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USA: Trends & Developments

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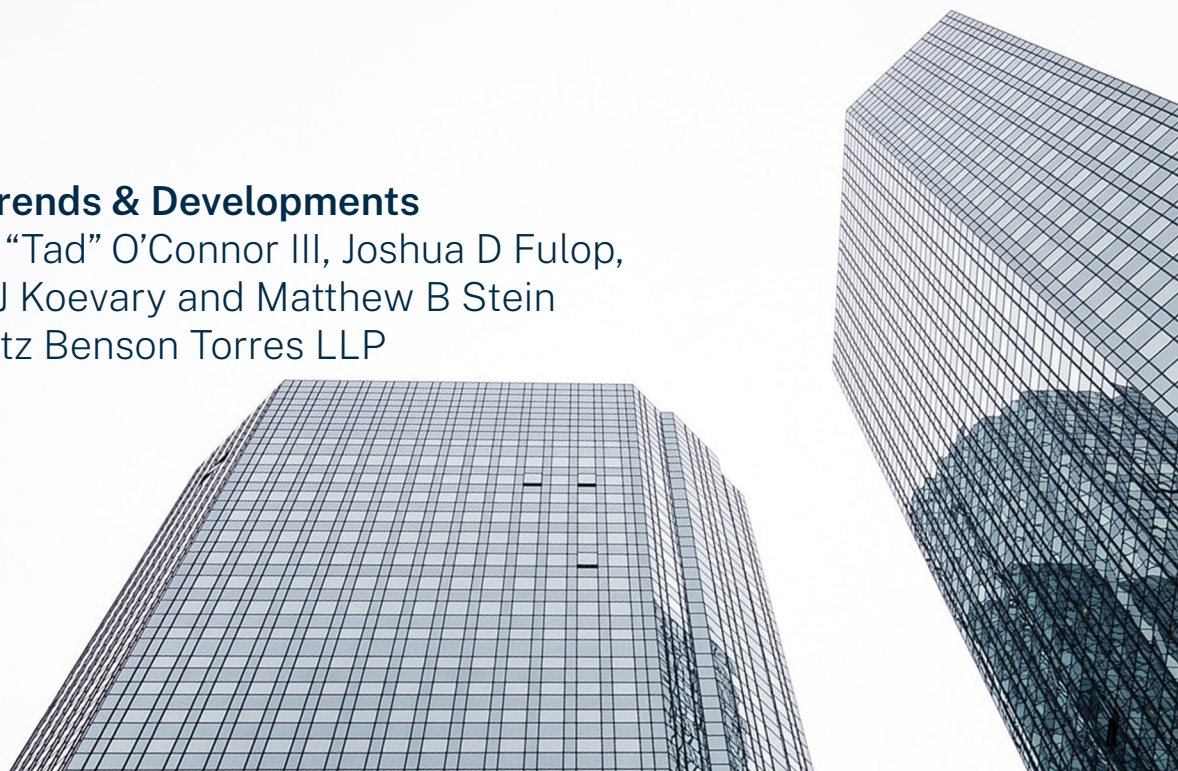

Trends and Developments

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Kasowitz Benson Torres LLP is headquartered in New York City and is one of the pre-eminent law firms in the United States, with approximately 250 lawyers across ten offices. Its core focus is commercial litigation, complemented by exceptionally strong bankruptcy/restructuring, employment litigation and real estate transactional practices. The firm is known for its creative, aggressive litigators and willingness to take on tough cases, and has extensive trial experience in representing both plaintiffs and defendants in every area of litigation. Clients include Fortune 500 companies, private equity and other investment firms across a wide range of industries, including financial services, technology and real estate. The firm has successfully secured billions of dollars in awards and settlements for clients.

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Litigation in the USA: an Introduction

In 2023, law firms have been navigating significant developments in technology and addressing important rulings relating to their own diversity hiring. There were also a number of important substantive law developments, notably relating to mass tort liability restructuring.

The rise of generative artificial intelligence (GenAI)

Many are predicting that GenAI will have dramatic effects across the legal industry. Early adopting practitioners are using software with GenAI to perform many tasks to increase efficiency and conserve resources, delivering additional value to their clients. In litigation, perhaps the most useful GenAI-based tools currently available can analyse vast numbers of documents by, for example, culling relevant documents from a large data set and identifying potential key documents in a litigation. Other useful AI tools include those that help to perform legal research and generate draft legal documents. GenAI-based tools can also quickly summarise complex cases and regulations, at least preliminarily helping lawyers quickly get up to speed on key issues.

Risks of relying on GenAI

GenAI must be exploited appropriately, as a tool that can perform tasks rather than as a replacement for an experienced practitioner. It should not be relied upon to provide legal advice, but to increase the efficiency of the provision of legal services. Importantly, the information that GenAI tools generate must be carefully reviewed, and a few cautionary tales have already emerged.

This past year, industry publications and mainstream media reported on Mata v Avianca, a case in federal court in New York, in which the plaintiff's attorneys, relying on research generated by GenAI, cited cases with rulings favourable to the plaintiff. It later emerged that the cited cases did not exist: the GenAI tool had invented the cases. Worse, when the defence and court questioned the legitimacy of the cited cases, the attorneys doubled down by providing, according to the court, "shifting and contradictory explanations" for their inclusion. The court sanctioned the attorneys for not meeting their obligations of "ensuring the accuracy of their filings" and for not being forthcoming initially as to the source of the citations.

Instances where GenAI creates information, such as the non-existent cases cited in Mata v Avianca, are not unusual and are referred to as "hallucinations". Hallucinations can be a feature of GenAI, not a flaw, and occur because certain GenAI tools are designed to generate language by attempting to mimic how people write – or perform other creative tasks – rather than to provide accurate data that is supported by data from a trustworthy legal source. GenAI tools may also draw data from the internet and from other GenAI users, without verifying the accuracy of that information. It is imperative, therefore, that attorneys verify the accuracy and truthfulness of any information obtained from these tools, as well as the sources for the data.

Other risks exist. For example, practitioners must be cautious not to input privileged or confidential information into publicly available GenAI-based tools because, given that GenAI tools learn from user inputs, there is a strong risk that GenAI tools retain and replicate data outputs that may include confidential, privileged and other types of proprietary information.

The advent of GenAI is a monumental shift for the legal community. Countless hours of work reviewing evidence, conducting research and drafting papers may be reduced to mere sec-

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onds in some instances. However, while this may save a lawyer time in some areas, it will require careful oversight and consideration to ensure that the final work product is accurate. As the court in Mata v Avianca stated: there is nothing "inherently improper" in practising attorneys using GenAI to "assist" in their work – so long as they can ensure its accuracy.

Bankruptcy litigation: non-consensual third-party releases

In August 2023, the U.S. Supreme Court accepted a review of the decision by the U.S. Court of Appeals for the Second Circuit in In re Purdue Pharma, L.P., reversing the decision of the U.S. District Court for the Southern District of New York and reinstating the decision of the U.S. Bankruptcy Court for the Southern District of New York, which held that the non-consensual third-party releases constituting the backbone of Purdue Pharma's plan of reorganisation did not violate the provisions of the Bankruptcy Code. Oral argument is set for December 2023.

Section 1141(d) of the Bankruptcy Code generally allows prepetition liabilities of a reorganised, non-liquidating Chapter 11 debtor to be discharged. However, there is no analogous provision in the Bankruptcy Code expressly extending non-consensual releases to third parties. Nonetheless, non-consensual third-party releases and related injunctions are recognised in a majority of circuit courts and are often approved as part of a plan of reorganisation in Chapter 11 cases. The issue on appeal to the Supreme Court is relatively straightforward: does the Bankruptcy Code authorise courts to release non-debtors from liability as part of a plan of reorganisation? However, the answer to this question and its practical implications are far more complex.

As is widely known, Purdue Pharma developed, manufactured and marketed OxyContin, an opioid which the company promoted as non-addictive. On 15 September 2009, Purdue filed for Chapter 11 bankruptcy in an effort to resolve thousands of lawsuits related to the drug against the company and its equity owners – the Sackler family and related entities. In September 2021, as part of the Bankruptcy Court's decision to confirm the debtors' reorganisation plan, Judge Drain issued a decision extending non-consensual third-party releases and injunctions to the Sackler family and related entities. In support of the holding that the third-party release was authorised, the Bankruptcy Court found that the Sackler family had agreed to:

- pay USD4.325 billion over nine years;
- certain restrictions on naming rights;
- not engage in business with the reorganised debtors;
- exit foreign companies within a prescribed time;
- release a public document depository, including privilege waivers, that future governments and the public could evaluate and benefit from; and
- certain "snap back" protections to enhance collectability upon default in settlement payments.

Eight objecting states and the U.S. Trustee, among others, appealed. Judge McMahon reversed the Bankruptcy Court's decision. The court reviewed the releases de novo, holding that the Bankruptcy Court did not have the constitutional authority to enter a final order in the case. In her analysis, Judge McMahon found that nothing in the Bankruptcy Code authorises non-consensual third-party releases for non-derivative claims (those claims for which a creditor may be liable independently of the debtor)

and non-asbestos claims (which Section 524(g) of the Bankruptcy Code expressly allows). Judge McMahon expressly rejected the argument that any "equitable authority" or "residual" authority in other provisions of the Bankruptcy Code permits third-party releases, while acknowledging the well-developed body of case law across the circuit courts and within the Second Circuit that has permitted such releases, observing that although "[o]ne would think that this had been settled long ago... [i]t has not been".

Subsequently, the debtors and other parties who supported the reorganisation plan appealed. The Second Circuit reversed the District Court's decision and reinstated the Bankruptcy Court's order confirming the plan. The Second Circuit based its rationale on the lack of a specific authority in the Bankruptcy Code precluding third-party releases. In doing so, the Court relied on Section 105(a), which grants bankruptcy courts broad equitable power to effectuate provisions of the Bankruptcy Code. The Court also relied on Section 1123(b)(6), which provides that a reorganisation plan can "include any other appropriate provision not inconsistent with the applicable provisions of this title". These sections, acting in tandem, grant bankruptcy courts "a residual authority consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships". As part of its decision, the Second Circuit laid out a seven-factor test to guide bankruptcy courts in determining whether to approve non-consensual third-party releases.

The stakes at risk before the Supreme Court are high. More than a simple legal determination of whether the Bankruptcy Code can affect creditor claims against non-debtors is at issue: it is a question of whether the Bankruptcy Code's provisions allow courts to adapt to current economic realities by authorising broad solutions to problems that extend beyond the debtor. A holding that third-party releases are unconstitutional would fundamentally alter an important strategic consideration for the debtor in determining whether to commence a Chapter 11 case and the prospect of creditor recoveries therein.

In Purdue Pharma, if third-party releases are not authorised, the Sackler family does not get released. At the same time, the bankruptcy estates would not benefit from over USD4 billion of value contributed by the Sackler family in exchange, leaving creditors to return to state courts to litigate liability and damages in thousands of separate cases against non-debtor, non-released parties. When the Supreme Court issues its decision, likely prior to the end of the current term on 30 June 2024, all affected parties must be prepared to adapt and strategically leverage the decision to enhance their respective interests in ongoing and future bankruptcy cases.

Law firm diversity after Students for Fair Admissions

On 29 June 2023, in Students for Fair Admissions v Harvard, the Supreme Court rejected admissions programmes used by Harvard College and the University of North Carolina that considered applicants' races. Although the Court did not directly overturn its precedent that achieving diversity could be a compelling basis for the positive consideration of race, the decisions rejected the justifications and procedures used by Harvard and UNC.

Specifically, the Court held that the Harvard and UNC programmes violated the Equal Protection Clause because they used race as a negative (eg, against Asian applicants) and stereotyped candidates (eg, into certain viewpoints). The

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Court further held that the justifications provided by the universities (eg, achieving new knowledge through diverse opinions) were too indefinite to be evaluated under the strict scrutiny standard required for race-conscious decisions, and the criteria used were both overinclusive and underinclusive to meaningfully address the stated goals. Accordingly, the Court found that such programmes lacked meaningful oversight and an identifiable end point.

Risks to certain law firm fellowship programmes

Many law firms in the US have recognised a benefit to increasing the diversity in their workforce, citing reduced operational costs, increased profits and an enhanced firm reputation. Some law firms have employed Diversity, Equity and Inclusion (DEI) initiatives that include race-conscious fellowship and scholarship programmes. Students for Fair Admissions portends an increase in litigation around such programmes. Indeed, less than one month following the Court's decisions, the American Alliance for Equal Rights filed federal actions in Texas and Florida against two law firms (Perkins Coie and Morrison Foerster), taking aim at their diversity fellowships. Subsequently, five state attorneys general sent a letter to the top 100 law firms, claiming that DEI programmes, initiatives and fellowships are discriminatory practices "unambiguously in tension with employer legal duties under state and federal law". Accordingly, many law firms are considering changes to their scholarship and fellowship programmes in order to remain compliant with federal and state law.

Law firms are adjusting approaches to DEI

While Students for Fair Admissions should give firms caution in how they advance efforts to increase diversity, the decision ultimately impacts only a small portion of the efforts law firms have historically used to achieve diversity. Law firms may still provide scholarships and fellowships, and the Supreme Court has recognised that, at least in the educational context, applicants may be encouraged to discuss how race has affected their lives, when tied to a quality of character or unique ability that the particular applicant can contribute to the firm.

Therefore, Perkins Coie announced that its diversity fellowship will be open to all students and that it will evaluate applicants based on their efforts to advance DEI in their community and the legal profession. Similarly, Morrison Foerster removed the requirement that its fellowship applicants be members of historically underrepresented groups, instead requiring that applicants "bring a diverse perspective to the firm" via adaptability, cultural fluency, resilience and life experiences.

Other tools are available to firms to promote diversity that are not proscribed by Students for Fair Admissions, including:

- establishing DEI committees and teams to support a diverse firm culture through networking, mentoring and career development;
- promoting mentorship programmes that allow the firms to connect with and assist students in underprivileged communities;
- achieving a broad applicant pool by recruiting at a diverse range of law schools;
- highlighting the achievements of partners and associates of diverse backgrounds in firm marketing; and
- training employees on unconscious biases, in accordance with local laws, that may limit opportunities for diverse employees and applicants.

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Students for Fair Admissions does not signal an end to DEI programmes at law firms; rather, law firms can continue to comply with the law while promoting diversity and strengthening their business and work culture.

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