

Chemical Industry Update - July/August 2019

August 12, 2019

by Troy M. Keller, Dave Townsend, and T. Augustine Lo

"I hope you still see fire inside of me."

Jason Isbell, Molotov

We looked for a more optimistic sentiment in this month's song lyric. In recent issues, we have focused on legal trends that have been tough on the industry—like product liability, ESG pressures and chemical regulatory. While it can be easy to be caught up in those negatives, we believe there is plenty of fire in the industry's belly.

For one, the shale oil revolution seems to be receiving the regulatory support it needs to continue to provide low-cost raw materials and energy to fuel manufacturing. Last month, the EPA finalized its strategy to repeal and replace the Obama administration's Clean Power Plan. And earlier this year, the President signed executive orders to make it easier to build oil and gas pipelines—and limit state ability to block them. The result? Even as new bans on single-use plastics emerge almost daily, major petrochemical construction are still being announced.

Another area of optimism is in technology policy trends. The Chemical Industry has heard for a long time how digitalization is going to change the industry. This McKinsey article from 2017 arguably kicked things off, and while many of the value premises are still on the come (no self-driving trucks anytime soon, unfortunately), using data to improve manufacturing efficiencies is real, and laws are evolving to deal with this reality. (See our article below on manufacturing process patents.)

Also, in terms of data's impact, the EU's primary chemical association, CEFIC, is said to be in discussions about the creation of a "Netflix of chemical data" that would allow regulators and companies to have access to studies and data on chemicals. Getting jurisdictions around the world to buy into something like this would indeed have value, simplifying, and lessening the costs, of doing product registrations in the plethora of jurisdictions that have added chemical regulation regimes in recent months and years. We should note that the impacts of broader tech policy trends, like data privacy and

Related People

- Troy M. Keller
- Dave Townsend
- T. Augustine Lo

Related Capabilities

- Energy & Natural Resources
- Corporate Governance & Compliance
- Mergers & Acquisitions

possible breakup of the big tech platforms, remain highly relevant to companies with international footprints, like many in this industry. We've been involved in some important local discussions on these issues.

As of the writing of this update, trade war dynamics have worsened, weighing heavily on industries that are at the level in the value chain where inputs and outputs cross borders multiple times before they leave the hands of industry players and head downstream to become consumer products. The silver lining here? It is harder to find one, but at least the trends are maturing. Industry has braced for the worst-case hard Brexit, and the steady escalations in the U.S.-China trade war are normalizing into a new reality. At least USMCA (NAFTA II) feels a step closer as USTR and House Democrats claim to be working on compromise language on the key open items, including data privacy and labor.

New Caselaw on Diagnostic Patents and What it Means for Chemical Process Patents

Can you patent a method for monitoring chemical components or reactions based on observations of reactants or products? Will such a patent stand up to third party challenges? Fair questions these days in view of recent Supreme Court rulings and USPTO examination guidelines. For the answers, we can take cues from the current state of subject matter eligibility law for diagnostic patents, an analog of chemical monitoring patents.

Categories of subject matter eligible for patent are set forth in 35 U.S.C. § 101 as “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” However, these categories are limited by judicial exceptions applied by the courts, which include natural laws, abstract ideas, and natural phenomenon. For example, claims that merely recite a generic use or observation of a natural law, abstract idea, or natural phenomenon are rejected as patent ineligible. These judicial exceptions present popular ways for third parties to challenge issued patents.

Recently, the Court of Appeals for the Federal Circuit, which oversees patent appeals in the United States, denied a petition for an *en banc* rehearing for a diagnostic patent. The denial included eight concurrences and dissents, each addressing the difficulty of following current Supreme Court guidance. Notably, nearly all of the concurrences and dissents requested clarification of subject matter eligibility guidelines from the Supreme Court or Congress. In a dissenting opinion, Judge Moore stated that for parties advocating patent eligibility for purely diagnostic technologies “[y]our only hope lies with the Supreme Court or Congress.”

The good news is members of Congress heard the call and are working on a solution. Senators Thom Tillis and Chris Coons have been working on a bipartisan bill to address uncertainty in subject matter eligibility. The language of the proposed legislation seeks to remove the “new” requirement from subject matter eligibility and specifically abrogates judicially created exceptions to subject matter eligibility. The legislation would pave the

way for patenting purely diagnostic technologies. In hearings that included the oft repeated theme that current subject matter eligibility guidelines are unworkable and against national interests, the proposed legislation received positive comments from the former director the USPTO and the former Chief Judge of the Federal Circuit. The bill may be presented for a vote as early as this fall and offers the cleanest break from current precedent.

Notwithstanding the Federal Circuit's pronouncement that purely diagnostic patents are not eligible for patent, all is not lost. In another dissenting opinion, Judge Newman noted that claims having diagnostic limitations that also include treatment steps are eligible for patenting. For example, claims directed testing for a specific genotype and then issuing a specific dosage of medication based on detecting the specific genotype have been upheld as patent eligible. Moving patent claims from the realm of purely diagnostic to treatment based on the diagnostic can provide a patentable avenue for applicants. In the immediate term, carefully crafting claims to avoid purely diagnosing or monitoring laws of nature or natural phenomena can provide patent eligible subject matter. So the simple answer is yes, you can patent a method for monitoring chemical components or reactions based on observations of reactants or products, in certain instances. And the future may hold some promise in view of Congress's current efforts.

For more information, contact Nathan Orme.

U.S. - India Trade Friction Impacts Chemicals

The United States recently revoked preferential status for imports of chemicals and many other products originating from India and Turkey. Effective in May (Turkey) and June (India), the Trump administration removed Turkey and India from the list of countries eligible for the Generalized System of Preferences ("GSP"). The removal of these countries from GSP means that many applicable tariff rates will increase from a preferential rate (Column 2) to the Most Favored Nation ("MFN") rate (Column 1) that generally applies to imports under the Harmonized Tariff Schedule of the United States ("HTSUS"). In response, India moved forward with long-planned tariffs against goods from the United States, which India previously proposed as retaliation for the U.S. Section 232 tariffs on global imports of steel and aluminum.

The GSP changes undoubtedly will affect many U.S. chemical companies as many chemicals classified under HTSUS Chapters 28 and 29 are duty-free under the GSP, but subject to tariffs under the MFN rate. Indian-origin imports into the United States were \$6.3 billion in 2018 under the GSP, more than any other GSP beneficiary, according to data published by the U.S. International Trade Commission. Turkish-origin imports into the United States were \$1.9 billion in 2018 under the GSP, the fifth largest among GSP beneficiaries. In taking the action, the Trump administration cited India's trade barriers and their detrimental effects on U.S. businesses. With respect to Turkey, the Trump administration cited Turkey's growth and higher level of economic development, which it found sufficient to revoke Turkey's GSP status.

For more information, contact [Dave Townsend](#) and [Augustine Lo](#).

Labor Policy Trends & Updates

The National Labor Relations Board has issued a series of precedent-shifting rulings so far in 2019, many of which are specifically overturning rulings under the Obama Board. In addition to the administrative rulings, the NLRB forecasted its intent to address certain key employer issues through the rulemaking process when it published its annual agenda in May 2019. Typically, the NLRB relies on adjudication in individual cases to enforce the National Labor Relations Act. Management and Union advocates criticize the unpredictability of this practice as the substantive law shifts with each change in administration. In the May 22 announcement, Republican Chairman John Ring noted, “The agenda reflects the Board majority’s strong interest in continued rulemaking. Addressing these important topics through rulemaking allows the Board to consider and issue guidance in a clear and more comprehensive manner.”

The NLRB’s published agenda included both “short-term actions,” which are generally expected to occur within the coming year, and “long-term actions,” which are not expected to be completed this year. One key short-term action involves the standards for access to an employer’s private property. The Obama-appointed NLRB created a loud outcry from employer advocates in its 2014’s Purple Communications decision allowing workers to use their employers’ email systems to discuss union business. It is this decision that the current NLRB seeks to roll back in its proposed rulemaking.

On the list of long-term actions is the standard for determining when two unrelated entities are joint employers. The policy is expected to have a significant impact on gig economy businesses, franchise business models and companies that rely on contractors.

In September of 2018, the NLRB issued its notice of proposed rulemaking, proposing to reverse the Browning Ferris Industries (BFI) decision issued in 2015. The NLRB received nearly 30,000 comments during the comment period. The BFI decision loosened the standard from “direct and immediate control” to “share or codetermine,” leading to joint employer findings that could be based solely on *indirect* or *reserved* control over employees – regardless of whether that control is ever exercised. In late 2017, the NLRB returned to the “direct and immediate control” standard in Hy-Brand Industrial Contractors Ltd., but then reversed Hy-Brand only a few months later due to possible ethical concerns related to the representation of one of the parties in BFI by the former law firm of a board member. Following this, the NLRB announced that it would engage in rulemaking to publish joint employer rules.

However, the BFI case was under appeal before the U.S. Court of Appeals for the District of Columbia Circuit when the NLRB announced its rulemaking intent. The D.C. Circuit ultimately ruled that the NLRB acted properly when it expanded its test for determining joint employment, but also said that courts are responsible for articulating the legal definition of “employer,” because the meaning of “employer” is defined by traditional principles of agency under common law. This means that the NLRB must

conform to the judiciary's definitions.

In short, based on the D.C. Circuit's ruling, the NLRB is permitted to apply its legal joint employer test in distinct situations, but it cannot fundamentally change the joint employer standard, whether by adjudication or rulemaking. Ultimately, unless the U.S. Supreme Court weighs in on the BFI case appeal, this issue will remain a subject of debate.

For more information, contact Rebecca J. Bernhard.

In Case You Missed It

California Privacy Law Update. A number of amendments to the California Consumer Privacy Act are under consideration during this year's legislative session that would significantly impact the treatment of data, customer loyalty programs and consumer request methods.

Trade Updates. Our trade team comments on and summarizes the state of play this summer on trade dynamics between the U.S. and China.

Delaware Law Updates. Delaware continues to promote the use of electronic signatures, making it clear that even transactional and M&A related documents are enforceable when delivered and signed electronically.

SEC Proposes Revisions to Business and Risk Factor Disclosures. The proposal would reduce the number of specific disclosure requirements and move to a more principles-based approach. Our eUpdate goes through some of the history and summarizes the significance of the proposed changes.

Notes from All Over

India Policy Update. Several policy proposals to encourage foreign investment are working their way through India's national budget discussions. This memo from Cyril Amarchand covers some highlights.

Chemical Industries Association Sends Message to New Prime Minister.

Remember when Brexit felt like the most disruptive event out there impacting global trade? Those were the good old days. That said, Brexit remains huge for the chemical industry. In a short press release, the UK's chemical association (Chemical Industries Association) indicated the continuing importance of a Brexit deal to the industry. We agree. It's relatively easy to move management and sales offices when conditions on the ground merit, but moving manufacturing facilities to avoid punitive taxes or tariffs is a different matter. Without a Brexit deal, manufacturers will bear the brunt of the impact.

New York Looks to Lead in Green. A few weeks ago, the State of New York passed into law the Climate Leadership and Community Protection Act that will require the state to have 100% renewable energy within 30 years.

Exxon Hit with Another Climate Change Lawsuit. Following the case filed by the New

York AG's office last year and Texas cases earlier this year alleging Exxon misled investors about the impacts of climate change on its business, a derivative suit was filed in New Jersey last week making similar claims.

Amazon hit with 1,000 Proposition 65 Notices. We have commented in prior issues about the amendments to Proposition 65 and how they facilitate claims against the platforms and the upstream providers. Amazon has been hit hard as a result.

Corporate and M&A

Blue Bell Ice Cream and Board Oversight

Derivative suits claiming a failure of a board to maintain proper oversight are, at their core, about whether a board has overseen the implementation of sufficient internal controls and compliance measures. These claims are usually hard to make stick. But, in this decision, authored by Chief Justice Strine, the Delaware Supreme Court found enough in the pleadings to overturn a dismissal at the Chancery Court level and send it to trial.

The claims related to the outbreak of listeria in Blue Bell Ice Cream's products, which the Department of Agriculture traced to all three of the company's plants. Three customers died between 2010 and 2015, and Blue Bell's operations were materially disrupted. The Chief Justice noted that the plaintiff had alleged "particularized facts that support a reasonable inference that the Blue Bell board failed to implement any system to monitor Blue Bell's food safety performance or compliance." The allegations claimed that the Blue Bell board had no committee or particular process for food safety.

In the end, the case is a good reminder of the need for boards to *be able to show* how they are overseeing an effective compliance program. One key takeaway is the importance of the record. The board minutes and materials are the record looked at in these cases to find evidence as to whether the Board did its duty or not. Cases like this reinforce the importance of including sufficient information about the Board's deliberations to provide support in the event of an allegation that the Board hasn't fulfilled its duty of care.

For more information, contact Troy Keller.

FTC Blocks Merger of Hydrogen Peroxide Producers

Antitrust has been much in the news of late, with big tech getting most of the headlines. In the background, the FTC continues to actively review industry transactions. Last year, it blocked Tronox' proposed acquisition Cristal, leading to a settlement earlier this year.

Last week, the FTC announced it was taking action to block Evonik Industries AG's proposed \$625 million acquisition of PeroxyChem Holding Company. For most transactions in the Chemical industry, regulators tend to take the view that the relevant market is national or even global. Here, the FTC took the position that the market for the

relevant products was regional (Pacific Northwest) and argues that the merger would leave just one other Hydrogen Peroxide manufacturer in that region. Interestingly, the FTC also pointed to a “history of strong interdependent behavior” among Hydrogen Peroxide suppliers and argued that the market was “vulnerable to coordination.”

Evonik has said they will fight the decision in court.

For more information, contact [Troy Keller](#).