SQUIRE PATTON BOGGS

October 2016

Monthly legal update

UK and European Union

UK – Payments to Commercial Agents on termination

The High Court has reviewed a compensation/indemnity clause in a commercial agency agreement, and, contrary to precedent, agreed to sever the clause rather than declaring it invalid in its entirety.

The clause in this case read as follows:

6.3(a) Upon expiry or termination of this Agreement for any reason:

(a) If and to the extent that the ….[Commercial Agents] Regulations apply, [the Claimant] shall (if and to the extent so entitled in accordance with the provisions of the Regulations) have the right to be indemnified as provided for in regulation 17 of those Regulations. For the avoidance of doubt, [the Claimant] shall have no right to any compensation under those Regulations upon termination or expiry of this Agreement provided that if the amount payable by way of indemnity under this Clause would be greater than the amount payable by way of compensation, [the Claimant] shall ….have the right to receive compensation instead of an indemnity under the regulations ….

The intention behind this clause was that on termination the agent would be entitled to an indemnity from the principal unless compensation would be less. Often, compensation results in a greater payment being made to the agent.

The agreement also contained this severance provision:

7.5 In the event that any provision of this Agreement is held to be invalid or unenforceable, such provision will be deemed to have been severed from the Agreement, while the remainder of the Agreement will remain in full force and effect.

In an earlier case, the High Court had held that the whole of a clause which had been drafted in the same way as clause 6.3(a) was unenforceable. The result was that the default position in the Commercial Agents Regulations applied and the agent was entitled to a compensation payment from the principal (this was greater than the indemnity payment would have been). However, in this case, the High Court held that the second sentence of clause 6.3(a) could be severed from the agreement with the first sentence remaining valid and enforceable. This meant that the agent remained entitled to an indemnity only.

This case is not necessarily an example of the court refusing to follow precedent – in the earlier case the possibility of severance had not been argued. This latest ruling will come as some comfort to principals that an attempt to minimise the payment that must be made to an agent on termination may avoid being struck down as unenforceable in its entirety, provided severance is possible and is provided for in the agreement.

UK - Reporting on payment practices could be in force from 6 April 2017

The UK Government has indicated that Section 3 of the Small Business, Enterprise and Employment Act 2015 is likely to come into force on 6 April 2017. Section 3 requires large companies to report on its payment practices and performance. This requirement is likely to be satisfied by an organisation putting a report, accessible to all, on its website on a half yearly basis, however government guidance is awaited on this. The report will need to include such matters as the organisation's standard payment terms,

the average time taken to pay, the proportion of invoices paid beyond agreed terms and the amount of late payment interest owed and paid by the organisation. The Government has indicated that Regulations bringing Section 3 into force and setting out some of the necessary detail (such as which organisations will be regarded as 'large' and so subject to the obligation to report) are expected to be laid before Parliament in early 2017.

Savings on UK registered design protection – effective date announced as 1 October 2016

In the June edition, we reported that application and renewal fees for UK registered designs were to be reduced resulting in significant savings for organisations looking for UK registered design protection. It has now been announced that the fee reductions will apply from 1 October 2016.

As previously reported, the fee reductions will be substantial. Filing fees will be based on the number of applications filed; the more applications, the greater the saving. Businesses will, for the first time, be able to file up to ten designs for a single fee of £70 (currently £420) and up to 20 designs for a single fee of £90 (currently £820). Businesses are advised to bulk file to make the greatest cost savings. One of the lessons to be learned from the recent Supreme Court ruling in the Trunki case (also reported in the June edition) is that filing simultaneous multiple applications, perhaps covering notable individual parts of the design or using different forms of representation of the design, is key to obtaining the widest possible protection. The new reduced upfront costs will make filing multiple applications possible, allowing designers to really maximise their registered design protection.

Overall, renewal fees will be reduced, with the biggest savings made in the third and final renewal periods. For example, the renewal fee payable at the end of year 15 will be £110 compared with the current £310 (a 64% reduction). At year 20, the fee will be £140 instead of the current £450 (a 69% saving). Overall, the total renewal fees for a full 25 year term will be reduced by 63% from £1,100 to £410. This will make it more affordable for designers to maintain their registration for the full 25 year term.

EU – IP owners could be entitled to additional compensation when their rights are infringed

In a recent ruling, the CJEU has interpreted Article 13(1) of the IP Enforcement Directive (2004/48/EC) and confirmed that an IP owner whose rights are infringed may claim compensation not only for material damage resulting from the infringement (typically lost sales) but, in addition, for any moral prejudice suffered. This would include, for example, damage to reputation. The CJEU held that Article 13(1) set out the general rule that a court must order an infringer to pay the IP owner damages 'appropriate to the actual prejudice suffered by him as a result of the infringement'. The CJEU's view was that moral prejudice constituted a component of the prejudice actually suffered by the IP owner. Therefore, to ensure the IP owner was compensated in full, he/she must be able to seek compensation for any moral prejudice suffered, in addition to compensation for material damage. This ruling calls into question earlier rulings (particularly in the UK) that have held that damages for moral prejudice are only available in very limited circumstances.

For more information on any of the items included for the UK/EU, please feel free to call Alastair Purssell

China

Provisional Measures for Filing Administration of Establishment and Changes of Foreign-invested Enterprises (Exposure Draft) Released to Public

Ministry of Commerce Concerning released the Provisional Measures for Filing Administration of Establishment and Changes of Foreign-invested Enterprises (Exposure Draft) for soliciting opinions from the public on September 3, 2016.

According to the Exposure Draft, the establishment and changes of foreign-invested enterprises ("FIEs") other than those that are subject to the special administrative measures (i.e. negative list) as stipulated by the State can be completed by filing without approval. The investors of FIEs or their designated agents shall, within 30 days after the issuance of license or the occurrence of change, fill out and submit the filing application and the relevant documents through the filing system to go through establishment or change filing formalities.

Meanwhile, Exposure Draft provides comprehensive provisions of supervision and inspection and legal liabilities. For any violation of the filing obligations, carrying out business in in the field of restriction or prohibition without approval or failure to cooperate in supervision and inspection with authorities, FIEs or their investors shall bear legal liabilities.

Moreover, Exposure Draft further indicates that for the purpose of sharing information, filing administrations will closely coordinate with relevant administrative departments of public security, state-owned assets, customs, tax, industry and commerce, securities, foreign exchange and etc.

《外商投资企业设立及变更备案管理暂行办法（征求意见稿）》公布

2016年9月3日，商务部公布了《外商投资企业设立及变更备案管理暂行办法（征求意见稿）》公开征求意见的通知。

根据《征求意见稿》，不涉及国家规定实施准入特别管理措施的外商投资企业，无须审批，只需经过备案即可完成设立及变更手续。外商投资企业投资者或其指定的代理人通过备案系统可在线填报和提交备案信息及材料。外商投资企业设立或变更的备案在营业执照签发前或营业执照签发后或变更事项发生后30日内办理。

同时，《征求意见稿》规定了较为全面的监督检查和法律责任条款。外商投资企业及其投资者违反备案义务，或未经审批在限制或禁止投资领域开展投资经营活动，或不配合监督检查的，将承担相应的法律责任。

而且，《征求意见稿》还明确备案机构将备案机构与公安、国有资产、海关、税务、工商、证券、外汇等有关行政管理部门应密切协同配合，加强信息共享。

Notice of Consumer Goods Standard and Quality Improvement Plan (Year 2016- Year 2020) Issued

Office of the State Council has issued the notice of Consumer Goods Standard and Quality Improvement Plan (Year 2016- Year 2020) ("Plan") on September 6, 2016. According to the Plan, standards and quality of clothing and accessories goods is one of the key areas to be improved. Its detailed targets include:

i. to adapt to the developing demand of individuation of consumption, fashion consumption, quality consumption and brand consumption;

ii. to consolidate traditional advantage status of textile garments, leather bags and other goods;
iii. to accelerate the technological innovation and industrial upgrading of jewellery, watches and clocks, glasses, hair products and other goods;
iv. to strengthen the protection of intellectual property rights, and enhance the ability of innovation and creative design;
v. to promote the 3D body measurement, digital fitting, product traceability, wearable clothing and other new technologies;
vi. to develop common standards of the whole process of service and manufacturing;
vii. to boot apparel production enterprises paying attention to local advantages;
viii. to expand the industries of personalized customization, scale customization and high-end customization, with the precision design, precision production, accurate service to win the consumer market;
ix. to optimize and improve the standard system, and to develop key technical standards;
x. to improve the requirements of new fiber, high-quality cotton wool, silk cashmere leather and other high-quality materials;
xi. to regulate the functional requirements of waterproof, windproof and thermal insulation, antibacterial and; and
xii. to manufacture high-end products.

发布《消费品标准和质量提升规划（2016—2020年）》的通知

2016年9月6日国务院办公厅印发《消费品标准和质量提升规划（2016—2020年）》的通知。根据《规划》，服装服饰产品是标准和质量提升的重点领域之一。具体的目标是：

1. 适应个性消费、时尚消费、品质消费、品牌消费的发展需求，
2. 巩固纺织服装鞋帽、皮革箱包等产业的传统优势地位，
3. 加快首饰、钟表、眼镜、发制品等产业的技术创新和产业升级，
4. 加大知识产权保护力度，提升创新创意设计能力，
5. 推进三维人体测量、数字化试衣、产品追溯、可穿戴服装等新技术产业推广，
6. 制定规范定制流程全过程服务和产品质量的通用标准，
7. 引导服装服饰产品生产企业注重发挥本土优势，
8. 壮大个性定制、规模定制和高端定制产业，以精准设计、精准生产、精准服务赢得消费市场。
9. 优化完善标准体系，研制关键技术标准，
10. 提高新型纤维、优质棉麻毛、高端羊绒丝绸皮革等材料质量要求，
11. 规范纺织产品防水、防风、保温、抗菌等功能性要求，
12. 制造高端精品。

Measures for Publicizing Acts in Material Violation of Labor Protection Laws Issued

Ministry of Human Resources and Social Security has issued Measures for Publicizing Acts in Material Violation of Labor Protection Laws on September 1, 2016, and will take effect on January 1, 2017.

The following seven violation behaviours of employers will be publicized to society:

1. deductions of large amounts from or delay in payment of large amounts of employees' labor remunerations without cause; or refusal to pay labor remunerations and being

transferred to judicial authorities for investigation of criminal liability;

2. failure to purchase social insurances or pay social insurance premiums in accordance with the law, which is serious in nature;

3. violation of the provisions on working hours, rest and vacations, which is serious in nature;

4. violation of the provisions on special protection for female employees and underage employees, which is serious in nature;

5. violation of the provision on prohibition of using child labor;

6. resulting in serious adverse social influences as a result of violation of labor protection laws; or

7. other acts in material violation of labor protection laws.

The ways to publicize include: web portals of the administrative departments of human resources and social security, as well as through major newspapers, TV and other media.

发布《重大劳动保障违法行为社会公布办法》

2016年9月1日人力资源和社会保障部发布《重大劳动保障违法行为社会公布办法》（“办法”），该办法将于2017年1月1日生效。

《办法》明确七类重大劳动保障违法行为应当进行社会公布。包括：(一)克扣、无故拖欠劳动者劳动报酬，数额较大的；拒不支付劳动报酬，依法移送司法机关追究刑事责任的；（二）不依法参加社会保险或者不依法缴纳社会保险费，情节严重的的；（三）违反工作时间和休息休假规定，情节严重的；（四）违反女职工和未成年工特殊劳动保护规定，情节严重的；（五）违反禁止使用童工规定的；（六）因劳动保障违法行为造成严重不良社会影响的；（七）其他重大劳动保障违法行为。

社会公布主要通过如下途径：一是应当在本级人社行政部门门户网站公布；二是在人社行政部门门户网站公布的同时，在当地主要报刊、电视等媒体公布重大劳动保障违法行为。

The Ministry of Commerce and the General Administration of Customs published the Announcement [2016] No.45 on issues relating to cancelling the approval for processing trade business (the “Announcement”) on August 25, 2016.

The Announcement has been effective since September 1, 2016. The key points are summarized as follow:

1. The first is to cancel the approval for both processing trade contracts and the domestic sales of bonded imported materials or finished products for processing trade with the competent authorities of commerce. Authorities of commerce at all levels shall no longer issue the Approval Certificate for Processing Trade Business, the Approval Certificate for Networked Surveillance of Enterprises’ Processing Trade Business, the Approval Certificate for Domestic Sales of Bonded Imported Materials for Processing Trade, the Approval Certificate for Non-priced Equipment for Processing Trade, and the Administrative Commission for Special Customs Surveillance Zones shall no longer issue the Approval Certificate for Processing Trade Business in Export Processing Zone and the Approval Certificate for Deep Processing Carry-over Business in Export Processing Zone.

2. The enterprises operating processing trade business can proceed with the formalities for establishment (change) of the processing trade manual (account book) at customs by presenting a valid Certificate of Operation and Production Capacity of Processing Trade Enterprises issued by the competent authorities of commerce or the Administrative Commission for Special Customs Surveillance Zones. The customs shall no longer verify relevant approval certificates and shall establish (change) the manual in accordance with the scope of tax items (i.e. the first 4 digits of HS code) prescribed in the Certificate of Operation and Production Capacity of Processing Trade Enterprises. In case of prohibited or restricted processing trade goods, the enterprise shall handle the relevant formalities after obtaining the approval documents from the Ministry of Commerce.

3. Where bonded imported materials or finished products for processing trade outside the Special Customs Surveillance Zones are to be sold domestically, the customs shall collect tax and tax-deferred interest according to law. In case of the imported materials involving approval certificate administration, the enterprise shall refer the relevant approval certificates to the customs.

2016年8月25日商务部、海关总署发布取消加工贸易业务审批有关事项公告(商务部 海关总署公告2016年第45号)

《公告》于2016年9月1日生效。主要事项包括：

1. 取消商务主管部门对加工贸易合同审批和加工贸易保税进口料件或制成品转内销审批。各级商务主管部门不再签发《加工贸易业务批准证》、《联网监管企业加工贸易业务批准证》和《加工贸易保税进口料件内销批准证》、《加工贸易不作价设备批准证》。海关特殊监管区域管委会不再签发《出口加工区加工贸易业务批准证》和《出口加工区深加工结转业务批准证》。
2. 开展加工贸易业务的企业，凭商务主管部门或海关特殊监管区域管委会出具的有效期内的《加工贸易企业经营状况和生产能力证明》（打印表样式见附件）到海关办理加工贸易手（账）册设立（变更）手续，海关不再验核相关许可证件，并按《加工贸易企业经营状况和生产能力证明》中列名的税目范围（即商品编码前4位）进行手册设立（变更）。涉及禁止或限制开展加工贸易商品的，企业应在取得商务部批准文件后到海关办理有关业务。
3. 海关特殊监管区域外加工贸易保税进口料件或者制成品如需转内销的，海关依法征收税款和缓税利息。进口料件涉及许可证件管理的，企业还应当向海关提交相关许可证件。

Recently the State Council has decided to newly establish 7 free trade pilot zones

Recently the State Council has decided to newly establish 7 free trade pilot zones in Liaoning, Zhejiang, Henan, Hubei, Sichuan, Shanxi Provinces and Chongqing municipality which reveals the new voyage of pilot exploration relating to the establishment of free trade pilot zones.

7 free trade pilot zones to be established respectively have features and emphasis.

Liaoning Province mainly implements the facilitation of reform of marketed-oriented regime and the promotion of structure

adjustment as requested by the central government, and attempts to promote the integral competitiveness and the level of opening-up of the old industrial base in the Northeast.

Zhejiang Province focuses on exploring the liberalization of bulk commodity trade and enhancement of the capacity for global allocation of bulk commodity pursuant to the requirements in respect to “exploring to set up Zhou Shan Free Trade Port Areas” made by the central government.

Henan Province is requested to accelerate construction of a modern stereoscopic traffic system linking south and north, west and east and a modern logistics system, and endeavors to construct a modern comprehensive transportation hub serving “One Belt and One Road ”.

Hubei Province places emphasis on supporting central China to undertake industrial transfer gradually, building an array of strategic emerging industries and high-tech industry bases in order to play its demonstration role in the strategy of rise of central China and the development of the Yangtze River Economic Belt.

Chongqing Municipality principally functions as a strategic pivot and junction and further opens up gateway cities in west China so as to move forward with the deep implementation of western development strategy.

Sichuan Province makes efforts to create an inland open economy highland at the request of boosting opening-up of gateway cities in west China and supporting inland opening strategy.

Shanxi Province aims to build an inland reform and opening-up highland to meet the requirements for utilizing “One Belt and One Road ” to lead the western development and boosting opening-up of gateway cities in west China.

Going forward, the Ministry of Commerce will cooperate with relevant provinces, municipalities and departments to improve the overall plan of newly established free trade pilot zones as soon as possible and the plan will be implemented after completing the requisite procedures.

近日国务院决定新设立 7 个自贸试验区

近日，国务院决定，在辽宁省、浙江省、河南省、湖北省、重庆市、四川省、陕西省新设立 7 个自贸试验区。这代表着自贸试验区建设进入了试点探索的新航程。

将新设的 7 个自贸试验区各具特色、各有侧重。

辽宁省主要是落实中央关于加快市场取向体制机制改革、推动结构调整的要求，着力提升东北老工业基地发展整体竞争力和对外开放水平。

浙江省主要是落实中央关于“探索建设舟山自由贸易港区”的要求，就推动大宗商品贸易自由化，提升大宗商品全球配置能力进行探索。

河南省主要是落实中央关于加快建设贯通南北、连接东西的现代立体交通体系和现代物流体系的要求，着力建设服务于“一带一路”建设的现代综合交通枢纽。

湖北省主要是落实关于中部地区有序承接产业转移、建设一批战略性新兴产业和高技术产业基地的要求，发挥其在实施中部崛起战略和推进长江经济带建设中的示范作用。

重庆市主要是落实关于发挥重庆战略支点和连接点重要作用、加大西部地区门户城市开放力度的要求，带动西部大开发战略深入实施。

四川省主要是落实中央关于加大西部地区门户城市开放力度以及建设内陆开放战略支撑带的要求，打造内陆开放型经济高地。

陕西省主要是落实关于更好发挥“一带一路”建设对西部大开发带动作用、加大西部地区门户城市开放力度的要求，打造内陆型改革开放新高地。

下一步，商务部将尽快会同相关省市和部门，研究完善新设自贸试验区总体方案，履行必要审核程序后实施。

For more information on any of the items included for PRC, please feel free to call Nicholas Chan.

Hong Kong

Family Status Discrimination

The Family Status Discrimination Ordinance (“FSDO”) (Cap. 527) was passed in 1997. Under the FSDO, it is unlawful for anyone or any organization to discriminate against a person based on his or her family status. The term “family status" means the status of a person who has the responsibility for the care of an immediate family member, who is related by blood, marriage, adoption or affinity.

The FSDO applies to seven areas, including employment. All employers in Hong Kong shall comply with the FSDO, unless the employee does his or her work wholly or mainly outside Hong Kong.

To avoid being held liable under the FSDO, employers may adopt the following practices:

- Adopt consistent selection criteria in recruitment, promotion, transfer, training, dismissal or redundancy.
- Do not hold stereotypical assumptions on the suitability of employees with or without family status for a particular job.
- Avoid advertising positions as “full-time” unless this can be justified.
- Offer part-time work or job sharing where possible.
- Keep work arrangements and allowance flexible for the employees with difficulties in meeting the working requirements.
- Maintain an open and inclusive working environment so that employees are open and forthcoming with their respective needs regarding family status.

How to avoid unintended rights of third parties in contracts

The new Contracts (Rights of Third Parties) Ordinance (“CRTPO”) (Cap. 623) has come into effect on 1 January 2016. In the past, under the strict privity of contract doctrine, only a person who is party to the contract can enforce it, while a third party cannot acquire any right even if the contract is made to give benefits to him or her. According to the Ordinance, parties entering into a contract may create contractual rights which are legally enforceable by a third party, such as to claim damages or to seek specific performance.

A third party can enforce a term of contract under the CRTPO if:

(1) The contract expressly provides that it may or purports to confer the benefit on it; and
(2) It is expressly identified in the contract as answering to a particular description.

Once a third party right is granted, the contracting parties cannot rescind the contract or vary the contractual terms in a way that would alter the third parties’ rights in general. If a third party brings an action to enforce certain contractual terms, the contracting party may raise defence or

counterclaim against the third party as if the legal proceeding was brought by a counterparty.

Notwithstanding the above, the CRTPO does not apply to some contracts, including:

- Bills of exchange
- Promissory notes
- Negotiable instruments
- Deeds of mutual covenant
- Contracts of carriage
- Letters of credit
- Company's articles of associations

An employment contract cannot confer a right onto a third party to enforce a term against an employee. However, a third party could be allowed to enforce a term against an employer.

To avoid potential disputes concerning the liability of unintended third party rights, a company is advised to review its standard forms and contracts, such as pre-printer forms. A company may consider putting an opt-out clause in standard forms and contracts to prevent application of the CRTPO, and excluding all third parties rights apart from those expressly provided for in the contract. A company should also be mindful of situations where they may have privity as a third party in contracts that fit the above descriptions.

For more information on any of the items included for Hong Kong, please feel free to call Nicholas Chan.

United States

PanAmerican Seed Company Settlement - U.S. Dept. of Treasury Enforcement Information

On September 13, 2016, the Department of Treasury's Office of Foreign Assets Control ("OFAC") reached a settlement with the PanAmerican Seed Company ("PanAm Seed") of potential civil liability for alleged violations of the Iranian Transactions and Sanctions Regulations. PanAm Seed agreed to pay $4,320,000 to settle potential civil liability for indirectly exporting flower seeds to two Iranian distributors. The statutory and civil penalties could have been as much as $12 million for the "egregious" violations.

OFAC's official statement explained how PanAm Seed shipped the seeds to consignees based in countries based in Europe or the Middle East, and then PanAm Seed's customers arranged for the re-exportation of the seeds to Iran. Personnel, including mid-level managers, were aware of U.S. economic sanctions programs involving Iran and the requirement to obtain an OFAC license in order to export the seeds. Despite this, PanAm Seed engaged in a practice designed to conceal the fact that the ultimate destination of the seeds were to distributors located in Iran.

OFAC determined that because PanAm Seed did not voluntarily self-disclose the transactions; employees, including mid-level managers, had contemporaneous knowledge and yet PanAm continued sales to Iranian distributors for nearly eight months after the company's' Director of Finance learned of OFAC's investigation; the conduct continued over a period of years providing over $770,000 in economic benefits to Iran; and furthermore, PanAm did not initially cooperate with OFAC's investigation, including providing inaccurate information; the violations constituted an egregious case. OFAC also noted that PanAm Seed is a division of Ball Horticultural, a commercially sophisticated, international corporation.

Mitigating factors taken into consideration in the settlement included: PanAm Seed was eligible for a "first offense" mitigation of up to 25 percent; the exports at issue were likely eligible for an OFAC license; PanAm Seed took remedial steps to ensure future compliance with OFAC sanctions, including stopping all exports to Iran, implementing a compliance program, and training employees on OFAC sanctions.

PanAm Seed's settlement with OFAC provides a warning to international corporations to ensure compliance with U.S. regulations when shipments involve the U.S. division or when conducting transactions in U.S. dollars. A comprehensive compliance policy, including employee training and monitoring program, is vital to safeguard against inadvertent actions that violate OFAC's country sanctions. PanAm Seed would have avoided the penalties if the company had procedures in place to discover and cease the violating actions before they went any further or had they simply applied for an OFAC license in the first instance. Ensuring a current and comprehensive compliance program is ultimately the most important thing a company can do to protect itself against future misconduct.

Webb v. Special Electric Co. – California Supreme Court decision

In Webb v. Special Electric Co., the Supreme Court of California formally adopted the Sophisticated Intermediary Doctrine, clarifying what circumstances may permit a raw materials supplier to discharge its duty to warn consumers.

This case stems from an employee who was diagnosed with mesothelioma, after being exposed to asbestos through his job with Pyramid Pipe & Supply Co. ("Pyramid"). Pyramid had bought the materials containing asbestos from Johns-Manville and Special Electric Company, Inc. ("Special Electric") brokered the sale. The employee brought suit against multiple defendants related to the asbestos exposure, including Special Electric. At trial, Special Electric argued that it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks posed by asbestos. Despite the jury returning a verdict in favor of the employee and apportioning fault to both Johns-Manville and Special Electric, the court granted Special Electric's motions for a directed verdict and nonsuit, finding that Special Electric was not liable for failure to warn.

The California Court of Appeals held the ruling was improper because substantial evidence supported the employee's claims that Special Electric breached its duty to warn Johns-Manville and other foreseeable downstream users about the risks of asbestos exposure. The Supreme Court of California affirmed, holding that the record did not establish as a matter of law that Special Electric discharged its duty to warn by relying on a sophisticated intermediary.

The decision allows suppliers of raw materials to discharge their duty to warn by relying on intermediaries to warn downstream users. However, this defense is only available if the supplier conveys adequate warnings to the intermediary or if the intermediary is a sufficiently sophisticated purchaser. The supplier can then reasonably rely on the purchaser to convey adequate warnings to others, including those who encounter the material in a finished product.

Although *Webb* involved hazardous raw materials, the holding could apply broadly to many types of component suppliers. For shipments in California and any jurisdiction that follows the Sophisticated Intermediary Doctrine in accordance with the Third Restatement of Torts, a company may discharge its duty to warn end users about known or knowable risks in the use of its product if it provides adequate warning to the products' immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, and further reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product. Reasonable reliance will depend on the totality of circumstances, including the degree of risk posed by the material, the likelihood the intermediary will convey the warnings, and the feasibility of directly warning end users.

Update: Fair Labor Standard Act Overtime Rule – Federal Rule

Officials from 21 states sued the U.S. Department of Labor over the Fair Labor Standard Act ("FLSA") Overtime Rule that would make about 4 million higher-earning workers eligible for overtime pay. Nevada Attorney General Adam Laxalt filed the lawsuit in the U.S. District Court in Eastern Texas, urging a block on the implementation of the rule before it takes effect on December 1, 2016. Other plaintiffs include Alabama, Arizona, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, Texas, Utah and Wisconsin.

Over 50 business groups, including the US Chamber of Commerce and the National Association of Manufacturers, have filed a similar lawsuit on the same day and in the same court. This lawsuit alleges, among other things, that the new rule disregards the mandate of Congress to exempt white-collar employees from the overtime requirements of the FLSA.

Opponents of the rule claim it would burden private and public sectors by straining budgets and forcing layoffs or cuts in working hours. The measure would more than double the salary threshold under which employers must pay overtime to their white collar workers. Overtime protections would apply to workers who make up to $913 a week, or $47,476 a year, and the threshold would readjust every three years to reflect changes in average wages.

Because it is still too early to determine what the outcome of these cases will be, companies should proceed as though the new rules will take effect on December 1, 2016, as scheduled.

Bristol-Myers Squibb Co. v. Superior Court (Anderson) - California Supreme Court decision

On August 29, 2016, the California Supreme Court held that a company with that was neither headquartered nor incorporated in California, nor had any peculiar ties to the state is subject to personal jurisdiction of the California courts on the basis of specific jurisdiction.

This decision stems from a case involving Bristol-Myers Squibb Co. ("BMS"), a company which manufactures a pharmaceutical drug called Plavix. BMS is incorporated in Delaware, headquartered in New York, and maintains substantial operations in New Jersey. While the company did not research, develop, or manufacture Plavix in California, it does have research and laboratory facilities in California and employs 250 sales representatives there.

Plaintiffs, consisting of both California residents and non-residents, brought suit over adverse consequences from ingesting Plavix. BMS alleged that the court lacked personal jurisdiction over it to adjudicate the claims of the non-resident plaintiffs. The California Supreme Court first looked to whether BMS could be subject to general jurisdiction and held that under the United States Supreme Court's "at home rule" for general jurisdiction, general jurisdiction could not be asserted over BMS as the company's activities in California did not meet the standards for general jurisdiction. The appointment of an agent for service of process, when required by state law, could not compel its surrender to general jurisdiction for disputes unrelated to its California transactions. However, the BMS was subject to specific jurisdiction as BMS purposely directed its activities at the forum state, the plaintiffs' claims arose out of or were related to those forum-directed activities, and the exercise of jurisdiction was reasonable in light of the traditional notions of fair play and substantial justice.
It is important to note that the holding "does not render California an all-purpose forum for filing suit against BMS for any matter, regardless of whether the action is related to its forum activities." The court reiterated that

specific jurisdiction is decided on a case-by-case basis and is a fact specific inquiry.

However, based on the Court's reasoning, the decision opens the doors for any large company with a nationally marketed product and employees in the state could be subject to specific personal jurisdiction in California.

Magill v. Ford Motor Co. – Colorado Supreme Court decision

On September 12, 2016, the Colorado Supreme Court limited the extent to which product manufacturers can be subjected to a state's general personal jurisdiction, even when the manufacturer's contacts with that state are substantial.

Magill involved a Colorado resident who was severely injured when his Ford Fusion collided with another vehicle. The plaintiff filed suit against Ford Motor Company in Colorado state court. Ford responded by filing a motion to dismiss for lack of personal jurisdiction. The Colorado Supreme Court ultimately held that the trial court erred in finding that Ford was "at home" in Colorado such that the company was subject to the general personal jurisdiction of the state and considered to be residing in the same county as its registered agent.

The Colorado Supreme Court rejected the doctrine where service of process on a defendant in Colorado gives a court jurisdiction over the defendant even if the defendant has no other connections in Colorado. Accordingly, registration of an agent for service of process in Colorado, which is required of corporations doing business in the state and often conferred jurisdiction, is no longer sufficient to confer general jurisdiction over the corporation. Further, in adopting the United States Supreme Court's "at home rule" reasoning, the Colorado Supreme Court held that Ford was not subject to the general jurisdiction of Colorado as it is not incorporated nor has its headquarters in Colorado. The Court acknowledged that, by any standard, Ford had substantial contacts with the state. Still, the court was not satisfied that Ford's contacts with the state rose to a level that justified exercising general jurisdiction over it. The Court did not opine directly on specific jurisdiction as that issue was not before it.

The Court's holding reflects the increasing reluctance of federal and state courts to find that states are entitled to exercise general personal jurisdiction over nonresident corporations. Though the Court did not provide an opinion regarding specific jurisdiction, large companies with a nationally marketed product should be keeping an eye on Colorado to see if it will follow in California's footsteps.

For more information on any of the items included for the US, please feel free to call Huu Nguyen or Sarah Rathke.

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