rapanos v. United States*,¹ the Army Corps of Engineers and the EPA have issued a joint guidance memorandum² for making wetlands jurisdictional determinations. In summary, the agencies will assert jurisdiction over “traditional navigable waters” and will analyze on a case-by-case basis other wetlands for their “significant nexus” to traditional navigable waters before asserting jurisdiction. The guidance will be in effect for six months to allow public input as to whether to conduct a formal rulemaking and what form the rules should take. The two agencies also issued a memorandum of agreement as to coordination of their post-*Rapanos* assessments.³

In the *Rapanos* case, land owners challenged the jurisdiction of the Corps under section 404 of the Clean Water Act over wetlands that were located several miles from a “navigable” waterway and thus, it was argued, did not constitute “waters of the United States” subject to regulation. The Supreme Court split 5-4 and issued five separate opinions. Five justices voted to vacate the decisions of the court below, holding that the record was not sufficiently developed to determine whether the wetlands at issue are jurisdictional. However, a plurality of the Court, led by Justice Antonin Scalia, held that wetlands must be of a semi-permanent nature and abut open water to qualify as jurisdictional. This is a test that many wetlands, previously thought to be jurisdictional, would fail to meet.

However, in his concurring opinion, Justice Anthony Kennedy would focus on how the subject wetlands serve the Clean Water Act’s primary objective, “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 USC § 1251(a). Citing a previous Supreme Court ruling⁴ that there must be a “significant nexus” between the wetlands and a navigable water, Justice Kennedy would examine whether there is “a reasonable inference of ecological connection” between the wetlands and navigable waters.

In trying to make sense of these competing viewpoints, the Corps and EPA cited the case of *Marks v. U.S.*, which holds that when the Court is divided, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁵ Applying the *Marks* case, the agencies conclude: “Thus, regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.”⁶

Under the Jurisdiction Memo, the agencies differentiate between wetlands that meet the Scalia plurality test and the Kennedy test. They will continue to assert jurisdiction over “traditional navigable waters,” which were previously defined in regulations as “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”⁷ Jurisdiction would also be asserted over “adjacent” wetlands, defined as “bordering, contiguous or neighboring.”⁸ The same is true for relatively permanent non-navigable tributaries of traditional navigable waters and adjacent wetlands with a continuous surface connection to the tributaries. All of these meet the Scalia test and require little analysis.

The Corps and EPA will exercise judgment with respect to less obvious wetlands to determine whether there is a “significant nexus” to navigable waters, as Justice Kennedy would require. Thus, ephemeral tributaries or intermittent streams that do not typically flow year round would not meet the Scalia test, but may be jurisdictional under the significant nexus standard. The agencies will assess the flow characteristics and ecological functions of the tributaries and adjacent wetlands to see if they “significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.”⁹ Swales, gullies, washes and other features caused by erosion, as well as ditches, would not usually be subject to jurisdiction.

In analyzing for a significant nexus, the agencies will consider a range of hydrologic and ecologic factors. Hydrologic factors include the volume, duration and frequency of flow; proximity to a navigable

water; the size of the watershed and average annual precipitation. Ecologic factors include the potential for tributaries to carry pollutants to navigable waters and the ability of adjacent wetlands to trap and filter such pollutants; wildlife habitat provided by the wetlands; and flood storage capability. The Corps and EPA will coordinate their assessments to make timely jurisdictional determinations and document their rationale for the record.

In conclusion, the main difference after *Rapanos* is the insistence of a direct relationship between the wetland in question and a traditional navigable water. The Corps and EPA will evaluate non-traditional navigable waters and wetlands on a case-by-case basis to discern whether a significant nexus exists. The time frames they have announced for making such jurisdictional determinations are ambitious and will prove challenging to implement. As the guidance documents described here do not have the force and effect of law, formal rules will still be needed.

Copies of the guidance memoranda may be found at:
www.epa.gov/owow/wetlands/guidance/CWAwaters.html

Footnotes

- ¹ 126 S. Ct. 2208 (2006). This case was consolidated with *Carabell v. United States*.
- ² "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" (June 5, 2007; referred to as "Jurisdiction Memo").
- ³ "Memorandum for Director of Civil Works and US EPA Regional Administrators" (June 5, 2007).
- ⁴ *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 US 159 (2001) ("SWANCC").
- ⁵ 430 US 188, 193 (1977).
- ⁶ Jurisdiction Memo at 3.
- ⁷ 33 C.F.R. § 328.3(a)(1), 40 C.F.R. § 230.3(s)(1).
- ⁸ Jurisdiction Memo at 5.
- ⁹ Jurisdiction Memo at 7.

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ANTITRUST UPDATE

HOGAN &
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U.S. Supreme Court Reformulates Pleading Standards Applicable to Antitrust Conspiracy Cases

In a 7-2 decision, the U. S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 2007 WL 1461066 (U.S. May 21, 2007) reversed the Second Circuit and held that a complaint which alleged mere parallel behavior among telecommunications companies coupled with stray statements of agreement that amounted only to legal conclusions failed as a matter of law to state a claim for conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Supreme Court ruled that in order to withstand a motion to dismiss, an antitrust conspiracy complaint must plead enough factual material (taken as true) to suggest that the defendants have entered into an unlawful agreement. Plaintiffs need not set forth detailed factual allegations, but the Supreme Court emphasized that "grounds showing entitlement to relief requires more than labels and conclusions, and a formulaic recitation of elements of a cause of action will not do." A complaint must contain plausible grounds from which to infer an agreement and allege enough facts to raise a reasonable expectation that discovery will reveal evidence of illegality.

The Supreme Court also made several other observations applicable to pleading in complex litigation generally:

- It restated and significantly limited its holding in *Conley v. Gibson*, 355 U.S. 41 (1957), which for 50 years has been the governing standard for motion to dismiss under Fed. R. Civ. P. 12(b)(6). The Supreme Court ruled that *Conley* merely describes the breadth of opportunity to prove what an adequate complaint contains and does not set a minimum standard of adequate pleading.
- It stressed that the high costs of discovery in antitrust cases make it critical to expose the deficiencies in cases at the motion to dismiss stage to minimize expenditures of time and money by the parties and the courts.
- It reiterated the long-recognized rule that on a motion under Fed. R. Civ. P. 12(b)(6), a court is not free to dismiss the claim merely because it disbelieves the complaint's factual allegations.
- It reaffirmed its holding in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) that courts may not impose heightened pleading standards except as required under Fed. R. Civ. P. 9(b), but stated that a plaintiff must plead sufficient facts to show that it is plausibly entitled to relief in order to meet the minimum standard for notice pleading under Fed. R. Civ. P. 8.



Twombly ratchets up the threshold pleading requirements for plaintiffs generally and for antitrust plaintiffs in particular. In the wake of *Twombly*, federal courts will likely be more receptive to defendants' motions to dismiss at the pleading stage.

Background

Twombly arose against the backdrop of the break-up of AT&T in 1982 and the enactment of the Telecommunications Act in 1996. The AT&T Consent Decree created a system of Regional Bell Operating Companies, referred to by the Supreme Court as Incumbent Local Exchanges Carriers (ILECs), who were granted monopolies in local phone service. The decree also created a competitive long-distance market from which the ILECs were excluded.

Thereafter, Congress enacted the Telecommunications Act of 1996 which fundamentally restructured the market for local phone service by ending the regional monopolies held by the ILECs and, in an effort to stimulate local competition, requiring each ILEC to share its local network with rivals. ILECs were slow to enter into each others' service areas and vigorously litigated the scope of their sharing obligations against the Federal Communications Commission. *Twombly*, a consumer of local phone and high speed Internet services, brought a putative class action against the ILECs under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that the ILECs (1) "engaged in parallel conduct" in their respective service areas to inhibit the growth of rival local service providers, by, inter alia, limiting access to their networks, overbilling, and sabotaging rivals' relationships with their customers; and (2) agreed not to compete in each other's service areas. The conspiracy allegation consisted of descriptions of parallel conduct coupled with a conclusory assertion that defendants had conspired. The trial court granted defendants' motion to dismiss, concluding that an antitrust complaint that alleged mere parallel behavior without more does not allege an actionable agreement under Section 1 and is, therefore, deficient as a matter of law. The Second Circuit reversed, holding that the complaint was adequate under the standard enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957).

The United States Supreme Court's Opinion

The Supreme Court reversed, holding that for a conspiracy complaint under the Sherman Act to survive a motion to dismiss, the plaintiff must plead allegations sufficient to "raise the right to relief above the speculative level." Accordingly, a pleading must do more than create a "suspicion [of] a legally cognizable right of action." Applying this standard to conspiracy cases under the Sherman Act, the Supreme Court held that to avoid a motion to dismiss, a complaint must contain "enough factual material (taken as true) to suggest that an agreement was made," that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Allegations of parallel conduct coupled with a bare assertion of conspiracy do not meet that standard and will not withstand a motion to dismiss.

The Supreme Court reasoned that this pleading standard was necessary to prevent plaintiffs with largely groundless claims from exacting higher settlements from defendants. Stressing the high costs of discovery, the Supreme Court underscored the need to expose deficiencies in pleadings

early in the litigation, at a point of minimum expenditure of time and money by the parties and the courts. The Supreme Court also suggested that such scrutiny at the pleading stage was necessary to filter out groundless claims, noting that hands-on case management, judicious use of summary judgment and lucid instructions to jurors had had little impact on reining in the high costs of litigation.

In addition, the Supreme Court rejected plaintiffs' argument that the complaint must be upheld under *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which had been understood to mean that a complaint will survive a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Supreme Court noted that the "no set of facts" language had been often criticized by lower courts and stated that this phrase "has earned its retirement" and is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." Rather, *Conley*, properly understood, describes "the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."

Still, the Supreme Court chose not to draw a bright line distinguishing "conceivable" claims from "plausible" claims and thus provided little guidance to lower courts on implementing the new pleading standard. It will likely take time for a new consensus to emerge. At the same time, the Supreme Court unequivocally re-affirmed its holding in *Swierkiewicz* that the courts may not create particularized pleading requirements not mandated in the Federal Rules of Civil Procedure. In *Twombly*, the Supreme Court was not insisting on "detailed factual allegations" but rather pleading enough facts to "raise a right to relief above the speculative level." Moreover, the threat of Rule 11 sanctions will presumably constrain plaintiffs seeking to meet this standard from alleging more than those factual allegations for which they have a reasonable basis.

Conclusion

Twombly is a landmark decision and may represent the most significant pronouncement on pleadings by the U.S. Supreme Court in the past half-century. While some lower courts have applied a more exacting pleading standard in practice, *Twombly* marks a clear and visible departure from the liberal standards that have governed pleadings in federal litigation but which have faced mounting criticism from bench and bar. The decision underscores the Supreme Court's sensitivity to the high costs of discovery and the need to evaluate the legal viability of claims before substantial discovery costs are incurred. Defendants in complex federal cases – especially antitrust actions – now have an important new precedent to support motions to dismiss complaints that are based largely on speculation and conclusory assertions of the elements of the cause of action.

About the Antitrust Update

Hogan & Hartson frequently publishes the Antitrust Update, which covers the latest global news and developments in competition and antitrust issues. For further information regarding the topic discussed in this update, please contact one of the authors below or the Hogan & Hartson attorney with whom you work.

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Court Upholds Arbitration of Construction Defects Involving Interstate Commerce

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Since 1989, arbitration clauses in California real estate sales contracts were subject to an important exception for construction defects. Code of Civil Procedure section 1298.7 allows a purchaser of real property to bring an action in court for construction and design defects, notwithstanding an agreement to arbitrate. However, a recent California Court of Appeal decision held that the Federal Arbitration Act ("FAA") preempts the statute where it is shown that the materials used in construction came from interstate commerce.



Roger C. Haerr

In *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, the plaintiff homebuyer sued a contractor and developer after a plumbing leak caused extensive damage to the buyer's home. The defendants moved to compel arbitration of the dispute based on an arbitration provision in the real estate purchase agreement, but the trial court denied the motion based on section 1298.7. On appeal, defendants argued the FAA preempted the statute based on recent Supreme Court decisions.

The Court of Appeal reversed the order denying arbitration. The court concluded that defendants met their burden of demonstrating that the transaction substantially affected interstate commerce. Defendants produced declarations showing that the construction of the buyer's home involved the receipt and use of building materials that were manufactured and produced outside of the state. Accordingly, the court held the FAA preempted the California statute.

For homebuilders, the *Shepard* decision is good news because it requires enforcement of arbitration clauses for construction defects in circumstances where an adequate showing is made that the building materials came from interstate commerce.

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