

HOSPITALITY AND GAMING LEGAL REVIEW 2015



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Introduction

In this 2015 edition of our annual *Hospitality and Gaming Legal Review* you will find a rich array of eight articles written by attorneys in our firm reflecting a diverse set of legal issues in the lodging and gaming industries. From litigation to privacy to antitrust, insurance and patents, we hope you will find timely and incisive insights on some of the great challenges and opportunities of the day.

Our hospitality practice has grown substantially in the past few years, initially in high stakes, highly contentious owner-operation litigation, but has expanded into a variety of representations for some of the most well-known companies in the industry. Our representations address fundamental legal questions over the meaning of hotel management agreements and development deals, the implications of technology and its increasing role in the hospitality industry, and the significance of the Patient Protection and Affordable Care Act for hospitality employers, among many others.

We wish to thank all our authors for their assistance in making this a legal review that is as practical as it is informative.

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Owner-Operator Disputes

The Costliness of Prematurely Terminating a Hotel Management Agreement

By Julie M. Carpenter and Lindsay C. Harrison

In the immediate aftermath of the Great Recession, a handful of hotel owners – especially of luxury hotels – sought to rid themselves of their long-term management contracts. Although these contracts were negotiated for terms of many decades and gave the owner no right to terminate absent a material breach by the manager, some owners determined that it was nevertheless in their interest to break their agreements prematurely. This article examines the costliness of those owners’ decisions. Case study after case study reveals an expensive and lengthy process that benefits the owners’ lawyers more than the owners themselves.

The lawyers make it sound so easy. “You own the hotel. It is your property. If the manager is not generating the return you expected (or not giving you enough information, or not putting enough heads in beds, or won’t reduce expenses, or has otherwise lost your trust), you have the legal power to remove them, and bring someone new in. And we can help you do that.”

Lawyers for hotel management companies and for hotel owners, as well as judges hearing these issues, will likely continue to disagree about whether the increasingly common early-termination strategy is legally justified in particular cases. Certainly the answer in each case depends on the particular management agreement – there is no bright line rule or industry understanding that all management companies are agents, or that all management contracts are personal services agreements, or that all owners may evict management as a matter of right. But what may get lost in the chatter about the “right” or the “power” to evict are the high costs of that course of action.

Fairmont Turnberry

In August 2011, the owners of the Fairmont Turnberry Isle Resort in Aventura, Florida took over their hotel’s management. The hotel had been operated

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pursuant to a management agreement with a term of more than 50 years remaining. As a result, the owners were sued by Fairmont for breach of contract. The settlement is a matter of public record: the owners paid Fairmont \$19 million. In other words, the owners paid Fairmont what likely amounts to *ten years* of management fees to not manage their hotel. On top of that amount, the owners paid their lawyers an undisclosed sum to litigate the case and assist in plotting the takeover.

The settlement is a matter of public record: the owners paid Fairmont \$19 million.

Waikiki Edition

In August 2011, the owners of The Waikiki EDITION sought to eject Marriott as manager of the hotel. Nearly 50 years remained under the terms of the parties' management agreement. Extraordinarily costly litigation ensued, in which the owners first were enjoined from taking over the hotel and were then forced to declare bankruptcy to avoid the injunction.

In order to save their asset, the owners filed a proposed plan of reorganization requiring them to pay down significant principal on their loan as well as millions of dollars to other creditors. In addition, the bankruptcy court estimated that the owners owed Marriott \$20.7 million in lost management fees and expenses, which would have to be paid as part of the owners' plan. Complicating matters further, Marriott filed a competing plan of reorganization proposing to buy the hotel, and the owners' lender signed an agreement to support Marriott's plan. This put immense pressure on the owners, as they were at serious risk of losing their entire investment in the hotel. As a result, the owners settled with Marriott, agreeing to pay an undisclosed sum in exchange for Marriott withdrawing its plan and dismissing its claims.

Although the owners ultimately kept their asset, they were forced to pay Marriott in order to keep their hotel. On top of that, the owners paid more than \$10 million to their litigators, bankruptcy lawyers, financial advisors, expert witnesses, local counsel, plus the lawyers for their secured lender, their debtor-in-possession lender, and for the Committee of Unsecured Creditors. All of those fees and costs could have been avoided had they negotiated with Marriott rather than pursuing a hostile takeover.

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The Setai

In March of 2012, the owners of the Setai, an Asian-inspired luxury condo-hotel in Miami, staged an owner takeover to terminate the 20-year management agreement with the Singaporean hotel management company, GHM. Extensive construction cost-overruns, the recession, and Lehman's bankruptcy led the owners to consider selling the asset, but they apparently believed they could obtain a better price without the GHM management agreement. This decision was a costly one.

To prepare for the takeover, the owners retained lawyers and experts to review the hotel for potential grounds for termination. To conduct the takeover, the owners paid not only their lawyers, but also a new management company in addition to substantial security, HR, and IT services. After the takeover,

expenses skyrocketed. Preliminary state court litigation against the owner and the new management company was followed by a full-fledged arbitration under International Chamber of Commerce (ICC) provisions. To make its case, the owner submitted 61 initial and rebuttal affidavits from 36 witnesses, and 18 initial and rebuttal expert reports from 9 different experts. The hearing in Florida spanned 3 weeks; the owners paid fees, transportation, and living expenses for their fleet of lawyers as well as for 18 fact witnesses and 5 expert witnesses. As noted in the ICC award in the case, the owner spent nearly \$12.1 million just to pursue the arbitration.

Then, the owners lost. The arbitration panel ruled that the owners owed GHM over \$10 million in lost profits due to the improper termination of the management agreement. The owners were also required to pay the approximately \$4.3 million in fees and costs that GHM had incurred in connection with the arbitration. So in total, the cost of terminating the management agreement was about \$26 million, not including the intangible damage to the Setai name and reputation resulting from the much-publicized owner takeover.

So in total, the cost of terminating the management agreement was about \$26 million.

Conclusion

Terminating a management contract is far more costly than most owners realize. While an owner may attempt to manufacture an argument that the management company was in breach, such an argument is likely to fail where the manager is passing the contractual performance test. Indeed, in every case to date in which an owner has attempted to manufacture a default, the owner has ultimately been forced to pay damages to the management company. On top of those damages, owners have paid millions of dollars to their own lawyers – and millions of dollars for their management company's lawyers as well. Owners would be wise to consider all of these costs before ending a long-term management agreement prematurely.

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Julie Carpenter is a litigator. She represents clients in state and federal litigation in courts nationwide. She also focuses her practice on disputes and litigation in the hospitality industry involving management contracts and in tort and contract claims arising out of management-owner relationships, including the GMH matter referenced here. Ms. Carpenter also litigates cases arising out of government contracts. She has successfully represented clients in False Claims Act cases, as well as in commercial procurement cases. In addition to these areas, Ms. Carpenter has substantial appellate and trial level experience handling First Amendment and other constitutional claims. She received a B.A. from The College of William & Mary (1983) and J.D. *cum laude* from the University of North Carolina School of Law (1987), where she was Editor of the *North Carolina Law Review*.



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Lindsay Harrison is a litigator. Ms. Harrison has substantial experience in matters involving the hospitality industry, successfully representing hotel management companies in high-stakes, multi-million dollar lawsuits and arbitrations, including the Marriott matter referenced here. She regularly participates in appellate litigation matters before the federal appellate courts and the Supreme

Court in a wide variety of subject matters. Corporations and individuals turn to her with their litigation matters in federal and state trial courts, as well as in arbitration, including international arbitration before the International Centre for Dispute Resolution. In 2013, she was named to the BTI Consulting Group's Client Service All-Star List. Ms. Harrison has a substantial pro bono practice, which has included a successful argument before the Supreme Court on behalf of an asylum-seeker. Ms. Harrison is a member of the Edward Coke Appellate Inn of Court and a former chair of the Amicus Committee of the Women's Bar Association of the District of Columbia. She is a member of the firm's International Committee. Ms. Harrison graduated *summa cum laude* from the University of Southern California (2000) and received her J.D. *cum laude* from Harvard Law School (2003), where she was Executive Articles Editor, *Harvard Civil Rights-Civil Liberties Law Review*; Best Oralist, Ames Moot Court Competition; and Executive Technical Editor, *Harvard Women's Law Journal*.



Hotel Management Agreements and Development Deals

Important Precedent Affirms Enforceability of Releases in Hotel Development Contracts

By David A. Handzo, Matthew S. Hellman and Leah J. Tulin

On May 23, 2014, the Supreme Court of Texas denied hotel owner Miller Global's petition for review in *Miller Global Properties, LLC, et al. v. Marriott International, Inc. et al.*, thus ending nearly five years of litigation over the development and construction of the JW Marriott San Antonio Hill Country Resort and Spa. What began as a hard-fought, high-stakes battle over Marriott's alleged responsibility for cost overruns associated with the construction of this luxury resort became an important bellwether case testing the enforceability of contractual disclaimers of reliance in the Texas courts. We represented Marriott in this litigation and report here on the court's decisions in the case.

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Development of the Resort and the Parties' Contracts

Marriott came up with the concept for and began initial development of the Resort in 2001 and subsequently entered into ongoing discussions with Miller Global, a real estate investment company specializing in the development of hotels and office buildings, about investing in and eventually owning the Resort. The parties memorialized each stage of the development and planning with contractual agreements, first entering into a Letter of Intent and then a Pre-Development Agreement. Operating under the terms of those agreements, Marriott and Miller Global worked together over the course of a year and a half to hire contractors—including a project manager, architect, general contractor, and interior designer—and to finalize both the project budget and construction plans.

The development phase of the project continued until the summer of 2007, just a few months after construction of the Resort began. On July 31, 2007, Marriott and Miller Global entered into a series of related agreements—most significantly a Purchase Agreement and a Management Agreement that incorporated a Technical Services Addendum (TSA)—through which Miller Global assumed

ownership of the Resort and Marriott agreed to manage it. At that time, the budget for the Resort was \$467 million, but both Marriott and Miller Global had seen projections as high as \$481 million as recently as a month prior to the closing. All told, the cost to complete the Resort ultimately rose to approximately \$560 million, a cost that exceeded the budget at closing by over \$90 million.

Litigating in the Trial Court

Miller Global filed suit against Marriott in Texas state court in September 2009, alleging claims for breach of the Management Agreement and a variety of torts, including fraud and fraudulent inducement. Two core allegations formed the basis of Miller Global's complaint: Marriott knowingly misrepresented that (1) the construction plans were essentially complete, and (2) the \$467 million budget was sufficient to complete construction of the Resort. Miller Global alleged that it relied on these representations when it purchased the Resort and that Marriott was liable for hundreds of millions of dollars in damages as a result.

From the beginning, Marriott maintained that Miller Global's allegations were false as a matter of fact and irrelevant as a matter of law. As a legal matter, Marriott argued that Miller Global's fraud claims were barred by the plain language of the Management Agreement and TSA, which contained provisions directly at odds with the alleged misrepresentations. Those provisions included a general merger clause in which Miller Global disclaimed all prior representations. They also included a series of provisions identifying various and substantial incomplete aspects of the plans, and other provisions setting out the parties' respective responsibilities for cost overruns. The trial court agreed with Marriott that both the general merger clause and the specific provisions dealing with costs and plans foreclosed reliance by Miller Global on any supposed extra-contractual representations that the Resort's plans were complete and that Resort could be built for any particular cost. It then granted summary judgment to Marriott in a series of rulings.

Miller Global then sought reconsideration of the trial court's rulings in light of the intervening Texas Supreme Court decision, *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323 (2011). The *Italian Cowboy* court held that a restaurant lessee could sue for fraudulent inducement because the lease did not clearly and unequivocally disclaim reliance on pre-contractual representations made by the landlord regarding the condition of the premises. *See id.* at 331. Miller Global seized on that decision, arguing that the contractual provisions in the Management Agreement and TSA were insufficient to disclaim reliance under *Italian Cowboy's* stringent standard. The trial court denied reconsideration, finding that the disclaiming language in the Marriott contracts was sufficiently broad to preclude liability.

With its tort claims dismissed, Miller Global voluntarily dismissed its remaining claims on the eve of trial and appealed the dismissal of its tort claims.

The Appeal

In December 2013, the Texas Court of Appeals rejected Miller Global's appeal. *See generally* 418 S.W.3d 342 (Tex. Ct. App. 2012). The court observed that the parties' agreements dealt extensively with the subject matter of the alleged

The trial court agreed with Marriott that both the general merger clause and the specific provisions dealing with costs and plans foreclosed reliance by Miller Global on any supposed extra-contractual representations.

misrepresentations upon which Miller Global claimed to have relied, and that the contracts' terms in fact "directly contradicted" Marriott's alleged representations. The court held not only that the plain language of the parties' agreements were sufficient to negate reliance, but also that any reliance by Miller Global was unjustified as a matter of law.

Miller Global filed a petition for review of the Court of Appeals' decision, which the Texas Supreme Court denied. By that time, Miller Global's claims against Marriott were time-barred, thus delivering a total victory to Marriott.

Conclusion

One reading of the Court of Appeals' decision is that the circumstances in this case were simply distinguishable from those presented in *Italian Cowboy*, but the ruling is likely to have a broader effect. The extreme reading of *Italian Cowboy* pressed by Miller Global would drastically change the standard for enforcing contractual bars against claims of fraudulent inducement. Marriott's victory in the Texas Court of Appeals, coupled with the Texas Supreme Court's refusal to review that decision, signals that Texas courts will continue to look closely at contractual disclaimers of reliance and not allow a party to claim that it was agreeing to a different deal than the one captured in the parties' written agreement. When negotiating the terms of development agreements, management companies should take care to include an express disclaimer of reliance to ensure the contract is interpreted as intended.

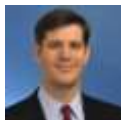
When negotiating the terms of development agreements, management companies should take care to include an express disclaimer of reliance to ensure the contract is interpreted as intended.



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issues such as commercial law, intellectual property and administrative law. He has argued important cases for corporations like Marriott, GE and General Dynamics. A former clerk to Justice David Souter of the Supreme Court, he has been lead counsel in dozens of appellate matters at all levels. In February 2014, he argued and won *Law v. Siegel*, a US Supreme Court decision involving an important question of bankruptcy law. He is a graduate of Swarthmore College (1998) with highest honors and received his J.D. from Harvard Law School (2002) *magna cum laude*, where he was President of the *Harvard Law Review*.



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Leah J. Tulin is a litigator. She was a part of the team representing Marriott in the Miller Global case. Ms. Tulin is a member of the firm's Complex Commercial Litigation, Communications, and Government Controversies and Public Policy Litigation Practices. She has substantial experience representing clients in complex commercial disputes in federal and state courts as well as in arbitration. She also regularly counsels clients on matters pending before the Federal Communications Commission, such as spectrum licensing issues and rulemaking proceedings related to universal service programs. Ms. Tulin recently returned to the firm after serving as an inaugural law clerk to Judge Cornelia T.L. Pillard of the United States Court of Appeals for the District of Columbia Circuit. She has experience in all aspects of complex litigation, from pre-litigation counseling to trials and appeals. She has represented clients in a broad range of matters, including high-stakes litigation and arbitration involving commercial contracts and business torts, defamation claims, and False Claims Act cases. She graduated from the University of Pennsylvania (2003) *summa cum laude* and received her J.D. from the Georgetown University Law Center (2007) *magna cum laude*, Order of the Coif and Executive Editor of *The Georgetown Law Journal*.



The Foreign Corrupt Practices Act

A Primer on FCPA-Related Civil Actions Brought by Private Parties

By Jessie K. Liu, William C. Pericak and Michael W. Khoo

It is now well-known that the Foreign Corrupt Practices Act (“FCPA”) is a hot spot of criminal and civil enforcement. The FCPA prohibits the bribery of foreign government officials and, for public companies, requires the maintenance of accurate books and records and a system of internal controls. In the wake of aggressive enforcement by the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), companies in a variety of industries have paid hundreds of millions of dollars in penalties, disgorgement, and prejudgment interest, and many individuals involved in foreign bribery schemes have been sentenced to prison, some to lengthy terms.

Less well-known, but also important for companies operating abroad to keep in mind, is the possibility of civil lawsuits brought by private entities and individuals. Private litigants have sued alleged FCPA wrongdoers under a variety of theories, including antitrust; breach of fiduciary duty; the civil Racketeering Influenced and Corrupt Organizations Act (“RICO”); defamation; and retaliation. While relatively few of these suits result in court judgments against the defendant company, they can entail significant expense, reputational damage, and business disruption.

Antitrust

It is not uncommon for a company to be sued by a competitor alleging that its bribes allowed it to obtain an unfair competitive advantage. For instance, in 2010, NewMarket Corp. sued Innospec Corp. in the Eastern District of Virginia shortly after Innospec settled FCPA charges with the SEC and the DOJ. NewMarket contended that Innospec paid bribes to obtain a competitive advantage against NewMarket, and brought claims under federal antitrust law and Virginia state statutes. After the District Court denied Innospec’s motion to dismiss the state-law claims, the parties settled for \$45 million. Similarly, in 2008, Supreme Fuels Trading FZE sued its competitor, International Oil Trading Company, for paying bribes to Jordanian officials in order to obtain a competitive advantage. Supreme Fuels brought claims under RICO, federal and state antitrust law, state unfair competition law, and state common law. After the defendant’s motion to dismiss was denied, the parties settled for \$5 million.

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Breach of Fiduciary Duty

It is also not uncommon for a company alleged to have bribed a foreign official to become the target of a shareholder derivative suit alleging that the board of directors breached its fiduciary duty by failing to halt, or even by condoning, the improper payments. For example, in February 2014, a Hewlett Packard Co. (HP) shareholder filed a derivative suit in federal court in San Francisco alleging that members of the company's board of directors breached their fiduciary duty by neglecting to stop bribes to foreign officials despite numerous "red flags," "stonewall[ing]" investigators, and failing to make a voluntary disclosure. As a result, according to the complaint, "the penalties and fines flowing from such violation are likely to be much more severe than if HP management and legal counsel had cooperated with the investigations from the outset and disclosed these violations of the FCPA." Other companies that have been sued by shareholders on a similar theory include Siemens and Wal-Mart.

The penalties and fines flowing from such violation are likely to be much more severe than if HP management and legal counsel had cooperated with the investigations from the outset.

Civil RICO

Under RICO, 18 U.S.C. § 1962, a plaintiff may bring suit if it is injured by a "pattern of racketeering activity." Over the years, a number of plaintiffs have alleged that defendants' bribes to foreign officials constituted such a pattern and that they were harmed thereby. For example, Bahrain's national aluminum company, Aluminum Bahrain B.S.C. (Alba), brought suit against Victor Dahdaleh, a consultant who allegedly funneled bribes from a subsidiary of Alcoa to Bahraini officials in order to sell alumina to Alba at inflated prices. Similarly, Mexico's national oil company and its subsidiary (collectively "PEMEX") alleged that Siemens and SK Engineering & Construction Company violated RICO by bribing PEMEX officials. Both of these actions recently were dismissed for different reasons (the Alba suit was dismissed in favor of mandatory arbitration and the PEMEX suit for lack of jurisdiction), but civil RICO remains a popular ground for FCPA-related civil litigation.

Defamation

Last November, the Texas Supreme Court held oral argument in *Shell Oil Co. v. Witt*, an FCPA-related defamation action against Shell Oil Company. The plaintiff, Robert Witt, is a former Shell employee who alleged that Shell voluntarily submitted a report to the DOJ falsely stating that he had engaged in unethical conduct in connection with paying bribes to foreign officials and that he had made inconsistent statements in the course of Shell's internal investigation. After the trial court granted Shell's motion for summary judgment, finding that Shell enjoyed absolute immunity from suit in these circumstances, the court of appeals reversed, holding that Shell's communications to the DOJ were protected only by a conditional privilege for statements made in the public interest. A decision is expected from the Texas Supreme Court sometime in 2015.

After the trial court granted Shell's motion for summary judgment the court of appeals reversed, holding that Shell's communications to the DOJ were protected only by a conditional privilege for statements made in the public interest.

Retaliation

The Dodd-Frank Act protects whistleblowers who report violations of the securities laws, including the FCPA, from job-related retaliation. Liu Meng-Lin, a citizen and resident of Taiwan employed as a compliance officer at Siemens' Chinese subsidiary, alleged in a lawsuit that Siemens fired him in retaliation for his reporting internally what he believed to be corrupt payments to North Korean and Chinese officials in connection with the sale of medical equipment. None of the alleged conduct occurred in the United States. Two months after he was terminated, Liu reported the alleged bribery to the SEC and subsequently filed a retaliation suit against Siemens. The district court granted Siemens' motion to dismiss on the grounds that the Dodd-Frank Act's whistleblower provision does

not apply extraterritorially and that Liu's complaint did not establish that he made a disclosure "required or protected" by certain enumerated statutes, as the Act's anti-retaliation provision requires. This past August, the Second Circuit affirmed on the first ground.

Thus, it is becoming increasingly clear that allegations of foreign bribery can attract the attention not only of law enforcement, but of private plaintiffs as well, creating yet another risk for companies doing business overseas.



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Michael W. Khoo is a litigator with a focus on assisting companies to respond to government enforcement actions or to conduct internal investigations and compliance reviews. He has assisted numerous Fortune 100 companies in matters spread across the globe, including in the Mideast, Europe, Africa, Asia, and Latin America. Mr. Khoo has significant experience with the Foreign Corrupt Practices Act, and is a contributing author to the anti-bribery chapter of *Practicing Under the U.S. Anti-Corruption Laws*, published by Aspen Publishers. In addition, he has also conducted FCPA training programs for corporate clients. Mr. Khoo is proficient in reading French-language materials. Mr. Khoo is member of the Firm's Litigation Department and of the White Collar Defense and Investigations Practice. He has a B.A. from the University of Chicago (1994), an M.S. from the Columbia University School of Journalism (1998) and a J.D. from Yale Law School (2008), where he was Editor of *The Yale Law Journal*.



Privacy

Data Breaches: What Hotels Need to Know

By Mary Ellen Callahan and Esteban M. Morin

The Federal Trade Commission has become increasingly aggressive in bringing enforcement actions against companies that have been the victims of data breaches. Section 5 of the FTC Act prohibits companies from engaging in “unfair or deceptive acts or practices in or affecting commerce.”¹ Invoking this provision, the FTC has charged dozens of companies with misrepresenting their data security practices and failing to employ reasonable measures to protect information they have collected from customers. Although courts are still weighing in on the propriety of the FTC’s efforts to enforce its rules in the realm of cybersecurity, national hotel brands should take note of this trend.

Hotels have historically been tempting targets for hackers because they store vast quantities of personal information about guests’ preferences and payment methods. In recent years, several chains have suffered from data breaches that have compromised thousands of guest credit cards and required costly remedial steps. Adding to these burdens, in one instance, the FTC brought an enforcement action against a hotel chain that was the victim of repeated breaches over the course of several months.² This has required the chain to expend resources defending itself and challenging the agency’s authority in addition to the expenses of remedying the breach and notifying affected guests.

The FTC brought an enforcement action against a hotel chain that was the victim of repeated breaches over the course of several months.

Given the risks, it is important for hotels to ensure that their guests’ data is secure and that they are fully prepared to respond to a breach. Consulting with an expert is always the best way to ensure compliance with FTC regulations and minimize the risk of a breach. However, there are several broad principles and steps that every hotelier should consider in establishing and updating its data collection practices and protocols. The most significant are:

¹ 15 U.S.C. § 45(a).

² *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014). A federal judge upheld the FTC’s authority, but the Third Circuit has agreed to consider the decision in an interlocutory appeal.

Protect Guest Data: The best way to avoid the costs and complexities of remedying a breach is to avoid one in the first place. At a basic level, a hotel can minimize risk by ensuring that customer data is stored on secure servers ideally encrypted in storage and in rest, as well as structuring their network so that a single compromised computer does not provide hackers with access to all information stored in the hotel's network. Additionally, hotels can require that all machines utilize difficult-to-guess passwords that must be changed on a regular basis, carefully limit both internal and external access to guest data, and ensure that guest information is not stored in readable text. These steps seem intuitive, but many companies have fallen victim to hackers because they either wrongly assumed their data was adequately protected or failed to enforce existing data protection protocols.

The aforementioned steps cannot guarantee that hackers will never breach a system, but by making your hotel a difficult target, it is much more likely that online predators will head off in search of easier prey.

Transparency About Data Security: It is important that a hotel accurately represent its data security practices to customers and in any public statements or policies. Post-breach, the FTC has charged companies with violations of Section 5 if those companies made even general statements about taking reasonable steps to protect customer data. Specifically, the FTC has alleged that certain statements about security are “deceptive” following a breach that could arguably have been prevented through some of the data protection practices described above. It is therefore important for hoteliers to scrutinize all official statements about privacy or data security practices.

Given that practices and policies change, hotels should also annually audit their public-facing statements to ensure that they remain accurate. What may be a reasonable security practice one day may be outdated several years later, so it is vital to periodically ensure both that practices are adequate and policies are accurate.

Respond Quickly to Remedy Breaches and Security Flaws: If a hotel is the victim of a data breach, it should move quickly to remedy any security flaws and prevent further intrusions. Every hotel chain should have a plan of action in the event of a data breach. As part of this plan, a hotel should immediately reach out to experts and begin investigating how the breach occurred. Once the security flaw is located, the hotel should work to fix it as quickly as possible to prevent repeat breaches. Failure to move quickly not only increases the risk that even more guest information will be exposed, but also increases the likelihood of gaining unwanted attention from the FTC.

Every hotel chain has its own unique protocols and every breach poses its own challenges. Receiving tailored advice from a professional is thus the best way to minimize any complications and liability. However, by keeping the above principles and steps in mind, hoteliers can avoid many common pitfalls, and avoid the mistakes that have recently caught the FTC's attention.

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Failure to move quickly not only increases the risk that even more guest information will be exposed, but also increases the likelihood of gaining unwanted attention from the FTC.

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Insurance Coverage

The Top 3 Questions for Hospitality Companies Considering Cyber Security Coverage

By Matthew L. Jacobs and Jan A. Larson

In the past year alone, at least two hospitality companies faced significant data security breaches, proving that the hospitality industry is not immune to the sort of widely reported breaches at other companies like Target, eBay, and Home Depot. The rate at which these incidents are taking place and the corresponding cost to the affected businesses should prompt the hospitality industry to consider its potential exposure and the availability of cyber security insurance coverage to mitigate these risks.

In early 2014, White Lodging Services Corp. (White Lodging) announced that an undisclosed number of guests' credit and debit card numbers were likely exposed over a nine-month period from March 20, 2013 to December 16, 2013, at fourteen franchise hotels in eight different states—including hotels operating under a variety of leading hotel brands. As a result, White Lodging reportedly incurred significant costs associated with a third-party forensic investigation, as well as notification and credit monitoring expenses for all affected customers.

Later, in May 2014, Wyndham Worldwide Corporation (Wyndham Worldwide) faced litigation arising from three data breaches that purportedly occurred between April 2008 and January 2010. As discussed elsewhere in this Review, Wyndham Worldwide is also the target of a Federal Trade Commission enforcement action seeking to compel the company to improve its security measures and remedy any harm its customers have suffered as a result of the breaches.

Hotels, like retailers, are particularly susceptible to these types of “point of service attacks” because they handle and process a large volume of consumer credit and debit card payments. Many owners and franchisees, however, may have a somewhat false sense of security, believing that the main source of

Hotels, like retailers, are particularly susceptible to these types of “point of service attacks” because they handle and process a large volume of consumer credit and debit card payments.

potential exposure is in the reservation system, which is generally maintained very securely by the brand. In fact, however, significant vulnerability also exists in the restaurants, bars, and gift shops, as well as in the hotel's wireless internet services, all of which may be more vulnerable and more easily hacked than a hotel reservations system. The White Lodging breach, for example, was later traced to food and beverage points of sale at each of the affected properties. As a result, information privacy and security should be a priority for both owners and operators.

One way owners and operators can protect themselves, and hotel guests, against these risks is by purchasing stand-alone cyber security insurance coverage. Although the coverage has been available for close to 20 years, its popularity is growing and the policy forms are not standardized and can be difficult to navigate. This article identifies three key questions for hospitality companies to consider when purchasing cyber security coverage.

(1) What costs does the policy cover as “loss” or “damages”?

Many of the policies available in the current market are “cafeteria style” and allow the policyholder to pick and choose among various coverage parts. Determining which coverage parts are right for a particular company requires careful analysis of not only its potential exposures, but also the types of loss or damage a breach could cause and the corresponding remedial costs. As the White Lodging and Wyndham Worldwide breaches demonstrate, hospitality companies can face both first- and third-party liability as a result of a data breach and should insure themselves accordingly.

The expenses a company incurs in responding to the breach—including forensic investigations, consumer notification and credit monitoring, and public relations consultants to protect the company's brand reputation—typically fall under the “Event Management” coverage offered in most policies. Other “first-party” costs, such as lost income caused by a cyber security-related business interruption or suspension, can be insured by obtaining “Network Interruption” coverage. Companies can also protect themselves against later investigations or lawsuits by purchasing third-party liability coverage (sometimes referred to as “Security & Privacy Liability” coverage), which is designed to cover a company's defense costs and any settlement or judgment.

In addition to these common coverage parts, cyber security policies can include other coverage parts to address specialized risks like cyber extortion or media content liability.

(2) What type of “information” must be involved in a breach in order to be covered by the policy?

Many—but not all—data breaches involve the theft of *consumer* information, such as credit and debit card numbers and other personally identifiable information. Another frequent target of data breaches, however, is *the company's* trade secrets and other proprietary information. To safeguard its brand, a hospitality company should negotiate a definition of “Confidential Information” in its cyber security policy that is as broad as possible.

As the White Lodging and Wyndham Worldwide breaches demonstrate, hospitality companies can face both first- and third-party liability as a result of a data breach and should insure themselves accordingly.

The definition of “Confidential Information” should also be broad enough to include information in the hands of third-party vendors in addition to the company. Many companies rely upon third-party vendors for some, or all, of the company’s data management and protection. As a result, it is important to ensure that the policy’s coverage extends to losses affecting or caused by those third parties.

(3) What does the application and policy require of the policyholder with respect to its computer systems?

Policyholders can expect to see extensive insurance application questions regarding the company’s current network and data security measures, particularly as the underwriting requirements for cyber security policies continue to tighten. Some policies also contain conditions requiring the policyholder to maintain (or implement) certain security standards throughout the policy period. These can include, for example, encryption programs on mobile devices like smart phones, tablets, laptops, and thumb drives, as well as identity authentication measures such as combined password and token-code log-ins. Before applying for cyber security insurance, a company should therefore evaluate its current systems and weigh the value of investing in additional technology, if necessary. Having state-of-the-art security in place may make it easier, and perhaps even less expensive, for a company to obtain cyber security insurance.

Before applying for cyber security insurance, a company should therefore evaluate its current systems and weigh the value of investing in additional technology.

* * *

Obtaining cyber security insurance is an important next step as the hospitality industry continues to incorporate information privacy and security into its “guest services.” When negotiating the terms of such insurance, hospitality companies must be mindful of the specific terms and conditions to ensure that they have adequate coverage.



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Gaming

Anticipating the Application of the Bank Secrecy Act to the Gaming Industry

By Timothy A. Karpoff, Charles B. Sklarsky and Micah J. Cogen

The gaming industry has become subject to increased Bank Secrecy Act (BSA) requirements and enforcement efforts in the last ten years. The BSA requires that institutions subject to it maintain and report certain information to federal regulators—specifically, the Financial Criminal Enforcement Network (FinCEN)—about their customers’ financial transactions. These requirements create special challenges for the gaming industry.

As FinCEN determines precisely how BSA requirements should apply to the gaming industry, those in the industry will need to engage with FinCEN and the Justice Department to help tailor compliance requirements applicable to the gaming industry and address continued enforcement initiatives. While numerous issues will arise as compliance requirements continue to develop, four areas in particular will likely dominate discussions of how the BSA applies to gaming.

Clarifying what federal regulators expect from casinos

Identifying the federal government’s expectations of financial institutions remains a key frustration of many institutions in dealing with BSA requirements. Gaming institutions confront the same issues in dealing with Suspicious Activity Reports by Casinos (SARCs)¹ Know-Your-Customer (KYC) standards and procedures,² and other anti-money laundering (AML) programs.³

By its very nature, the BSA imposes on gaming institutions a requirement to exercise significant judgment. A casino must file a SARC whenever a transaction involves at least \$5,000 and the casino: “knows, suspects, or has reason to suspect” that the transaction: (i) involves funds from illegal activity; (ii) disguises funds from such activity as part of a plan to violate or evade federal

Those in the industry will need to engage with FinCEN and the Justice Department to help tailor compliance requirements applicable to the gaming industry.

¹ 31 C.F.R. § 1021.320(a)(2).

² See, e.g., 31 C.F.R. §§ 1021.210.

³ See, e.g., 31 C.F.R. §§ 1021.210, 10241.410.

law; (iii) is structured to evade BSA requirements; (iv) appears to serve no known business or apparent lawful purpose; or else (v) involves using the casino to facilitate criminal activity.⁴

FinCEN has made several attempts in recent years to clarify the reach of the BSA to the gaming industry,⁵ but the unusual nature of this regulatory framework—obligations triggered by a “reason to suspect”—requires continued dialogue with FinCEN to help better clarify circumstances specific to the gaming industry that trigger BSA obligations. In the meantime, as recent enforcement actions confirm, FinCEN has taken the position that the BSA imposes a considerable burden on the gaming industry to know and monitor its clients. In response, gaming institutions must protect themselves against civil and criminal liability by adopting strong internal compliance programs. Hopefully, as FinCEN continues to refine its approach, the gaming industry will get greater clarity about more tailored expectations with respect to BSA compliance.

Differentiating casinos from other financial institutions.

Improved clarity from FinCEN in the form of a better-tailored application of the BSA to gaming institutions is appropriate given that casinos are not like other financial institutions. Casinos are in the entertainment business, and not in the business of providing financial services. Their financial role largely is ancillary to their core product. As a result, AML and BSA requirements can have a significantly greater impact on a casino’s core businesses than they do on a traditional financial institution. Traditional KYC, Currency Transaction Report (CTR), and SARC requirements are not just a cost-of-doing-business for a casino—these requirements can affect revenue streams by changing the product and experience that casinos are able to provide to their customers.

BSA compliance measures should not, and certainly need not, alienate gaming customers. And engaging with FinCEN over the next several years to better articulate fundamental differences between casinos and other financial institutions—like depositories, broker-dealers, and non-bank finance companies—can help strike the appropriate regulatory balance to ensure that is the case.

Separating casinos’ compliance obligations from their data collection for business purposes.

That balance also should extend to the gaming industry’s market research activities. Casinos’ business models often employ sophisticated technologies, techniques, data mining, and statistical analyses to understand the patterns and preferences of their customers and, in particular, high net-worth individuals. The industry’s capability to understand its’ clients preferences has caught FinCEN’s attention, as Director Shasky Calvery recently remarked: “A casino’s capability for knowing its customers’ preferences and credit information, combined with [its]

Traditional KYC, Currency Transaction Report (CTR), and SARC requirements are not just a cost-of-doing-business for a casino.

⁴ 31 C.F.R. § 1021.320(a)(2).

⁵ See, e.g., FinCEN, Frequently Asked Questions Casino Recordkeeping, Reporting, and Compliance Program Requirements (Aug. 13, 2012); FinCEN, Guidance: Casino or Card Club Risk-Based Compliance Indicators (June 30, 2010); See FinCEN, Guidance: Recognizing Suspicious Activity – Red Flags for Casinos and Card Clubs (Aug. 1, 2008); FinCEN, Guidance: Frequently Asked Questions – Casino Recordkeeping, Reporting, and Compliance Program Requirements (Nov. 14, 2007); FinCEN, Suspicious Activity Reporting Guidance for Casinos 2 (Dec. 2003).

security technology, can and should be leveraged to piece together relevant information to understand [its] customers' source of funds."⁶

The targeting capabilities facilitated by these technologies and techniques have had a substantial impact on the industry and may be able to aid FinCEN. But it will be important for the gaming industry to consider the second-order ramifications of FinCEN's reliance on this information. Use of market research activities for BSA purposes has the potential to trigger a "race to the bottom" among some gaming institutions whereby some casinos become known for relying on less aggressive monitoring and players with ulterior motives for their gaming begin frequenting establishments with less robust BSA programs. The gaming industry would do well to work with FinCEN to develop a consistent standard as to what types of information come within the BSA so that there is a level playing field. Casinos should work with FinCEN to try and draw an appropriate line between information collected for purely market research purposes and the information that they should use for BSA/AML compliance purposes. This sort of line drawing is never easy, and may involve the possible intersection of federal and state laws with competing interests. Casinos should consult with a legal advisor when confronting questions of whether and to what extent to use such information.

Dealing with continued enforcement initiatives.

FinCEN continues to bring enforcement actions against the gaming industry. This summer it announced a settlement agreement that fined and permanently banned a casino official from participating in the affairs of any financial institution for having willfully participated in a casino's failure to file CTRs and SARCs.⁷ A year earlier the Justice Department announced that Las Vegas Sands Corp. (LVSC) had agreed to pay more than \$47 million for failing to file SARCs based on large deposits made by a customer who later faced drug trafficking charges and who funded his gaming using methods that the government claimed should have raised suspicion.⁸ And there is reason to believe that FinCEN enforcement action against casinos and other regulated entities will continue to increase over the next several years. FinCEN recently set up its first stand-alone enforcement division, and it is expected that BSA enforcement and AML initiatives will continue to be high priorities. Gaming institutions overdue to evaluate the strength of their BSA compliance programs should make this a priority in 2015.

Conclusion

The BSA is still new to the gaming industry and FinCEN is still tailoring its application to this industry. There are substantial differences between the services and products that casinos provide and those provided by financial institutions. Nevertheless, over the next few years regulation and enforcement will determine precisely how the BSA will apply in this space. The gaming industry would do well to engage fully on these issues with the FinCEN, with the hope of shaping the outcome.

Casinos should work with FinCEN to try and draw an appropriate line between information collected for purely market research purposes and the information that they should use for BSA/AML compliance purposes.

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⁶ Remarks of Jennifer Shasky Calvey, 2014 Bank Secrecy Act Conference (Jun. 12, 2014).

⁷ *In re George Que*, Matter No. 2014-05 (Aug. 20, 2014).

⁸ Press Release, U.S. Dep't of Justice, Las Vegas Sands Corp. to Avoid Criminal Prosecution after Cooperating and Agreeing to Continue to Strengthen Internal Compliance Programs (Aug. 27, 2013) available at <http://www.justice.gov/usao/cac/Pressroom/2013/110.html>.

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Intellectual Property

Patent Trolls and Attorney-Fee Shifting

By Bradford P. Lyerla, Nick G. Saros and Adam G. Unikowsky

Patents are widely regarded as the engine of national innovation. By giving inventors an exclusive monopoly to practice their inventions, patents ensure that inventors have the economic incentive to expend time and money in developing and perfecting their inventions. At the same time, by requiring inventors to describe their inventions in the patent specification, the patent system ensures that society can learn from the inventors' efforts and gives others the opportunity to practice the invention once the patent expires.

Some patents today still serve that laudable role, but not all. Many patents – particularly patents on software and “business methods” – are broad, vague, and add virtually nothing to the store of knowledge. In some cases, a party will acquire these types of patents for the sole purpose of bringing infringement suits even after the patent lays dormant – sometimes for a decade or more. Those entities are called non-practicing entities or “patent trolls.”

In a typical patent troll case, the patent owner will do nothing to commercialize the invention, and will instead engage in a strategy of litigation against wealthy companies for infringement. In many cases, the infringement allegations are based on an interpretation of the claims going wildly beyond anything the patentee contemplated at the time of the invention. The non-practicing entity will often sue dozens of companies and allege infringement against the defendants' most profitable products seeking millions of dollars in damages, notwithstanding that the defendants knew nothing about the patent. Even though the infringement claims are often meritless, companies will sometimes settle for small sums to avoid the prospect of expensive litigation. By pursuing this strategy, the patent-troll plaintiff can collect small settlements from a wide number of defendants, resulting in a handsome profit.

One important tool to deter patent trolls in these cases is the fee-shifting provision of the Patent Act, which provides: “The court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. By giving defendants the opportunity to recover their attorney's fees under appropriate circumstances, this statute encourages patent defendants faced with

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troll lawsuits to fight rather than settle. And faced with the prospect of being forced to pay a hefty award of attorney's fees, this statute deters trolls from bringing frivolous lawsuits in the first place.

Until recently, the force of Section 285 was blunted by two doctrines created by the U.S. Court of Appeals for the Federal Circuit, the appellate court which hears all patent appeals. The first doctrine held that a party could not obtain attorney's fees under Section 285 unless it could show that "there has been some material inappropriate conduct," or that the lawsuit was both "brought in subjective bad faith," and was "objectively baseless." *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005). The second doctrine held that trial court decisions finding a case to be "objectively baseless" were reviewed de novo by the Federal Circuit. *Highmark, Inc. v. Allcare Health Management Systems, Inc.*, 687 F.3d 1300, 1309 & n.1 (Fed. Cir. 2012). Thus, trial courts could award attorney's fees only under narrow circumstances, and those awards could easily be reversed by the Federal Circuit, a court which is widely regarded as favorable to patent holders and litigation. Together, these two rules ensured that patent trolls were not meaningfully deterred by the threat of an attorney's fees award.

Until recently, the force of Section 285 was blunted by two doctrines created by the U.S. Court of Appeals for the Federal Circuit.

In 2014, however, the Supreme Court disapproved of each of these two doctrines. As to the first, it held that the Federal Circuit's formula was excessively rigid. It determined that "[a]n 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). As to the second, it held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's § 285 determination." *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744, 1749 (2014). Together, these two decisions will both make it easier for district courts to award attorney's fees, and harder for the Federal Circuit to reverse such awards. It is widely expected that these decisions will lead to more fee awards against troll plaintiffs – and less troll litigation.

The Supreme Court's decisions are a helpful, but incomplete solution to the problem of patent trolls.

The Supreme Court's decisions are a helpful, but incomplete solution to the problem of patent trolls. It is difficult to predict whether a court will award attorney's fees in any particular case, and even if it does, such judgments might be difficult to collect against patent trolls. Thus, patent defendants will still have an incentive to settle. Further, while Section 285 might deter frivolous infringement claims, it does not address the separate problem of low-quality patents; a court will be unlikely to find a plaintiff's case to be frivolous merely because the patent is ultimately adjudged to be invalid. Still, the Supreme Court's decisions are a welcome development for the patent defense bar.

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Antitrust

Hotel Brands and OTAs Secure Major Antitrust Victory Regarding Hotel Room Pricing

By Lindsay C. Harrison and Kelly M. Morrison

A federal court in Dallas recently dismissed a major antitrust lawsuit accusing U.S. hotel companies and online travel companies of a conspiracy to fix online pricing of hotel rooms.

The lawsuit involved the consolidated complaints of several putative nationwide classes of consumers alleging collusion between hotel brands like Marriott, Starwood and Trump, and online travel agencies (OTAs) like Orbitz, Expedia and Hotels.com. Specifically, the plaintiffs alleged collusion between the OTAs and the hotel brands to eliminate price competition by imposing “rate parity” across hotel room booking websites.

By way of example, the plaintiffs alleged that a room at the Dallas Marriott in June 2013 cost \$159 per night regardless of whether a consumer purchased it on Expedia, Hotels.com, Orbitz, or Marriott’s own website, Marriott.com. According to the complaints, this violated federal and state antitrust law as well as state consumer protection statutes prohibiting misleading advertising, as the various OTAs allegedly could not accurately say that they were offering the “best” or “lowest” price for hotel rooms.

Importantly, the lawsuit did not allege a conspiracy to eliminate competition between the different hotel brands, but rather to eliminate intrabrand competition — that is, competition among each hotel’s online distribution channels. It was the failure to allege any interbrand conspiracy that doomed the lawsuit’s fate.

In February 2014, the federal district court resoundingly rejected the plaintiffs’ theory of liability. It explained that the defendants’ parallel business behavior — the adoption of similar “resale price agreements” across pairs of OTAs and hotels — was neither suspicious nor suggestive of a conspiracy.

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To the contrary, “common economic experience” offered an “obvious explanation” for the similar agreements: the “natural desire” of hotels to control the prices at which their rooms are sold online, coupled with the desire of the OTAs to ensure through most-favored-nation clauses that their competitors would be prohibited from offering a lower price than the published rate.

In other words, hotel companies sell rooms directly to consumers; if they choose also to sell hotel rooms through online distributors, they have no obligation to allow those distributors to undercut their own prices. In short, the court explained, “[j]ust because defendants’ rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed.” Accordingly, the court held that the complaint failed to sufficiently allege that the defendants conspired to fix prices on hotel rooms sold online.

The court also dismissed the state law consumer protection claims, holding that the plaintiffs failed to plausibly allege that they were injured by the defendants’ “lowest” or “best” price guarantees. The complaint alleged that the defendants’ rate guarantees caused the plaintiffs to pay supracompetitive prices — that is, rates above the “best” or “lowest” rate a competitive online market could offer.

The court disagreed: According to the complaint, the plaintiffs would have paid the exact same price even if the hotels and OTAs had not made rate guarantees because room prices were allegedly the same across the entire online bookings market. Moreover, because the rates were allegedly the same across all online outlets, the plaintiffs got exactly what they were promised — the lowest price available online.

The court’s opinion provides two helpful rulings for U.S. industries that utilize OTA channels, including not just hotels but also airlines, rental car companies, and cruise lines.

First, the court rejected the plaintiffs’ novel theory that antitrust laws require a company to compete against itself, holding that hotels may sign agreements setting a “best available rate” that may not be undercut by OTAs. Second, the court accepted the widespread usage of most-favored-nation clauses in distribution agreements.

Most-favored-nation clauses are commonly used in contracts to guarantee that one contracting party is offering the terms to the other that are equivalent to its best terms offered in other contracts. The court’s decision blesses the use of such clauses in contracts between hotel companies and OTAs. Other recent cases — most prominently the e-book case involving Apple Inc. — have rejected the use of most-favored-nation clauses in other contexts, so this decision sets an important precedent approving of their use in the OTA marketplace.

The court granted the plaintiffs an opportunity to amend their complaint, but expressed skepticism that they would be able to do so. The plaintiffs attempted to amend their complaint, making some significant changes including dropping the hotel defendants and focusing on allegations of a price-fixing agreement between defendant OTAs. In October 2014, however, the court concluded that the amended complaint failed to overcome the pleading deficiencies identified in the February 2014 order and dismissed the suit.

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This decision sets an important precedent approving of most-favored-nation clauses in the OTA marketplace.

Although this marks an important victory under U.S. law, OTAs and hotels may still face risks in other jurisdictions. For instance, in response to challenges in the U.K., the British Office of Fair Trade accepted formal commitments from Booking.com, Expedia and InterContinental Hotels designed to permit Booking.com, Expedia and other OTAs to discount the hotel's room prices in order to promote more competitive pricing.

The British Office of Fair Trade has made clear that it expects other OTAs and hotels operating in the U.K. to introduce similar discounting schemes. Likewise, there exists an ongoing investigation by Switzerland's Competition Commission into "best price guarantee" clauses contained in agreements between certain OTAs and their partner hotels, and the European Commission is coordinating antitrust investigations by the French, Swedish, and Italian competition authorities into "parity clauses" in contracts between Booking.com and hotels.

Notwithstanding international challenges, the dismissal of the American lawsuit is very good news for hospitality companies and OTAs, which can continue to expand online distribution channels with greater certainty that their business model is lawful and competitive.



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Lindsay Harrison is a litigator. She regularly participates in appellate litigation matters before the federal appellate courts and the Supreme Court in a wide variety of subject matters.

Corporations and individuals turn to her with their litigation matters in federal and state trial courts, as well as in arbitration, including international arbitration before the International Centre for Dispute Resolution. Ms. Harrison has substantial experience in matters involving the hospitality industry, successfully representing hotel management companies in high-stakes, multi-million dollar lawsuits and arbitrations. In 2013, she was named to the BTI Consulting Group's Client Service All-Star List. Ms. Harrison is a member of the Edward Coke Appellate Inn of Court and a former chair of the Amicus Committee of the Women's Bar Association of the District of Columbia. She is a member of the firm's International Committee. Ms. Harrison graduated summa cum laude from the University of Southern California (2000) and received her J.D. cum laude from Harvard Law School (2003), where she was Executive Articles Editor, Harvard Civil Rights-Civil Liberties Law Review; Best Oralist, Ames Moot Court Competition; and Executive Technical Editor, Harvard Women's Law Journal.



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Kelly M. Morrison concentrates on complex civil litigation, arbitration, and appellate matters, with a focus on class action defense. She has been a key member of the defense team for dozens of consumer and employment class action lawsuits, achieving dismissals at the pleading stage and denials of class certification. In addition to her deep experience disposing of cases in early proceedings, Ms. Morrison has trial and arbitration hearing experience. She has also handled a number of appellate matters and has argued in the U.S. Court of Appeals. Ms. Morrison graduated magna cum laude from Tufts University (2002) and received an M.A. from the Johns Hopkins University School of Advanced International Studies (2007) and a J.D. from the University of Virginia School of Law (2007).

About Our Hospitality and Gaming Practice

Jenner & Block brings a rich variety of litigation experience to clients in the hospitality and gaming industries. We have represented many of the leading companies in the industry on some of the most significant and complex cases over the past decade. Our experience includes representation of operators in owner-operator disputes, franchise litigation, intellectual property litigation, hotel development-related litigation, bankruptcy litigation and class actions. We have litigated on behalf of hospitality clients in state and federal courts, domestic and international arbitrations, bankruptcy court, and in multiple appellate courts. Our litigators are fellows of the American College of Trial Lawyers and highly-ranked by Chambers for the work in Leisure and Hospitality.

We also regularly provide regulatory and other counseling to individuals and companies involved in the hospitality and gaming industries. We offer particular expertise in compliance with respect to privacy and data security, the Foreign Corrupt Practices Act, and the Bank Secrecy Act. Likewise, we counsel numerous clients regarding insurance coverage, employee benefits, and tax issues. We also have substantial experience leading internal investigations, advising clients before state gaming commissions, and representing clients in licensing and grand jury investigations.

In addition to our substantial litigation and investigations expertise, our real estate practice provides transactional counseling with respect to sale and refinancing of lodging properties. Our attorneys have extensive experience handling workouts and restructuring, leasing, acquisitions and dispositions, development and construction, debt finance and private equity, corporate and institutional real estate services and real estate securities. Jenner & Block has been listed among the leading firms for real estate in the Chambers USA Client Guide every year since 2004.

Representative Engagements

Owner-Operator Litigation

- *Miller Global Properties LLC v. Marriott International Inc., et al.*: Defended Marriott International against various tort and breach of contract claims involving the development of the 1,000-room JW Marriott San Antonio Hill Country Resort and Spa. After the project experienced cost overruns, the owner filed suit alleging, among other things, that Marriott provided fraudulent budget estimates before transferring development responsibility for the resort to the plaintiff. The owner sought \$200 million in damages. The Texas court granted summary judgment on the majority of the owner's tort claims, and two days before the start of the trial on the remaining counts, the owner voluntarily dismissed the case in order to appeal the earlier summary judgment rulings. In December 2013, the lower court's grant of summary judgment was affirmed by the Texas Court of Appeals. In May 2014, the Texas Supreme Court denied the owner's petition, thereby delivering Marriott a total victory in the case.
- *GHM (South Beach) LLC v. Setai Owners LLC et al.*: Represented GHM, a Singapore-based hotel management company, in litigation with the owner of the Setai Hotel in Miami, Florida. After the owner staged a midnight takeover, GHM contacted us to provide representation in connection with an International Chamber of Commerce (ICC) arbitration to establish their damages resulting from a hostile takeover as well as a state court action raising tort claims not subject to arbitration. Following the ICC arbitration, the panel denied all of the owner's claims and awarded GHM damages and costs in excess of \$10 million.
- *M Waikiki LLC v. Marriott Hotel Services, Inc.*: Represented Marriott in litigation over The Waikiki EDITION hotel in Hawaii. The owner of the hotel filed suit in New York state court alleging that Marriott defaulted on its obligations to manage the hotel and develop a chain of EDITION-brand hotels. The complaint sought monetary damages and a declaration that owner could terminate the management agreement for default. Several months after filing suit, the owner forcibly evicted Marriott from the hotel in a midnight raid. With days, Marriott obtained a TRO returning Marriott to possession of the property – the first of its kind issued in a US court. In response, owner filed for bankruptcy in Hawaii in order to stay the enforcement of the TRO. The owner claimed the right to reject the management agreement under bankruptcy law, and Marriott filed a claim for breach of the contract. After a four-day hearing

in bankruptcy court, the court estimated Marriott's claim at \$21 million, and the case settled shortly thereafter.

- *Rose Hall Resort, L.P. v. The Ritz-Carlton Company of Jamaica, Limited*: Represented Ritz-Carlton in successfully resisting claims by the owner of The Ritz-Carlton, Rose Hall, Jamaica, that Ritz-Carlton defaulted on its obligations to properly manage the hotel. In July 2009, the plaintiff filed a demand for arbitration under AAA ICDR rules seeking \$145 million in damages and a declaration that plaintiff was entitled to terminate for default its management agreement with Ritz-Carlton. In September 2009 the plaintiff purported to terminate the agreement, and sought injunctive relief in three separate courts to evict Ritz-Carlton from the hotel. We successfully had each injunctive relief request dismissed or stayed pending the outcome of the arbitration. In April 2011, following an eight-day trial, the arbitral tribunal issued its ruling finding in favor of Ritz-Carlton and awarding fees to Ritz-Carlton in the amount of \$2.75 million. All of the injunctive relief requests were subsequently dismissed.
- *RC/PB Inc. v. The Ritz-Carlton Hotel Company LLC et al.*: Representing Ritz-Carlton and Marriott in ongoing litigation brought by owner in Florida state court. The owner's complaint alleged breach of the hotel management agreement, breach of fiduciary duties, and fraud and misrepresentation. We successfully obtained summary judgment on the owner's tort claims, including its claims for breach of fiduciary duties, fraud, and misrepresentation.

Franchise Litigation

- *31525 W 12 Mile Rd MI LLC v. Marriott International, Inc.*: Represented Marriott in litigation in Michigan state court brought by owner of mortgage on Marriott Courtyard hotel. We successfully fought two separate efforts by the owner to obtain emergency injunctive relief that would have required the Company to maintain the hotel as a Courtyard by Marriott and barred Marriott from ending its franchise relationship. We then obtained an order granting Marriott's motion to dismiss with prejudice, which was not appealed.

Class Actions

- *McIntyre, et al. v. Marriott International, Inc., et al.*: Represented Marriott in a nation-wide class action complaint filed by purchasers of timeshare properties from Marriott. The complaint alleged that Marriott had violated the federal Real Estate Settlement Procedures Act of 1974, along with several common law causes of action, by failing to disclose the Marriott entities' retention of a portion of certain title insurance premiums. The federal District Court for the District of New Jersey dismissed the complaint on Marriott's motion and subsequently denied plaintiffs' motion for reconsideration as well as their motion for leave to amend the complaint.
- *Schittino v. Marriott International, Inc.*: Representing Marriott in a putative consumer class action concerning the sale of Kobe beef products at Marriott hotels throughout the United States. The putative class is alleging claims including breach of contract, fraud, and violation of Illinois' consumer fraud statute.

Gaming

In our gaming industry practice, we counsel individuals and companies involved in various aspects of the gaming industry in a wide array of forums. Our gaming practice includes representation in a wide array of litigation contexts, including bankruptcy, intellectual property, insurance coverage, and complex commercial litigation. We also represent clients before regulatory authorities, including the Illinois Gaming Board. Representative engagements include the following:

- Represented Harrah's Jazz Company and JCC Holding Co., the owners of the land-based "Harrah's" casino in downtown New Orleans, in their respective reorganization proceedings. Our efforts permitted completion of construction and the opening of the casino. Over five years, we successfully negotiated and confirmed plans of reorganization involving modified capital structures and renegotiated contracts with the State of Louisiana, the City of New Orleans and other key parties in interest. This representation involved numerous bankruptcy adversary proceedings, contested matters and state court litigation, including litigation with the City of New Orleans, the Louisiana Gaming Control Board and members of the state

legislature. The matters also involved several appeals from litigated matters, including appeals to the Fifth Circuit Court of Appeals and the Louisiana Supreme Court.

- Represented the trustee of Emerald Casino in federal bankruptcy court, including in an adversary proceeding brought against certain former directors and officers of Emerald Casino to recover more than \$500 million.
- Represented Legends Gaming, LLC in its Chapter 11 bankruptcy and exit financing, consisting of \$162 million first lien and \$75 million second lien financings, with a successful cram-down on the second lien lender class and preservation of equity ownership upon emergence.
- Represented WMS Gaming Inc., a manufacturer of slot machines, video lottery terminals and other gaming software, in insurance coverage litigation seeking coverage for business interruption losses stemming from Hurricane Katrina.
- Represented Bally Manufacturing Corporation in patent infringement litigation concerning software that determined the probability of certain payoffs from gaming machines.
- Represented GE Capital in New York and Nevada contract and fraud cases involving the purchase of rental payment streams and the residual value of leased gaming equipment.

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