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Privilege Under English Law – the Lay of the Land following *Al Sadeq v Dechert LLP*

Introduction

Legal professional privilege is a longstanding and fundamental principle of English law, and yet it finds itself before the Courts with such frequency that it is also one that is continually evolving.

Most recently, on 24 January 2024, the Court of Appeal of England and Wales handed down its judgment in *Al Sadeq v Dechert LLP and Others* [2024] EWCA Civ 28. That decision considers a number of key aspects of the English law position on legal professional privilege, which will usually arise in the following two circumstances:

- ***Legal advice privilege*** that applies to "communications between a lawyer and its client for the sole or dominant purpose of giving or receiving legal advice, and documents which would reveal the contents of such communications"*;* and
- ***Litigation privilege*** that applies to "communications between a lawyer and its client or third parties which are brought into existence for the sole or dominant purpose of use in the conduct of existing or contemplated adversarial litigation."

The judgment considers certain key elements of the criteria for each of these categories of privilege to apply, including (a) the need to define a "*client*" for the purposes of litigation privilege, and (b) the circumstances in which investigatory work will attract legal advice privilege.

Importantly, the Court also:

- Confirmed that parties (including funders and insurers) are able to assert litigation privilege in relation to anticipated or actual proceedings to which they themselves are not parties; and
- Considered the scope of the so-called "iniquity exception" to privilege, ultimately finding that the threshold for establishing that the exception applies may in fact be higher than many had previously understood to be the case.

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INSIDE

London Partner Julianne Hughes-Jennett Ranked as One of *The Lawyer*'s 2024 "Hot 100"

London partner Julianne Hughes-Jennett has been ranked as one of *The Lawyer*'s "Hot 100" for 2024. The award highlights her significant work in the area of human rights and ESG litigation, and her role in leading the inter-state proceedings on behalf of Ukraine against Russia**.**

Chicago Office Welcomes Top-Rated Intellectual Property Attorney Paul Collier

Paul Collier, previously at Kirkland & Ellis, has joined the Chicago Office as a Partner. Paul has deep experience in intellectual property, mass tort and product liability litigation. He has worked in state and federal trial and appellate courts across the country, and in the United States International Trade Commission.

Washington, D.C. Office Appoints Meghan McCaffrey Co-Managing Partner

Meghan McCaffrey has been named Co-Managing Partner of the firm's Washington, D.C. office. Since she joined Quinn Emanuel as an associate in 2014, Meghan's practice has focused on complex business disputes and multi-billion-dollar commercial litigation in federal and state courts. She will manage the office alongside Co-Managing Partner Michael Liftik.

Background Facts

The Claimant, Mr. Karam Salah Al Din Awni Al Sadeq ("Mr. Al Sadeq"), had, between 2008 and his resignation in 2012, held various positions, from legal advisor to Deputy CEO, within the Ras Al Khaimah Investment Authority ("RAKIA").

RAKIA claimed that, in around 2012, it had discovered that its CEO throughout that time, Dr. Khater Massaad ("Dr. Massaad"), had perpetrated "systematic and wide ranging fraud" against RAKIA and related entities, resulting in losses in the hundreds of millions of dollars.

Mr. Al Sadeq was arrested in connection with that fraud in September 2014 and was subsequently convicted and imprisoned in Ras Al Khaimah. He maintains his innocence and claims that his wrongful conviction was politically motivated.

The First Defendant, Dechert LLP ("Dechert") was the law firm engaged in 2013 to investigate the suspected fraud by Dr. Massaad. The Second to Fourth Defendants were former Dechert partners who were involved in the investigation (the "Former Partners"). It was Dechert's investigation that resulted in the proceedings being brought against Mr. Al Sadeq, and that resulted in numerous other sets of civil and criminal proceedings against various individuals, in numerous jurisdictions.

There were various issues arising from Dechert's engagement including, crucially for privilege purposes, the identities of the lawyer and the client. Although these in themselves can be complex and fact-sensitive issues, it suffices to say that, in this case, the Court found that the lawyer was the "global law firm known as Dechert, including as necessary all its constituent parts and local offices." The client, in relation to the events which formed subject of the appeal, was Ras Al Khaimah Development LLC ("RAK Development") (to whom responsibility for various matters, including the investigation, had been transferred from another RAK entity).

The High Court Proceedings

Mr. Al Sadeq's claim in the English High Court was, in summary, that Dechert had used various unlawful methods, including threats and intimidation, to force him to give evidence (some of which was false) to assist them in building a case against Dr. Massaad and his alleged co-conspirators, at the behest of the ruler of Ras Al Khaimah, Sheikh Suad bin Saqr al-Qasimi (the "Ruler"). Mr. Al Sadeq claimed that mistreatment, which amounted to a breach of his human rights under UAE and international law, had caused him physical, emotional, psychological, and moral harm, as well as financial loss and damage, and sought compensation in relation to the same.

A number of challenges to the Defendants' privilege claims followed the giving of standard disclosure, resulting in a two-day hearing before the English High Court in December 2021. Some of those issues then went to appeal, including:

- Whether the correct legal test had been applied to determine whether documents fell within the iniquity exception to privilege and, consequently, whether the relevant threshold had been met in respect of the iniquities alleged so as to prevent those documents from attracting legal privilege;
- Whether there was a requirement for Dechert's clients to have been parties to the proceedings which were said to have been in contemplation for the purposes of litigation privilege; and
- As regards legal advice privilege:
  i. First, whether the Court of Appeal's decision in *Three Rivers District Council & Ors v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474, that legal advice privilege would only attach to communications between (a) employees and representatives specifically authorized to seek and receive legal advice on behalf of a client, and (b) the legal advisers (the "Three Rivers No. 5 Principle"), was correct, and whether it also applied to litigation privilege; and
  ii. Second, whether legal advice privilege could attach to Dechert's investigatory work, which Mr. Al Sadeq contended was not of a legal nature.

Issue 1: The Iniquity Exception

What was the Issue?

A document will not attract legal privilege if the "iniquity exception" applies: that will be the case if the document in question has come into existence "in relation to a fraud, crime, or other iniquity," where that iniquity "puts the conduct outside the normal scope of [the] professional engagement or is an abuse of the relationship which falls within the ordinary course of such engagement."

Dechert's evidence was that it had carried out a careful review to establish whether documents fell within the iniquity exception, by reference to eight possible iniquities, adopting a threshold test of (a) whether there was a "strong prima face case" that an iniquity existed (in accordance with *Kuwait Airways Corporation v Iraqi Airways Co (No. 6)* [2005] EWCA Civ 286) and (b) if that test was met, whether the document in question had been "brought into existence for the purpose of furthering the iniquity" (as per *Barrowfen Properties v Patel & Ors* [2020] EWHCA 2536 (Ch)). Applying those tests, no documents had been found to fall within the iniquity exception.

Mr. Al Sadeq maintained that the wrong test had been applied at both stages. He argued that the threshold test did not require a "strong" prima facie case, and that the lower threshold required had, in fact, been met in respect of the three alleged iniquities relied upon in support of his application:

- Mr. Al Sadeq's unlawful abduction from Dubai (where he had been resident at the relevant time) and his detention in Ras Al Khaimah;
- The unlawful prison conditions in which he had been held while in Ras Al Khaimah; and
- The denial of access to legal representation in Ras Al Khaimah.

Mr. Al Sadeq's case on the second limb of the test was less clear, formulated as including documents generated "in furtherance of" an iniquity, as well as "as a result of", "generated by", "reporting on", "concerning", or "relating to and/or prompted by" the iniquity. Mr. Al Sadeq sought an order that documents and parts thereof "generated by or report[ing] on" the three iniquities be disclosed.

The first instance Judge had rejected Mr. Al Sadeq's interpretation of the second limb of the test as being overly broad, maintaining that the appropriate test was whether a document was specifically created "in furtherance of" an iniquity. In light of that, the Judge had concluded that he need not consider whether or not a "strong" prima facie case was required, though confirmed that, if necessary, he would have applied Dechert's proposed higher threshold of a "strong… if not a very strong" prima facie case.

What did the Court of Appeal find?

By the time of the appeal, it had become common ground that the relevant threshold test was whether there was a "strong prima facie case" that an iniquity existed, though it became apparent in the course of the parties' submissions that there was a discrepancy in their respective understandings of what that meant. The Court of Appeal was therefore asked to consider whether a "real prospect of success" test applied, or whether it simply required an iniquity to be established as "more likely than not", on the balance of probabilities.

The Court of Appeal concluded that the latter was the more appropriate test. In other words, save in exceptional circumstances, it needed to be more likely than not based "on the material available to the decision maker" (that being the party, the legal advisor responsible for disclosure, or the Court) that an iniquity existed. The Court took the view that the application of any lower threshold would be inconsistent with principle, would potentially require a party to disclose communications which, on the material available, were more likely than not to be privileged. In circumstances where the loss of privilege is "irremediable," that was plainly an unsatisfactory outcome. The addition of the proviso "save in exceptional circumstances" was said by the Court to be necessary to account for situations, such as in an interlocutory context, where it was necessary for the Court to reach a provisional conclusion on incomplete evidence, and where a consideration of the "balance of prejudice" may also come into play.

The Court of Appeal considered that a prima facie case had been established in respect of all three alleged iniquities, overturning the first instance decision on the basis that the Judge had not adequately considered all of the evidence before him. The result was that it did fall to the Court to consider the second limb – the "relationship test" – which Mr. Al Sadeq contended to be broader in scope, so as to encompass documents reporting on or evidencing the iniquity, as well as documents which existed because of the iniquity (akin to the "but for" test).

The Court of Appeal concluded that the relevant test was whether the document was "brought into existence as part of or in furtherance of the iniquity." "Part of" included documents reporting on or revealing the iniquitous conduct and was distinguished by the Court from "in the course of,", which suggested a temporal limit and/or supported the "but for" assertion put forward by Mr. Al Sadeq, which the Court rejected as being too remote. The Court ultimately ordered that the disclosure exercise would need to be re-undertaken due to the risk of material having been wrongly withheld.

Issue 2: Litigation Privilege

What was the Issue?

As noted above, various issues arose in respect of the Defendants' claims to litigation privilege. The Defendants had identified eleven (11) sets of legal proceedings said to have been in contemplation at various dates. The contemplation was said to be that of both Dechert and its clients. However, Mr. Sadeq contended that:

- The Defendants' evidence was inadequate in establishing that the relevant litigation was in contemplation at the point suggested;
- The date on which litigation against him was said to have been contemplated, that being 5 September 2014, was unjustifiably early, in circumstances where the complaint was not accepted by the public prosecutor until some months later, in February 2015; and
- Five of the eleven sets of proceedings (which comprised criminal or extradition proceedings) could not qualify for the purpose of litigation proceedings because Dechert's clients were not parties to those proceedings (the "Non-Party Issue").

Mr. Al Sadeq sought an order that the Defendants

produce documents falling within these parameters (to the extent they were established). The first instance Judge found against Mr. Al Sadeq in respect of the adequacy of Dechert's evidence and the appropriateness of the date from which privilege was asserted. The Judge also found against Mr. Al Sadeq on the Non-Party Issue.

What did the Court of Appeal find?

Taking the first two issues in turn, the Court of Appeal found:

- The burden of proof was on the party seeking to assert privilege, and specific considerations applied to the treatment of evidence given in support of such assertions, which should be "as specific as possible," and which would be subject to "anxious scrutiny" by the Courts, due to the "difficulties in going behind that evidence" *(Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB)). Ideally, parties would refer to contemporaneous material insofar as it was possible to do so, "without making disclosure of the very matters that the claim for privilege is designed to protect,"((*West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50]) but, especially at an interlocutory stage, the evidence would be conclusive unless it was reasonably certain that it was incorrect or incomplete. In this case, the Court was satisfied that the evidence was sufficient to establish that litigation was in contemplation at the relevant points, and accepted Dechert's submission that disclosure of contemporaneous material to support that assertion would have the effect of undermining the privilege it was seeking to protect.
- The Court also rejected Mr. Al Sadeq's argument about the September 2014 date. It was predicated on an argument that the public prosecutor had not accepted the criminal complaint until February 2015, such that proceedings could not have been in the public prosecutor's reasonable contemplation before then. However, the Court's approach to the Non-Party Issue rendered the public prosecutor's contemplation irrelevant.

The Non-Party Issue is perhaps one of the most interesting points to arise from the judgment, with Mr. Al Sadeq contending that litigation privilege would be incapable of applying to litigation to which the person asserting privilege is not and/or does not expect to be a party. The Court took issue with that as a matter of principle, provided the dominant purpose test was met. It would, the Court said, result in a distinction between private prosecutions (to which the privilege holder would be a party) and a public prosecution (to which it would not).

It would also create difficulties in various other scenarios:

- One such scenario is where insurers have conduct of, but are not parties to, proceedings to which their assured are parties (and similarly for litigation funders). Mr. Al Sadeq submitted that such cases were distinct, requiring the third party to be treated as "equivalent to" the party to the proceedings.
- The Court noted that the same could be true of non-parties with no control over the litigation, such as in the case of Group Litigation Orders and collective proceedings.
- An anomaly may also arise in respect of a joint venture company which becomes party to litigation, with its shareholders wishing to conduct their own "process of advice and evidence gathering" in relation to that litigation.
- Finally, it may well be the case that allegations could be made against a person in proceedings to which they are not a party, or that person may be a (potential) witness seeking advice as to his role. That advice would be subject to legal advice privilege, and it would be anomalous if litigation privilege did not also apply so as to protect communications between that person or his lawyers and a third party for the same purpose.

The position as a matter of principle was found to be supported by the authorities, and the Court therefore found in favour of Dechert. However, it did leave open one of the issues which had arisen: whether, in addition, there needs to be a sufficient interest in the contemplated proceedings, over and above satisfying the dominant purpose test.

Issue 3: Legal Advice Privilege and the Three Rivers (No. 5) Principle

What was the Issue?

The Three Rivers (No. 5) Principle in issue was how broadly the definition of "client" extended for the purposes of asserting legal advice privilege, the Court of Appeal having previously found that it would only extend to communications between employees and representatives who were specifically authorized to seek and receive legal advice. Although Dechert contended that the Court of Appeal's decision in that case had been wrong, the parties accepted that the Court of Appeal in this instance was bound by it: the point was therefore taken in order to preserve it in the event of an appeal to the Supreme Court.

Mr. Al Sadeq sought (a) an order that Dechert identify the persons whom they contended were authorized to seek or receive legal advice on behalf of RAK Development, and explain the basis for that, and (b) disclosure of documents

between Dechert and representative of its clients who were not authorized.

No order was made in respect of the definition of "client", which was said to have been resolved in correspondence or in respect of the extension of the Three Rivers (No. 5) Principle to litigation privilege.

What did the Court of Appeal find?

The Court of Appeal drew a distinction between the need for there to be a defined "client" in the context of legal advice privilege, but not in the context of litigation privilege: the distinction, the Court found, was that legal advice privilege was incapable of extending to third parties, thus requiring a rule enabling a distinction to be drawn between the client and a third party. In the case of litigation privilege, the extension to third parties was such that all legal and natural persons, if they fell outside the definition of client, would still fall within the definition of a third party, thus preserving the privilege. The Three Rivers (No. 5) Principle was therefore not applicable to litigation privilege.

In circumstances where it was common ground that the Court of Appeal was bound by the Three Rivers (No. 5) Principle in relation to the definition of "client" in respect of legal advice privilege, the cross-appeal fell to be dismissed.

Issue 4: Legal Advice Privilege and its Application to Investigations

Mr. Al Sadeq also sought disclosure of documents previously withheld from production on the basis of legal advice privilege, insofar as they were created for the "dominant purpose of [Dechert's] investigatory work," on the basis that such documents could not attract legal advice privilege.

The first instance Judge found that Dechert's investigatory work had been undertaken in a "relevant legal context," thus being capable of attracting legal advice privilege.

What did the Court of Appeal find?

The appeal judgment helpfully summarizes the state of the law in this area, confirming that the relevant communication's sole or dominant purpose needs to be legal advice, and that commercial advice would not suffice: for that to be the case, the communication needed to be made "in a legal context," although "legal context" was widely defined to include not just legal advice, but advice "given with the benefit of a lawyer's skill as a lawyer or through a 'lawyer's eyes.'" Legal advice privilege would also attach to communications disseminating or revealing the contents of communications fulfilling that criteria. The Court took the view that, in light of this, "most communications from and to the client are likely to be set in a legal context and to attract privilege."

On the facts, the Court did not consider there to be any "real doubt" that Dechert was appointed as a law firm for its legal expertise, which extends "not only to advice on black letter law and its application… but also to the practical aspects of legal proceedings and preparations thereof." There was authority to the effect that a lawyer's skills included taking statements, assembling facts and handling evidence, such that investigatory work would ordinarily fall within the "legal context" and there was justification for a finding that Dechert was engaged to conduct the investigation through a lawyer's eyes: the Court rejected the suggestion by Mr. Al Sadeq that Dechert was stepping into the shoes of the public prosecutor or acting in a similar capacity. The issue was therefore ultimately whether there were grounds to infer that that Dechert had applied the test too widely: the Court did not consider that it had.

Conclusion

The judgment covers such significant ground that it will inevitably become a key authority in relation to privilege issues. The Non-Party Issue in particular seems likely to be one which may fall to be revisited, especially in light of the Court's rejection of the assertion advanced on behalf of Mr. Al Sadeq that differing approaches may need to be taken in respect of third parties whose involvement is "equivalent to" that of the party to proceedings, and there is obvious potential for the correctness of the Three Rivers (No. 5) Principle to be revisited in the course of a Supreme Court appeal.

Parties are now able to take comfort from the increased clarity that the judgment has provided on the position regarding legal advice privilege and its applications to investigations, and the Court has provided further assurance on a balance of probabilities threshold applying to application of the iniquity exception.

More generally, the judgment should provide potential litigants with reassurance as to the extent to which legal professional privilege remains protected under English law, including in the context of applications to challenge it.

NOTED WITH INTEREST

Newly-Issued DFS Guidance on Banks

In recently-issued guidance, the New York State Department of Financial Services (DFS) advises banks to vet the "character and fitness" of their top personnel.

The directive, issued in January, applies to New York state-regulated banking organizations, as well as branches, agencies, and representative offices of foreign banking organizations licensed by DFS. The guidance also applies to non-depository financial institutions, licensed or chartered, under the New York Banking Law. Each institution's board of directors and C-suite executives are covered by the guidance.

The guidance includes actual questions to pose to executives at the time of hiring that hit a range of issues—indebtedness, lobbying activities, lawsuits, and past regulatory queries. This list also includes questions on payment of taxes, judgments and liens, and prior employment terminations. The agency suggests additional questions that address past or ongoing litigation, criminal convictions, and relationships with outside auditors. The guidance recommends periodically repeating the vetting process after people are already in their role for a while.

The guidance represents a regulatory recognition that tone starts at the top. It would be easy to view the guidance as a continued focus by DFS on its seizure of Signature Bank, considering the draft guidance was issued for public comment just weeks after the bank was seized in March 2023. In a report shortly after the seizure, the agency cited "emerging weaknesses in corporate governance" as a concern in prior examinations of the bank. At the time, commentators suggested Signature Bank's involvement with the crypto industry, in part, led to its seizure. DFS's leadership, on the other hand, repeatedly asserted the seizure was unrelated to the bank's crypto ties. At the same time, however, DFS had increased its focus and attention on the intersection of the banking and crypto industries following multiple crypto exchange failures in 2022. Weeks after the high-speed collapse of FTX in December 2022, for example, DFS directed New York state-licensed banks and other financial institutions to seek its approval before engaging in or expanding crypto-related activity.

Politicians and regulators may seek to impose stricter compliance requirements on corporate America given these recent insolvencies, coupled with the prospect of a recession in a presidential election year. The recent high-profile federal criminal prosecutions of FTX CEO, Sam Bankman-Fried, and Celsius CEO, Alex Mashinsky, underscore the need for greater executive vetting. Codification of the agency's guidance into law could amount to an easy legislative win in New York and several other states.

Most mature financial institutions likely already have in place similar policies and extensively vet senior executives and board members. But those banks, crypto exchanges, and other financial institutions with vetting gaps should take to heart the DFS guidance. A financial institution should ensure, for example, that vetting is appropriately in-depth, given the overall risk profile of the institution's operations.

Financial institutions should also ensure that initial vetting assessments are reviewed periodically and not viewed as required only at the time of an executive's hiring. Corporate transactions such as mergers and acquisitions should likewise trigger vetting of newly onboarded executives.

Admittedly, the DFS guidance does not have the same effect as a binding regulation or law and therefore is merely advisory in nature. At the same time, financial institutions would do well to cast a critical eye over their vetting policies and address any deficiencies they find when compared to these new guidelines.

By taking the DFS guidance to heart today, a financial institution could avoid finding itself in regulatory crosshairs tomorrow.

PRACTICE AREA NOTES

Data Privacy and Cyber Security Update

2024 State Privacy Law Outlook

With no federal privacy law on the horizon, the patchwork of state privacy laws is continuing to grow in 2024, including both comprehensive privacy regimes and narrower laws aimed at specific types of sensitive data.

More states will have comprehensive privacy regimes in 2024. New comprehensive state privacy regimes – which generally grant consumers a slate of rights such as the ability to opt out, object, and request deletion while also imposing comprehensive requirements on businesses - will take effect in 2024 in Florida, Oregon, Texas, and Montana after passage last year. Additional comprehensive state privacy laws have already passed in the first quarter of this year in New Jersey and New Hampshire (where the law awaits signature). The new laws in Florida, Oregon and Texas take effect July 1, while Montana's law takes effect October 1, and New Jersey's law will take effect in January 2025. And as of early March 2024 , at least nineteen more proposed comprehensive privacy regime

laws were under consideration in state legislatures.

The comprehensive state privacy laws are part of a trend that began in 2018 with the passage of the California Consumer Privacy Act, and picked up significant momentum in 2023, when the number of states that had passed comprehensive privacy regimes more than doubled, from five to thirteen (including Florida's law, which only applies to specified types of data controllers with an annual global revenue of more than $1 billion). In January 2024, New Jersey's governor signed New Jersey's comprehensive law. If New Hampshire's Senate Bill 255, which passed January 18, 2024, is signed by the governor, it will be the fifteenth such state law (including the Florida law).

Some proposed state laws would expand private right of action for violation beyond California's CCPA/CPRA regime, but none have passed so far. California remains the only state with a private right of action for violations (specifically, California's law allows for violations of data breaches). But given the rising trend, even that could change, as proposed laws currently in committee or otherwise proposed by lawmakers in Maine, Massachusetts, Minnesota, New York, and West Virginia could also give consumers their own right of action.

State privacy regimes will continue to vary in many ways in 2024. The laws taking effect in 2024, and under consideration, reflect that although there is substantial overlap, there will also continue to be numerous differences across the various state privacy laws, reflecting their patchwork nature.

For example, Oregon's law taking effect this year goes further than other such state laws by explicitly including "derived" data, which is largely defined as data deduced from a consumer. Oregon also expressly includes in the definition of "sensitive data" the categories "status as transgender or nonbinary" and "status as victim of a crime," although other such state comprehensive laws do not include these categories expressly.

The new state laws also vary in their applicability – for example, Florida's narrower law applies only to companies with an annual global revenue of more than $1 billion, with other specified limitations that appear aimed only at very large "Big Tech" companies. The Texas law is broad in its applicability, applying to all but defined small businesses.

The laws also vary in terms of what rights are granted to consumers: for example, the data privacy law in Utah, which took effect December 31, 2023, does not provide consumers with the right to correct errors in their personal data. Similar laws in all but one other state, Iowa, do afford correction rights.

Although private rights of action in comprehensive laws beyond California have not yet been passed, other new state privacy laws regarding specific data types provide or expand private rights of action. Beyond the comprehensive regimes where it remains to be seen how many additional states, if any, will adopt a private right of action, however, there have been some additional new laws and legislative changes that do provide additional, specific bases for a private right of action and/or statutory damages in specific circumstances. These new laws or amendments in 2024 will add a slate of other existing specific state laws along these lines that are already appearing in complaints in various jurisdictions, such as Illinois' Biometrics Information Privacy Act (BIPA), and California's Confidentiality of Medical Information Act (CMIA).

For example, Washington's My Health My Data Act (MHMDA), came into effect March 31 for many entities subject to the law, and included a private right of action for violations of health data privacy, by establishing that a violation of the Act is an unfair or deceptive act under the Washington Consumer Protection Act (CPA). And while the MHMDA does not provide for statutory damages, consumers are eligible for damages up to $25,000.

And in New Jersey, a 2023 amendment to a statute known as Daniel's Law provides $1,000 in liquidated damages for each violation of a law requiring takedown of personal information regarding law enforcement officers, other public officials, and their immediate families. In the first quarter of this year, a private company filed more than 100 lawsuits in New Jersey alleging it is an "assignee" and seeking statutory damages for over 20,000 state officials.

Given these recent developments, and those on the horizon, companies will want to keep a close eye on state privacy law developments this year. The privacy law landscape is expanding, and evolving, at rapid pace.

Product Liability Update

Courts Assess Product Liability Allegations Against Social Media Giants

Introduction

A slew of cases filed in the past year may have you asking, "is the next product liability plaintiff frontier the land of the Social Media Giants?" The plaintiffs in these cases range from personal injury claimants, to school districts, to states' Attorneys General, and the defendants they seek to hold liable are names we are all familiar with: Meta, Instagram, Snapchat, TikTok, and YouTube, to name just several. Plaintiffs allege a broad set of harms, including but not limited to addiction, depression, and self-harm, particularly in minors, leading to a youth mental health crisis. Here, we examine two recent decisions that provide a mixed picture of whether the Social Media landscape is fruitful or barren for product liability claimants.

***In re Coordinated Proceeding Special Title Rule 3.550 Soc. Media Cases*, Oct. 13, 2023 Ruling on Defendants' Demurrer, JCCP 5255, Case No. 22STCV21355, 2023 Cal. Super. LEXIS 76992 (L.A. Cty.).**

Background: Plaintiffs filed their master complaint on May 16, 2023, asserting thirteen causes of action, including strict liability for design defect and product-based negligent design. Plaintiffs alleged that a design defect exists in the way defendants "harvest user data and use this information to generate and push algorithmically tailored 'feeds' of photos and videos" that are designed to "space out dopamine-triggering rewards with dopamine gaps." According to plaintiffs, this purposeful dopamine release and withholding is structured to cause addiction. Defendants responded with their demurrer on July 14, 2023, requesting that the court dismiss the complaint because the factual allegations were insufficient to support plaintiffs' product liability causes of action. *In re Coordinated Proceeding Special Title Rule 3.550 Soc. Media Cases*, 2023 Cal. Super. LEXIS 76992, *22.

Holding: On October 13, 2023, the court held that defendants' social media sites are not "products" for the purpose of applying product liability doctrine. *Id*. at *41. The court identified three primary reasons for the holding: (1) the sites are not tangible products; (2) the "risk-benefit" product liability analysis cannot easily be applied to the sites; and (3) the sites are better categorized as a course of conduct between the defendants and the consumer than products. *Id*. at *43.

First, regarding the sites not being "products," the court reasoned that defendants' sites are more akin to services than products because users have a direct relationship with the creator of the sites (defendants) and each customer has a unique experience with these sites - unlike a mass-produced, tangible product. *Id*. at *46-48. The court noted that none of the cases plaintiffs cited conclusively held that software is a product for the purpose of applying product liability law (*id*. at *48) and also dismissed plaintiffs' arguments that California case law did not require a product to be tangible for the purpose of applying product liability law (*id*. at *53-54). *Second*, the court held that California's tests for strict liability design defect - the "risk-benefit" test and the "consumer expectations" test - could not be applied to defendants' social media platforms because the tests assume that the product is a "static thing," which the platforms are not because they "facilitate an interactive experience." *Id*. at *60. *Third*, regarding a course of conduct, the court reasoned that the focus of plaintiffs' allegations is on the intent and the conduct of the defendants; namely, that the defendants knew that their algorithms would injure minors, and they still chose to use those algorithms because they wanted to produce more advertising profit. *Id*. at *62-63. This, the court held, is more appropriately applied to a theory of common law negligence as opposed to product liability. According to the court, "[a]llowing this case to go forward on theories of product liability would be like trying to fit a four-dimensional peg into a three-dimensional hole." *Id*. at *63.

***In re Soc. Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig.*, Nov. 14, 2023 Order on Defendants' Motions to Dismiss, Case No. 4:22-md-03047, 2023 U.S. Dist. LEXIS 203926 (N.D. Cal.).**

Background: In their master amended complaint, filed April 14, 2023, MDL plaintiffs asserted eighteen claims under various state laws, including but not limited to strict liability design defect, strict liability failure to warn, product-based negligent design defect, and product-based negligent failure to warn. *Id*. at *17. Specific to their design defect claims, plaintiffs allege defects in the form of endless feeds of content, lack of screen time limitations, intermittent variable rewards ("IVR"), and lack of age verification and parent controls, among others. *Id.* at *20-27. Defendants filed their motion to dismiss on April 17, 2023, arguing that their platforms are not "products," but rather "interactive communication services" that facilitate users to communicate with each other and interact with each other's content. *Id*. at *72. For purposes of the motion, applicable law was limited to New York and Georgia. *Id*. at *66.

Holding: Unlike the Judicial Council Coordination Proceedings (JCCP) holding discused above, the MDL court held that certain of plaintiffs' allegations supported their product liability causes of action. In so doing, the court criticized the parties for taking an "all or nothing" approach to arguing whether the platforms qualified as "products" in their briefing. *Id.* at *71-72. Instead, the court conducted an examination of each individual defect allegation and determined that, when viewed defect-by-defect, many sounded in product liability. *Id*. at *74, 77. For example, the court held that alleged failure to implement robust age verification and effective parental controls, failure to implement opt-in restrictions for length and frequency of use, and related defect claims were akin to tangible property, comparing age verification and parental controls to the "[m]yriad tangible products [that] contain parental locks or controls to protect young children," such as medicine bottles or televisions, and restrictions of frequency and length of use to "physical timers and alarms." *Id*. at *87, 90, 92-96. The court also found these purported defects to be "content-agnostic" in that plaintiffs' theories involved the "manner in which users access the apps, not the content they view there," and thus were not excluded from product liability on the ground that they pertain to "ideas, thoughts, or expressive

content." *Id.* at *88.

Conclusion

The holdings' disagreement as to whether Social Media platforms are appropriately classified as "products" for purposes of applying product liability law previews the struggle that courts will face in deciding whether plaintiffs' product liability allegations can withstand scrutiny under Rule 12(b)(6) and underscores the importance of which state's law applies.

Class Actions Update

Potential Changes to BIPA in 2024

In 2008, Illinois became the first state to pass a biometric privacy act, appropriately entitled the Biometric Information Privacy Act ("BIPA"), which has become a common basis for class action lawsuits. 740 ILCS 14/1 *et seq.* Potential recovery is especially enticing for plaintiffs, because a "prevailing party may recover for each violation": "(1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater," or "(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater." 740 ILCS 14/20(1)-(2). Plaintiffs may also recover reasonable attorneys' fees and costs, expert witness fees and other litigation expenses, and any other relief that a court deems appropriate, including injunctive relief. 740 ILCS 14/20(3)-(4).

In February 2023, in a 4-3 decision, the Illinois Supreme Court ruled that "a separate claim accrues under the Act each time a private entity scans or transmits an individual's biometric identifier or information in violation of section 15(b) or 15(d)." *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 1. In that case, the defendant "required its employees to scan their fingerprints to access their pay stubs and computers." *Id.* ¶ 4. The Illinois Supreme Court ruled that each scan counts as a separate BIPA violation (rather than per affected employee) even though the defendant could face a $17 billion judgment if found liable. *Id.* ¶¶ 40-41. The *Cothron* decision provided defendants with some hope, holding that "[i] t also appears that the General Assembly chose to make damages discretionary rather than mandatory." *Id.* The Illinois Supreme Court further recognized that in the class action context, courts still had the right to "fashion a damage award that (1) fairly compensated claiming class members and (2) included an amount designed to deter future violations, without destroying [a] defendant's business." *Id.* ¶ 42 (quoting *Century Mutual Insurance Co. v. Tracy's Treasures, Inc.*, 2014 IL App (1st) 123339, ¶ 72).

Despite this language, the potential exposure to defendants remains high. There have been large settlements both before and after *Cothron*. In the social media context, Meta settled for $68.5 million for claimed violations by Instagram, which was approved in late 2023. *See Parris v. Meta Platforms, Inc.*, Cir. Ct. DuPage Cty. (IL), No. 2023LA000672. Snapchat settled in 2022 for $35 million. *See Boone v. Snap, Inc.*, Cir. Ct. DuPage Cty. (IL), No. 2022LA000708. Facebook's 2020 settlement dwarfed that: it was $650 million. *See In re Facebook Biometric Information Privacy Litig.*, Master File No. 3:15-cv-03747-JD (N.D. Cal.). Claims involving employees also have settled for large amounts. After the first BIPA jury trial, BNSF was found liable for scanning truck drivers' fingerprints to identify their identities. The judge initially awarded $228 million for 45,600 class members, but then vacated the damages amount on a post-trial motion. Rather than have a second jury trial solely on damages, the parties received preliminary approval for a $75 million settlement on February 28, 2024, with a final approval hearing scheduled for June 2024. *See Rogers v. BNSF Railway*, No. 19-cv-03083 (N.D. Ill.). Companies are sued for BIPA violations on smaller scales as well, which also result in significant settlements. In late 2023, the parent company of the Jewel grocery store chain received approval for a $1,076,075 settlement for approximately 1,001 class members who worked at one distribution center. *See Goree v. New Albertsons L.P.*, No. 1:22-cv-01738 (N.D. Ill.). Graphic Packaging International has received preliminary approval of a settlement for over $997,800 for using hand-scan timeclocks for 603 employees, with a final approval hearing scheduled for June 2024. *See Roberts v. Graphic Packaging Int'l, LLC*, No. 3:21-cv-00750 (S.D. Ill.).

But change may be on the horizon in 2024. As the *Cothron* court noted, "we continue to believe that policy-based concerns about potentially excessive damage awards under the Act are best addressed by the legislature." 2023 IL 128004, ¶ 43. The Illinois legislature may do just that. Bills recently have been introduced in the both the Illinois Senate (S.B. 2979) and the Illinois House (H.B. 4686) to amend BIPA.

The synopsis of the Illinois Senate Bill introduced on January 31, 2024 describes part of the proposed amendments as follows: "Provides that a private entity that more than once collects or discloses a person's biometric identifier or biometric information from the same person in violation of the Act has committed a single violation for which the aggrieved person is entitled to, at most, one recovery." S.B. 2979 passed the Illinois Senate judiciary committee on March 13, 2024 and the full State Senate on April 11, 2024 with a 46-13 vote. The bill has been sent to the Illinois House for its consideration.

On February 1, 2024, a different bill was introduced in the Illinois House, which seeks more far-reaching amendments. This proposal includes provisions such as: (i) a 30-day notice and cure period, in which case there would be no cause of action if a private entity expressly states that it has cured the violation and no further violation shall occur; (ii) if the private entity breaches the express statement that it has cured any violation and it would not occur again, only then would there be a cause of action; (iii) potential recovery amounts would be limited to actual damages for a negligent violation or actual damages plus liquidated damages up to the amount of actual damages for willful violations; and (iv) an exclusion for employees covered by a collective bargaining agreement that provides for different policies regarding biometric information. H.B. 4686 was sent to the Civil Procedure & Tort Liability Subcommittee on March 13, 2024 and was re-referred to the Rules Committee on April 5, 2024.

If a bill limiting BIPA claims passes the Illinois state legislature and is signed by the governor, the potential exposure to defendants would be much less than what is currently allowed by BIPA, without having to rely on the discretion (and mercy) of a court in a class action lawsuit. Q

VICTORIES

Victorious Settlement for Tilray Brands, Inc. and High Park Holdings Ltd.

The firm represented defendants Tilray Brands, Inc. and High Park Holdings Ltd. in a licensing dispute against Docklight Brands, Inc. involving cannabis products sold under the Bob Marley brand. Tilray was accused of causing its subsidiary, High Park Holdings, to breach its contract with Docklight. Both defendants were also accused of withholding royalties allegedly owed to Docklight. Defendants brought counterclaims against Docklight, alleging that Docklight had breached its duty of good faith and fair dealing with respect to its refusal to discuss changes to the royalty rate and termination of the license, had breached the contract between Docklight and the Defendants with respect to certain Right of First Offer provisions, and anticipatorily had breached the contract with respect to Docklight's termination of the license prior to the annual Royalty Rate Review. In April 2023, the Bob Marley estate terminated its license with Docklight. Accordingly, in May 2023, Docklight amended its complaint to seek damages for loss of the entire Marley license, increasing its damages demand.

Following Docklight's amendment, the firm won a string of motions, including a motion to extend the trial schedule, a substantial motion to compel, and a motion to disqualify Docklight's general counsel because of conflicts arising out of legal services he had provided to Defendants in 2018 and 2019. As a result of these wins, we renewed our settlement offer, and also agreed to release Docklight's general counsel. Docklight accepted the settlement the next day.

Massachusetts Appeals Court Upholds Right to Appeal, Sets Precedent in Housing Law

In the summer of 2022, the Boston Volunteer Lawyers Project (VLP) asked if the firm could represent a family of four facing eviction in just three weeks' time on a *pro bono* basis. The family faced unique difficulties: one of the parents was recovering from a severe heart attack, requiring around-the-clock care by a medical aide, and one of the children has severe developmental difficulties. The family had a default judgment already entered against them, and their Rule 60 motion to set aside the default (1) had been filed 10 months after judgment was entered; and (2) did not provide much of an explanation why they had failed to appear at trial. The family also had made comments on the record at a two-hour long hearing that, the trial court found, indicated that they had settled the case and had waived appellate rights.

The firm filed a stay pending appeal. The initial stay application was denied, only days before eviction. Then, the firm filed a motion for reconsideration and prevailed, getting a stay of eviction pending appeal less than 24 hours before eviction was to take place. That preliminary victory kept the family housed for the last 18 months. On March 4, 2024, the Massachusetts Appeals Court issued a unanimous opinion reversing the housing court's issuance of the writ of execution (the eviction order) on the grounds that it had not been timely issued under the statutory three-month deadline for obtaining execution. This means that the landlord now cannot evict our client without bringing an entirely new action.

The issue about the timeliness of eviction orders has been bedeviling tenants and legal aid groups for the last three decades, evading appellate review. The Appeals Court fully adopted the firm's textual, structural, and historical arguments in favor of this reading of the Massachusetts housing law and agreed with the firm, on clear error review, that the tenants had not waived their right to appeal. This decision has already received significant attention in the world of Massachusetts housing law. At the time of decision, at least two pending appellate cases were already leveraging our result to get their eviction orders stayed pending appeal. Q

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- When representing plaintiffs, our lawyers have garnered over $80 billion in judgments and settlements.
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- We have also obtained fifty-one 9-figure settlements and twenty 10-figure settlements.

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