KING & SPALDING

Business Lit Ledger

Welcome to our first newsletter of 2015. In this issue, you will read about several important developments in commercial litigation, including an analysis of the Supreme Court's increasing interest in intellectual property issues, an article on the NLRB's decision involving employee access to employer e-mail systems, a review of important new developments concerning the False Claims Act, and a discussion of a recent New York court's refusal to approve a disclosure-only settlement of a merger challenge. As always, we hope you will find this issue of our newsletter helpful and informative. Our national business litigation team handles every variety of commercial dispute in cases in virtually every jurisdiction. We are committed to being the most trusted, value-added, and service driven choice of counsel for our clients.

Robert Meadows
King & Spalding National Business Litigation Team Leader

Important Legal Developments

The Supreme Court's Growing Intellectual Property Docket

In the closing decades of the twentieth century, the United States Supreme Court appeared to follow an informal policy of benign neglect toward the law of intellectual property. The Court entertained a case every few years but, on the whole, left the development of the law to lower courts, especially in the area of patent law. Those days are long gone. Even as the Supreme Court's overall docket has shrunk in recent years, its interest in intellectual property cases has escalated.
More »

NLRB Provides Employee Access to Employer Email Systems

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More »

Free Speech & Pharmaceutical Promotion — U.S. ex rel. Solis v. Millennium Pharmaceuticals, Inc.

Off-label prescription drug use — using drugs to treat ailments not indicated on

Winter 2015

Publications and Presentations

FTC Announces Increased Hart-Scott-Rodino Thresholds
More »

Illinois Federal District Court Dismisses Customer Data Breach Class Actions Against P.F. Chang's More »

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FDA-approved labeling — is among the thorniest legal issues facing the pharmaceutical sector. On one hand, off-label prescriptions are lawful and often the standard of care in fields such as oncology and pediatrics. Indeed, Congress requires federal health care programs like Medicare and Medicaid to cover and reimburse "medically accepted" off-label uses. On the other hand, FDA regulations bar drug makers from promoting their products for off-label use, and the Justice Department has aggressively used the False Claims Act to punish off-label promotion indirectly. More »

It's Not Just A Delaware Thing: Other Courts Are Also Questioning Disclosure-Only Settlements In M&A Litigation

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Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

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The Supreme Court's Growing Intellectual Property Docket

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In the closing decades of the twentieth century, the United States Supreme Court appeared to follow an informal policy of benign neglect toward the law of intellectual property. The Court entertained a case every few years but, on the whole, left the development of the law to lower courts, especially in the area of patent law. Those days are long gone. Even as the Supreme Court's overall docket has shrunk in recent years, its interest in intellectual property cases has escalated.

The Court reentered the field in a small but splashy way in the 2005 and 2006 Terms. In those two years, the Court heard six patent cases—noticeably higher than previous terms—that significantly changed patent law. Among other things, the Court did away with the virtually automatic right to an injunction following a finding of infringement, which had been a fixture of the patent jurisprudence of the Court of Appeals for the Federal Circuit. See eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006). That ruling has significantly reduced the threat of an injunction in a large percentage of patent cases, especially those brought by plaintiffs who do not practice their patents. In its other decisions, the Supreme Court rejected the Federal Circuit's test for obviousness under 35 U.S.C. § 103 and revised the test for infringement related to overseas activities. See e.g., KSR Int'l Co.v. Teleflex, Inc., 550 U.S. 398 (2007) (obviousness); Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007) (overseas activity).

Supreme Court observers may have reasonably wondered whether the IP docket would revert to the mean. That has not happened. It seems instead that there is a new normal and that intellectual property has captured the Court's attention in an enduring way: last year, the Court took a record six patent cases along with four other intellectual property cases (two copyright cases, and two Lanham Act cases).

The Court will not hear six patent cases again this Term, but any appearance of a drop-off in the IP docket has been short lived. In recent weeks, the Court has reversed the appellate standard of review for patent claim construction, a critical aspect of virtually every patent litigation. See Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., No. 13-854 (Jan. 20, 2015). And the Court granted review in two other cases to determine whether a defendant may assert a good faith belief in a patent's invalidity as a defense to induced infringement under 35 U.S.C. § 271(b), and whether license agreements can require payment of royalties after a patent expires. See Commil USA, LLC v. Cisco Sys., Inc., No. 13-896; Kimble v. Marvel Enter., Inc., No. 13-720.

In January, the Court also issued orders calling for the views of the Solicitor General in two intellectual property cases. The Court sometimes issues such orders when evaluating whether to grant petitions for certiorari in patent cases and other complex areas of law. The Court views the Solicitor General as a (more or less) neutral party with deep expertise. When the Solicitor General advises in favor of granting certiorari, the Court often agrees and grants the petition.

The two pending petitions raise important questions and, if granted, could have widespread impact.(1) The first case is Google, Inc. v. Oracle America, Inc., No. 14-410 (filed Oct. 6, 2014), a heavyweight copyright battle that has been highly watched by both Court observers and the IP bar. The question before the Supreme Court concerns the extent to which software is entitled to copyright protection. With obvious importance to the software industry, the case has generated considerable amicus support on both sides.

The second case involves a question concerning the methodology for construing patent claims. See Google, Inc. v. Vederi, LLC, No. 14-448 (filed Oct. 16, 2014). More specifically, the question involves how courts should construe a claim term that resulted from an amendment made by an applicant to secure the patent by overcoming a rejection by the Patent Office. The petition explains that Supreme Court precedent requires strict construction of such terms but that the Federal Circuit has departed from that precedent by holding that any disclaimer of claim scope resulting from such an amendment must be clear and unmistakable. Given that most patent claims are amended multiple times during examination, the issue has the potential to affect a substantial number of patent litigations.

Although the Supreme Court's continued interest in IP cases is clear, the reasons for that interest are not because the Court grants and denies petitions without stating its reasons for doing so. It is hard not to notice, however, that the Court's spiking interest coincided with the appointment of Chief Justice John Roberts. New Members of the Court sometimes shake up the docket, and the Chief Justice often handled patent appeals to the Federal Circuit during his time in private practice.

The Court's interest may also reflect the simple reality that intellectual property has increased in importance in the modern economy. While it may have been fashionable to view patent law as a niche area of the law a few decades ago, few would hold that view today, where patents and technology are at the forefront for many businesses. The Court may well have been content to leave patent law to the Federal Circuit after its creation in 1982. It no longer has that luxury.

That said, even if the Court believed initially that it must entertain IP cases because of their importance, the Court may now simply be more comfortable with the area. A number of the Justices have written multiple opinions on complex IP topics. Having made the investment and gained the experience, the Court is now flexing its muscles. Expect the trend to continue.

(1) King & Spalding serves as lead counsel on both petitions.

NLRB Provides Employee Access to Employer Email Systems

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On December 11 in a 3-2 ruling, the National Labor Relations Board (the "Board") held in Purple Communications, Inc.(1) that employees may use their employer's email systems during non-work time in furtherance of their rights under Section 7 of the National Labor Relations Act ("NLRA"). In other recent rulings the Board has held that activities such as disciplining employees for negative Facebook posts and promulgating handbook provisions discouraging "discourteous or inappropriate" behavior may violate the NLRA. In essence, the current ruling means that employees may use their employer's email systems for union organizing activities and non-union related protected concerted activity.

Background and Prior Law

Purple Communications provides sign language-based video interpretation services for the hearing impaired. The video interpreters have employer-assigned email accounts, but the employer's handbook contained a policy limiting use of email to business purposes only. The policy prohibited, among other things:

• Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company.
• Sending uninvited email of a personal nature.

Last year, a NLRB administrative law judge ("ALJ") was tasked with determining whether this ban on email use for non-work related reasons violated the NLRA by interfering with the employees' Section 7 rights. The ALJ held that it did not. His ruling was based on the 2007 Register Guard(2) decision where the Board held that an employer "may lawfully bar employees' non-work related use of its e-mail system, unless the [employer] acts in a manner that discriminates against Section 7 activity."(3)

The NLRB's Purple Communications Decision

Purple Communications overrules Register Guard and articulates the following new standard:

• There is a presumption that employee use of employer email systems for Section 7 protected activities during non-working time is permitted.
• The presumption only applies to employees with rightful access to the employer's email system and there is no requirement that an employer provide email access for all employees.
• The presumption does not apply to any other form of electronic communications.
• An employer may rebut the presumption by establishing special circumstances that make this broad email access inappropriate due to production or discipline concerns.
• The opinion does not prevent employer monitoring of its computer systems. Of course, the monitoring must be for legitimate, non-discriminatory business reasons.

Important Considerations for Employers

1. Purple Communications applies to most private sector employers, not just those with a unionized workforce or who are the subject of union activity. Under Section 7 of the NLRA, employees have a right to engage in protected concerted activity for the purposes of mutual aid and protection. This means that employees may use the employer's email system for communications related to wages, hours or other terms and conditions of employment. The opinion does not require employers to grant unions access to their email systems.

2. There is a strong likelihood that Purple Communications will spur related litigation and ultimately may not stand. In the interim, however, employers should consider revising "business use only" email policies and other policies that would prohibit employee use of employer email systems during non-working time.

3. Employers should periodically audit their policies governing computer and email monitoring to ensure that the policies are not enforced in a discriminatory manner. Employers contemplating computer monitoring policies should implement the policies prior to any suspected union activity.

4. Employers should be cognizant of the interplay between Purple Communications and other recent Board rulings expanding the NLRA's reach into non-unionized workplaces. In particular, the Board has held that various social media policies violated the NLRA based on vague prohibitions against disseminating confidential information, overly broad and ambiguous no-gossip policies, and blanket prohibitions on derogatory or unprofessional language. Employers who have not already scrutinized their email policies to determine if they should be modified in light of these rulings should do so in the near future.

(1) 361 NLRB No. 126 (2014), available here.
(2) 351 NLRB 1110 (2007), available here.
(3) Id. at 1116

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Business Lit Ledger

Winter 2015 | Print Page | Home

Free Speech & Pharmaceutical Promotion — U.S. ex rel. Solis v. Millennium Pharmaceuticals, Inc.

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Off-label prescription drug use — using drugs to treat ailments not indicated on FDA-approved labeling — is among the thorniest legal issues facing the pharmaceutical sector. On one hand, off-label prescriptions are lawful and often the standard of care in fields such as oncology and pediatrics. Indeed, Congress requires federal health care programs like Medicare and Medicaid to cover and reimburse "medically accepted" off-label uses. On the other hand, FDA regulations bar drug makers from promoting their products for off-label use, and the Justice Department has aggressively used the False Claims Act (FCA) to punish off-label promotion indirectly.

A federal district court in California is now considering an FCA action that could have implications for the First Amendment protection accorded to truthful off-label promotion. In U.S. ex rel. Solis v. Millennium Pharmaceuticals, Inc., the relator alleges that defendants Millennium Pharmaceuticals and Schering-Plough Corporation (now part of Merck & Co.) promoted a heart-disease drug for off-label use and thereby caused the submission of false claims. In its motion to dismiss, Merck argued that the FCA cannot, consistent with the First Amendment, be interpreted to impose liability for disseminating truthful, non-misleading scientific information about drugs.(1) Merck noted that the Supreme Court previously struck down restrictions on drug manufacturer's promotional activities in Sorrell v. IMS Health, Inc.,(2) and that the Second Circuit held in United States v. Caronia(3) that the Food, Drug, and Cosmetic Act cannot, in light of the First Amendment, be construed to ban a manufacturer's truthful, non-misleading speech about off-label uses. Building on these precedents, Merck argued that the FCA should be interpreted to avoid constitutional difficulties that the relator's theory of liability raises.

In response to Merck's pending motion to dismiss, the U.S. Department of Justice submitted a statement of interest arguing that truthful promotion can be used as a basis for FCA liability.(4) PhRMA submitted an amicus brief forcefully responding to that argument.(5) With the First Amendment issues fully briefed, it is possible that the district court could dismiss the relator's complaint in whole or in part based on constitutional considerations. Millennium Pharmaceuticals is clearly a case to watch.

(1) See Merck Mem. In Support of Mot. to Dismiss 15, U.S. ex rel. Frank Solis v. Millennium Pharmaceuticals, Inc., et al., 2:09-cv-03010-MCE-EFB (E.D. Cal. May 19, 2014).
(2) 131 S. Ct. 2653, 2659, 2667-72 (2011).
(3) 703 F.3d 149 (2d Cir. 2012).
(4) See U.S. Statement of Interest 11–12, Millennium Pharmaceuticals (E.D. Cal. June 18, 2014).
(5) PhRMA Amicus Br., Millennium Pharmaceuticals (E.D. Cal. Aug. 15, 2014).

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It's Not Just A Delaware Thing: Other Courts Are Also Questioning Disclosure-Only Settlements In M&A Litigation

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In an age when overburdened courts with reduced budgets often approve class action settlements without significant oversight, Delaware courts have frequently bucked that trend in the merger litigation context: rejecting certain disclosure-based settlements or significantly reducing the claimed attorneys' fees (where the supplemental disclosures provided little value to shareholders). See In re SS& T Techs., Inc. S'holders Litig., 2008 WL 3271242 (Del. Ch. 2008) (rejecting disclosure based settlement); Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890–VCL (Report of Special Counsel) (Mar. 11, 2011) (reducing attorneys' fees). As a result of this scrutiny, shareholder plaintiff firms have resorted to filing lawsuits in jurisdictions other than Delaware that have historically provided little oversight to settlements. See Strine, Leo E. Jr. et. al., Putting Stockholders First, Not the First-Filed Complaint, 69 Bus. Law. 1 (2013) (noting the "anywhere but Delaware" effect and citing Mirvis, T., Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions, 7 M & A J 17 (2007)). A recent New York decision that included scathing criticism of certain merger litigation may signal a shift in that regard, however. The lesson: be careful pursuing a disclosure-only settlement because it may not be the smooth sailing you might expect outside of Delaware.

In January 2014, Martin Marietta Materials, Inc. ("MMM") and Texas Industries, Inc. ("TXI") announced that they had entered a merger agreement for MMM to acquire all of TXI's outstanding stock in a transaction valued at approximately $2.7 billion. After MMM filed its definitive proxy statement detailing the terms of the merger with the Securities and Exchange Commission, plaintiffs – who owned just ten shares of MMM stock – filed a putative class action lawsuit against MMM, TXI, and certain of MMM's officers and directors in New York state court challenging the sufficiency of the MMM's disclosures in the proxy statement. Just ten days prior to the scheduled vote on the merger, on the day the court intended to deny the plaintiffs' motion for preliminary injunction "so all uncertainty surrounding the [m]erger could be expeditiously eliminated," the parties informed the court that the matter had been settled. The court was "disturbed by the settlement," which consisted of MMM's agreement to make certain supplemental disclosures to its shareholders and pay $500,000 to the plaintiffs' counsel. The court refused to approve the settlement and explained its reasoning in an opinion addressing each of the allegedly inadequate disclosures in the proxy statement and finding that each category of allegedly omitted information was immaterial. The court also noted that the four supplemental disclosures that resulted from the settlement were "grossly immaterial" and did "not warrant an award of attorneys' fees," thereby eliminating the basis for the settlement.

The court then summarized the current state of merger litigation as follows: "when a public company announces a merger, lawsuits follow." The court acknowledged that "[t]here is nothing inherently wrong with this phenomenon" and in certain instances, "a lawsuit is very much the proper way to redress" matters such as a "woefully unjustifiable" merger price or truly inadequate disclosures. However, such lawsuits – known as a "merger tax" – are viewed with "a certain degree of skepticism" in light of the pressure on defendants to settle such suits in order to keep a merger on track.

The court noted that "notwithstanding the current climate of merger litigation, this case still stands out … for its downright frivolity." Specifically, the court criticized the plaintiff, essentially a brokerage account masquerading as a general partnership, and the plaintiffs' counsel, whose "modus operandi" is to "purchase nominal amounts of shares in publicly traded companies" to enable them to "file a merger tax lawsuit" upon the announcement of a merger. The court labeled this practice – and the attendant litigation brought by "fictitious entities with no purpose for existing and no economic interests apart from the generation of attorneys' fees" – as "pernicious," and noted that the Delaware courts had previously sanctioned this plaintiffs' counsel for abuses committed in connection with similar suits.

In addition, the court criticized two additional "atypical" features of the lawsuit. First, as shareholders of the acquiring company rather than the target, plaintiffs ordinarily would have to assert claims for breach of fiduciary duty with respect to the merger terms via a derivative suit rather than as a direct claim. Derivative claims entail "extra procedural hurdles making them relatively more difficult to maintain" than direct claims. These plaintiffs sidestepped those hurdles, however, by challenging only the sufficiency of MMM's disclosures about the transaction (which may be attacked by a direct claim) and not the merger price or terms. Second, and of greater concern to the court, the plaintiffs waited until MMM had filed the definitive proxy to commence their lawsuit, rather than filing promptly after the issuance of the substantively-identical preliminary proxy. If the plaintiffs had brought suit after the preliminary proxy, MMM's shareholders and the court would have had "an extra two months to consider the disclosures," and "the risk that the lawsuit would impact the [m]erger" would have been "drastically reduced."

The court went on to observe that "had [the] plaintiffs alleged material omissions or settled for material supplemental disclosures, the court would have approved the settlement," but in this case "[a]pproving the settlement … would both undermine the public interest and the interest of MMM's shareholders." Moreover, "[i]t would incentivize plaintiffs to file frivolous disclosure lawsuits shortly before a merger, knowing they will always procure a settlement and attorneys' fees under conditions of duress" and that would be a "perverse result."

This case may signal a turning of the tide with respect to settlements of M&A litigation outside Delaware on a disclosure-only basis. Among other things, it may suggest that courts outside Delaware will view certain merger litigation with a skeptical eye and take seriously their role as "gatekeeper" for class settlements before approving them. While it is too early to tell if such a trend will reduce the number of "merger tax" suits filed, it may result in fewer disclosure-only settlements, as defendants may be more emboldened to fight frivolous disclosure-based claims and plaintiffs may be less willing to submit questionable disclosure-only settlements for approval.

The case is City Trading Fund v. Nye, case number 651668/2014 (N.Y. Sup. Ct.). A copy of the decision can be found here.

January 20, 2015

FTC Announces Increased Hart-Scott-Rodino Thresholds

On January 15, 2015, the Federal Trade Commission (FTC) announced revised jurisdictional thresholds for determining whether a proposed transaction must be reported to federal authorities under the Hart-Scott-Rodino (HSR) pre-merger notification statute. The new thresholds will apply to all transactions that close 30 days after the notice is published in the Federal Register.

As a result of the revision:

- The $75.9 minimum transaction value filing threshold has increased to $76.3 million.
- The $303.4 million transaction value, above which size-of-person tests are inapplicable, has increased to $305.1 million.
- The $15.2 million and $151.7 million size-of-person tests become $15.3 million and $152.5 million tests, respectively.
- The amounts of the filing fees have not changed, but the thresholds are increased as follows:
    - Transactions valued between $76.3 million and $152.5 million pay $45,000.
    - Transactions valued at $152.5 million and up to $762.7 million pay $125,000.
    - Transactions valued at $762.7 million or more pay $280,000.
    - Many (but not all) of the dollar amounts appearing in the HSR Rules (and particularly in the exemptions) have been similarly adjusted.

It is important for any company contemplating a transaction to seek legal advice to determine if the transaction triggers an HSR filing obligation pursuant to the revised HSR thresholds. If required, the failure to file an HSR prior to closing is a violation of federal law and can subject the parties to significant penalties.

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December 16, 2014

Illinois Federal Court Dismisses Customer Data Breach Class Actions Against P.F. Chang's

On December 10, 2014, a United States District Court in the Northern District of Illinois dismissed the class action complaints filed by two customers of P.F. Chang's China Bistro who alleged damages resulting from a data security breach that affected 33 P.F. Chang's restaurants in 18 states.[1] The plaintiffs asserted that P.F. Chang's alleged failure to comply with reasonable data security standards breached an implied contract with its customers to protect their credit card information and also constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The court granted P.F. Chang's motion to dismiss the claims on the basis that the plaintiffs failed to allege they suffered an injury sufficient to establish standing.

The plaintiffs—two P.F. Chang's customers—filed suit against P.F. Chang's following P.F. Chang's June 12, 2014 announcement of a data security breach involving the theft of customers' credit and debit card data. The plaintiffs alleged that they had incurred several types of damages stemming from P.F. Chang's data security breach. First, the plaintiffs alleged that their purchase from P.F. Chang's included a charge for the protection of their personal information, and that by virtue of P.F. Chang's failure to provide that protection, the plaintiffs had overpaid for those services. The plaintiffs also claimed monetary damages for losses arising from fraudulent charges and resulting bank fees. They claimed an opportunity cost for the inability to accrue rewards points during the time it took to cancel and replace their stolen credit cards. Finally, the plaintiffs claimed damages due to the costs associated with identity theft and the increased risk of identity theft. P.F. Chang's moved to dismiss the complaint, arguing that the plaintiffs failed to allege an injury sufficient to confer standing.

In a seven-page opinion, U.S. District Judge John W. Darrah addressed each claim of damages, assessing whether the allegation of injury was sufficient to confer standing on the plaintiffs. The court first held that the allegation of overpayment did not state an injury because the plaintiffs did not allege that P.F. Chang's charged a higher price for goods purchased with a credit or debit card. In addition, because the plaintiffs did not allege "an unreimbursed charge on their credit or debit card," they failed to allege any monetary damages with respect to fraudulent charges. Finally, the court held that opportunity costs do not constitute a "cognizable injury" and that the speculation of future harm through the increased risk of identity theft was

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also insufficient to allege an injury in fact. Noting that "[s]tanding is an indispensable part of the plaintiff's case," the court dismissed the case due to the plaintiffs' failure to allege they suffered any cognizable injury stemming from the P.F. Chang's data security breach.

This decision comes in the wake of a Minnesota court's denial of Target's motion to dismiss claims by financial institutions for losses they suffered as a result of Target's 2013 holiday-season security breach.[2] Click **here** for a Client Alert regarding the Minnesota decision. The different result in Target may be due to the fact that the Minnesota decision dealt with claims against Target by financial institutions, rather than consumers. However, Target also faces a consumer class action alleging damages similar to those addressed by the Illinois court in the P.F. Chang's case, and Target's motion to dismiss the consumer class actions was recently argued before the Minnesota district court. Judge Darrah's holding that the plaintiffs lacked standing in the suit against P.F. Chang's could carry implications for the forthcoming decision from the Minnesota court on Target's motion to dismiss its consumer class actions.

King & Spalding's Data, Privacy and Security Practice

King & Spalding is particularly well equipped to assist clients in the area of privacy and data security law. Our Data, Privacy & Security Practice regularly advises clients regarding the myriad statutory and regulatory requirements that businesses face when handling personal customer information and other sensitive information in the U.S. and globally. This often involves assisting clients in developing comprehensive privacy and data security programs, responding to data security breaches, complying with breach notification laws, avoiding potential litigation arising out of internal and external data security breaches, defending litigation, whether class actions brought by those affected by data breaches, third party suits, or government actions, and handling both state and federal government investigations and enforcement actions.

With more than 50 Data, Privacy & Security lawyers in offices across the United States, Europe and the Middle East, King & Spalding is able to provide substantive expertise and collaborative support to clients across a wide spectrum of industries and jurisdictions facing privacy-based legal concerns. We apply a multidisciplinary approach to such issues, bringing together attorneys with backgrounds in corporate governance and transactions, healthcare, intellectual property rights, complex civil litigation, e-discovery, government investigations, government advocacy, insurance recovery, and public policy.

* * *

[1] *Lewert, et al v. P.F. Chang's China Bistro Inc.*, Nos. 14-cv-4923, 14-cv-4787, 2014 WL 7005097 (N.D. Ill. Dec. 10, 2014).
[2] *In re Target Corp. Customer Data Security Breach Litigation*, MDL No. 14-2522, 2014 WL 6775314 (D. Minn. Dec. 2, 2014).