

LITIGATION FORECAST 2013

WHAT CORPORATE COUNSEL NEED TO KNOW FOR THE COMING YEAR



LITIGATION FORECAST 2013

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“Escalating enforcement activity is trending toward higher fines, prison sentences, and civil recoveries, as well as competitive limitations on patent rights and remedies.”

—JOHN GIBSON



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“Cases asserting the theft of trade secrets will continue to grow, especially cases with an international dimension, considering the global competition for new technology.”

—MIKE SONGER

Government Contracts 6

“In a tough economy, the loss of one award could make or break a contractor. If filing a challenge gives them another shot at getting the contract, they will do it.”

—AMY O’SULLIVAN



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“FCPA enforcement is a stated priority for this Justice Department. We are going to continue to see the government bringing these cases regardless of prior setbacks.”

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“Because the requirements of the FLSA can be hypertechnical, hard to implement, and harder to monitor, employers are vulnerable to wage-and-hour claims.”

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“The courts aren’t just rubber-stamping settlements, but are instead asking for more detail about what, exactly, is the benefit to the class.”

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“Courts and Congress have imposed significant restrictions on infringement remedies, but the number of suits—particularly by NPEs—continues to rise.”

—MARK SUPKO



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“Plaintiffs’ counsel continue to seek ways to expand tort lawsuits using strategies from asbestos and Big Tobacco litigation. Trial attorneys must anticipate these trends.”

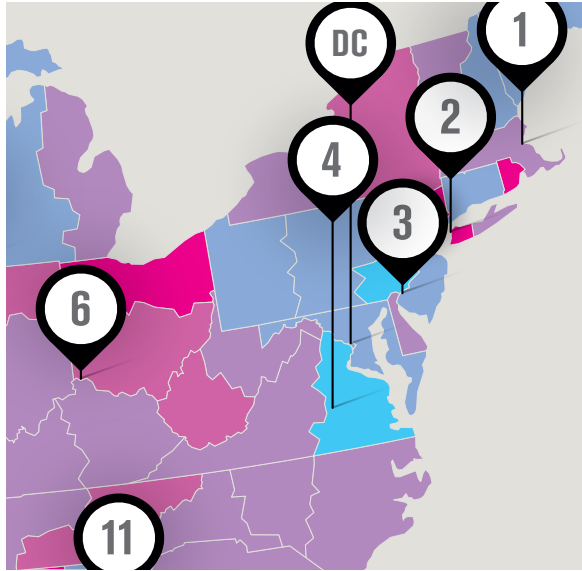
—KEVIN MAYER



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“Before embracing the cloud, companies need to consider negotiating guarantees with the provider about preserving and producing documents.”

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Which districts move most quickly from filing to disposition? Which are the slowest? Here's an annotated look at each district's record, averaged over the last three years.

Litigation: A Look Ahead

For corporate legal departments today, success demands a more proactive approach than hiring outside counsel and managing costs. In-house lawyers need to know more than ever to succeed, both about their clients and about the



legal landscape. At the same time, that landscape—particularly the U.S. litigation landscape—is becoming increasingly complex. Because everything from protecting innovation and winning contracts to growing through acquisitions and avoiding compliance penalties may

be at stake, Crowell & Moring is increasingly asked to provide accessible guidance on the cutting-edge trends in litigation.

This is no surprise to our long-standing clients. Crowell & Moring was founded more than three decades ago by attorneys who left traditional practices to pursue practical approaches to helping businesses succeed. Our record of bringing innovation to the legal profession is a source of great pride.

So is our reputation as a litigation and trial firm. That reputation is bolstered by our substantial experience across practice specialties, such as antitrust, intellectual property, white collar, and government contracts, as well as our industry-specific focus in areas such as technology, manufacturing, health care, and financial services. Two-thirds of our lawyers litigate before federal and state trial and appellate courts and before governmental agencies.

This publication is designed to bring this broad range of experience together to identify and provide guidance on critical litigation issues. This most definitely is not an academic treatise. Rather, it is designed to provide concise, forward-looking perspectives on the trends that will impact corporate legal departments in 2013 and beyond. For the general counsel or head of litigation—or for a broad range of in-house lawyers and outside counsel who seek to bring more value to their clients—this publication offers a practical look at the most important trends, including key cases to watch in the coming year and emerging challenges from the plaintiffs' bar, trade secret thieves, government regulators, and other quarters.

We welcome your feedback on this Litigation Forecast to improve next year's publication. In the end, we see this publication as a starting point for further exploration. Of course, Crowell & Moring holds webinars and publishes alerts on developments during the year, but an ongoing dialogue with knowledgeable and practical counsel is critical to success. We look forward to hearing from you.

—KENT GARDINER
Chairman, Crowell & Moring

LITIGATION FORECAST 2013

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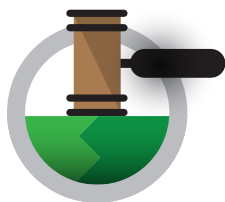
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Antitrust

Antitrust enforcement activity is on the rise.

And civil litigation is escalating at the intersection of competition law and IP rights.



After the 2008 U.S. presidential election, many observers expected to see an immediate spike in antitrust enforcement activity and a weakening of patent rights in an attempt to boost competition. But neither expected trend materialized—until 2012.

“The prophesied reinvigorated antitrust enforcement is now here. Escalating government and private enforcement activity is trending toward higher fines, prison sentences, and civil recoveries, as well as competitive limitations on patent rights and remedies,” says John Gibson, a partner in Crowell & Moring’s Antitrust Group.

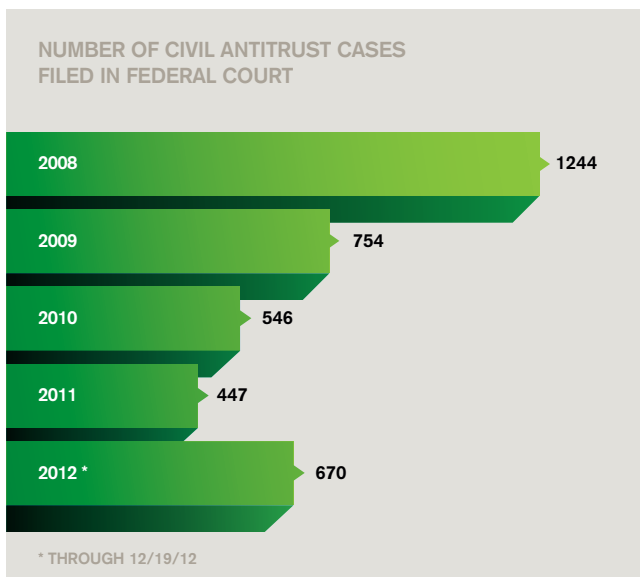
The past year has seen a number of prominent examples of that increased activity. Most prominently, the DOJ objected to AT&T’s proposed \$39 billion acquisition of T-Mobile USA.* In a criminal cartel case involving alleged price fixing among LCD manufacturers, several companies agreed to a \$571 million fine in a plea agreement. One defendant, AU Optronics, went to trial and lost; it was fined \$500 million, and two of its executives were sentenced to prison. In a civil LCD cartel suit, Motorola obtained a \$150 million settlement from Epson.* Finally, in payment-card litigation relating to credit card interchange fees, Visa, MasterCard, and their member banks entered into a \$7.25 billion settlement of proposed class action suits. And the list goes on.

“In this environment, it’s more important than ever to have a robust antitrust prevention training program and conduct frequent audits of ‘hot spots,’ such as sales and expatriates,” says Gibson. And companies victimized by alleged cartels should seek out experienced counsel to recover their losses.

Competitive Limitations on Patent Rights

On another front, antitrust litigation is moving into uncharted territory. “The law is still developing at the intersection of IP and antitrust—it’s the new frontier, and there are a lot of questions,” says Gibson. And a lot of the answers will be hammered out in litigation.

In 2012, Gibson says, the DOJ and the FTC established policy positions favoring, in essence, compulsory licensing of standard-essential patents (SEPs) on reasonable and nondiscriminatory (RAND) terms. Their rationale, much like that of the European Commission, is that during the technology standard-setting process, when holders of SEPs make a RAND commitment, they are inherently making both a commitment to license and a commitment to license on RAND terms. The FTC’s settlement with Google in January



↑ Vigorous enforcement is increasing the number of antitrust cases in the courts—and many of those cases are leading to higher fines and civil recoveries.

The growing focus on antitrust activity is reflected in the sentences given to convicted executives, with the average sentence now being more than three times what it was in the 1980s.

regarding enforcement of SEPs crystallized those positions. This heightens the tension between competition law and patent rights, which otherwise enable patent holders to exclude others from practicing their inventions altogether.

It's not clear in practice how RAND terms would be determined under compulsory licensing. "No cases have gone the distance to clarify which methodology should be used in every case," says Gibson. A federal judge in Washington State may soon issue an opinion on the subject; he heard evidence in a court trial between Microsoft and Motorola in November. There is also the question of who bears the burden of proving RAND terms. "Must the patent owner prove the terms it offered are reasonable? Or must the infringer prove they aren't?" asks Gibson. "There is no answer yet." With so much in flux, companies can look for opportunities to develop the law by litigating test cases that are most favorable to them.

At the same time, Gibson says, expect more antitrust scrutiny of standard-setting organizations (SSOs) dealing with emerging technologies, given the high stakes often involved. This is already being seen in the mobile space. In *Corr Wireless v. AT&T**, for example, SSO member companies had been sued for their work on technology standards relating to 4G-LTE mobile communications. The SSO members won motions to dismiss the antitrust case this past August.

Going forward, companies involved with SSOs should expect to run into such challenges more frequently. With that in mind, says Gibson, "be ready to defend your company's standard-setting participation not only by demonstrating strict compliance with the rules, but also by identifying ways in which its conduct promotes innovation and competition."

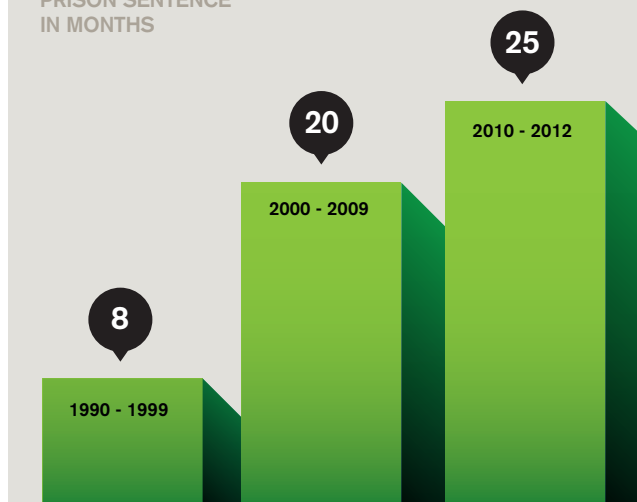
KEY CASES

TRUEPOSITION V. ERICSSON SSO members and the SSO itself are being sued in private litigation over the standard-setting process for caller location technology.

APPLE V. SAMSUNG After Apple won a \$1 billion patent-infringement jury verdict, the trial judge refused to permanently enjoin Samsung from selling its infringing products, ruling that Apple failed to prove the features copied played a decisive role in a consumer's choice of a phone.

FTC V. PHOEBE PUTNEY The Supreme Court is considering whether the "state action doctrine" applies to a merger of Georgia health care organizations. A decision in favor of Phoebe could broaden antitrust immunity in health care and other regulated industries.

AVERAGE PRISON SENTENCE IN MONTHS



MFNs Out of Favor

Most-favored nation (MFN) clauses—in which a company agrees to give a customer the best terms it makes available to any other customer—are very common and have long been regarded as fostering competition. But MFNs "came into the enforcement agencies' crosshairs this year," notes John Gibson. "The agencies have declared that it's time to reexamine the effect of MFNs in various industries." In September 2012, a DOJ/FTC conference called for more antitrust scrutiny of such agreements; the agencies' view is that when employed by companies with market power, MFNs can effectively prevent scrappy competitors from selling below the dominant companies' prices.

The agencies didn't specify which industries, but several actions over the past months provide some clues. For example, DOJ civil actions have alleged that the use of MFNs in the health insurance and e-book industries violated Section 1 of the Sherman Act. "The idea is that companies could use e-books, for example, to set prices and hurt consumers," says Gibson. "There has also been private enforcement and class-action litigation alleging that use of MFNs by online travel agencies operated to increase the price of online hotel room rentals." These developments are still playing out. But, he says, "companies that utilize MFN agreements need to be aware of the increased focus."

* *Crowell & Moring representation*

Government Contracts

With tight budgets and a shortage of resources, government agencies are looking for ways to save and recover money from contractors.

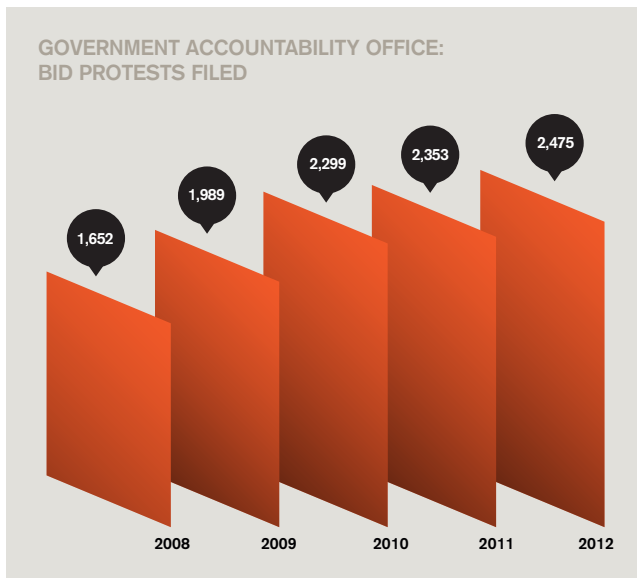


Bid protests against government contract awards have been increasing for nearly a decade, and an uncertain economy has only accelerated those increases. “The spike in protests that we’ve seen in the last several years seems to be continuing,” says Amy O’Sullivan, a partner in Crowell & Moring’s Government Contracts Group.

“In a tough economy, the loss of one award could make or break a contractor. If filing a challenge gives them another shot at getting the contract, they will do it,” O’Sullivan says. “So protests have come to be an expected part of the government procurement process.”

Faced with budget restrictions and high employee turnover, government agencies often have difficulty keeping up with the rising tide, which has prompted changes in their processes. For example, agencies have been taking quick corrective action in response to bid protests, rather than incurring the expense of taking a case through litigation or defending clear errors in the procurement process. Similarly, the Defense Contract Management Agency has been accelerating final decisions in cases where it is seeking to recover money from contractors. “Because of limited resources and audit backlogs, contracting officers are worried that the statute of limitations will run out on these issues before they can complete the normal course of audit and review,” says Chris Haile, a partner in Crowell & Moring’s Government Contracts Group. “Contracting officers are concerned that they will lose their right to recover funds. So we are seeing a blizzard of final decisions issued in otherwise routine negotiations.”

Meanwhile, ongoing government austerity measures are likely to lead to further contract terminations and reductions in scope on existing contracts, which in turn will drive an increase in disputes. “As the government looks for ways to cut expenditures, contractors may feel the impact not just through reductions in new procurement but also on contracts already awarded, leading to a backlash of litigation,” says Haile.



↑ An uncertain economy has driven steady increases in the number of bid protests being filed by government contractors—and agencies are adopting new strategies to keep up.

Under the Microscope

Government contractors are also coming under more scrutiny from the Department of Justice. Since 2009, the DOJ has recovered \$1.7 billion in government procurement fraud cases alone. In FY 2012, it secured a record \$4.9 billion in settlements and judgments in civil fraud cases overall. Last year also saw the largest False Claims Act settlement ever obtained under a General Services Administration contract—the recovery of \$200 million from Oracle Corp. and Oracle USA.

Last year, the DOJ secured nearly \$5 billion in FCA settlements and judgments, the largest annual amount ever. The \$14.9 billion recovered over the past five years represents more than 40 percent of the total recovered since 1987.

Against that background, government enforcement and recovery actions are expected to see “exponential increases in 2013,” with much of that continuing to come from FCA actions, says Robert Rhoad, a partner in Crowell & Moring’s Government Contracts and White Collar groups. Increased whistleblower incentives are likely to play a big role in that growth. In FY 2012, whistleblower cases accounted for a record \$3.3 billion of the \$4.9 billion recovered by the DOJ.

The growth in enforcement actions will also be driven by increased spending in a number of areas—and the associated opportunities for fraud that creates. “We are likely to see more cases in the home mortgage, school loans, and financial services fields,” Rhoad says. But health care will continue to be the area of greatest activity, he adds, with an aging population driving increased Medicare spending over the coming decade, and economic uncertainty and the Affordable Care Act driving higher Medicaid spending.

Finally, the focus on weeding out fraud and the reality of tight agency budgets seem to be with us for the foreseeable future. With high-profile debates on the federal budget and debt, spending and waste will remain a top-of-mind issue for the White House, Congress, agencies, and the public—and the resulting tensions will continue to make protests and litigation a familiar part of the government contracts landscape.

KEY CASES

CR ASSOCIATES V. U.S.* CR Associates filed multiple rounds of protests of the award of a contract to Spectrum Healthcare Resources to build health clinics for the military. The Court of Federal Claims ruled against CR Associates, expanding the court’s timeliness rules and saying it had waited too long to raise its lead challenges; in August 2012, the U.S. Court of Appeals turned down the company’s effort to revive the protest.

U.S. EX REL. WALL V. CIRCLE C CONSTR. The Sixth Circuit affirmed a decision imposing FCA liability when a prime contractor submitted inaccurate or false payroll certifications that did not properly describe work done by subcontractors and that contained hourly wages for subcontractor employees that did not meet federal guidelines for prevailing wages under Davis-Bacon, underscoring the fact that failure to comply with minimum wage rate requirements may have significant adverse consequences.

DOJ FRAUD SETTLEMENTS AND JUDGMENTS
2008-2012 (IN \$BILLIONS)



Improving the Protest Process?

In November 2012, the Government Accountability Office asked Congress to approve a filing fee for government contract bid protests, the first such fee to be proposed. This flat fee is intended to fund an online docket system designed to help the GAO handle the growing number of protests coming into the office. Currently, the GAO staff manually processes about 16,000 protest-related email messages a year—a workload that is putting a strain on the agency, which has the lowest number of employees it has had in 75 years.

The proposed fee would be a modest \$240. The GAO does not anticipate that this amount will significantly reduce the volume of bid protests, even though the majority of protest filings are made by small businesses. Instead, the agency expects that the fee and the system it would fund will help improve the process. Currently, only redacted versions of the GAO bid protest decisions are available to review online from GAO. “GAO hopes that the proposed docketing system will make the protest process more transparent by allowing public access to additional protest-related filings,” says Amy O’Sullivan. But there may be a limit to this approach’s effectiveness. “Given the protective orders in place,” she says, “only redacted, publicly releasable filings would be available for general online access.”

* Crowell & Moring representation

Labor and Employment

Government action and advancing technology are creating greater complexity—and new challenges—for employers.



Social media has found its way into all aspects of life, including business and employer-employee relations. Looking ahead, social media is likely to be a focal point in a significant amount of employment litigation.

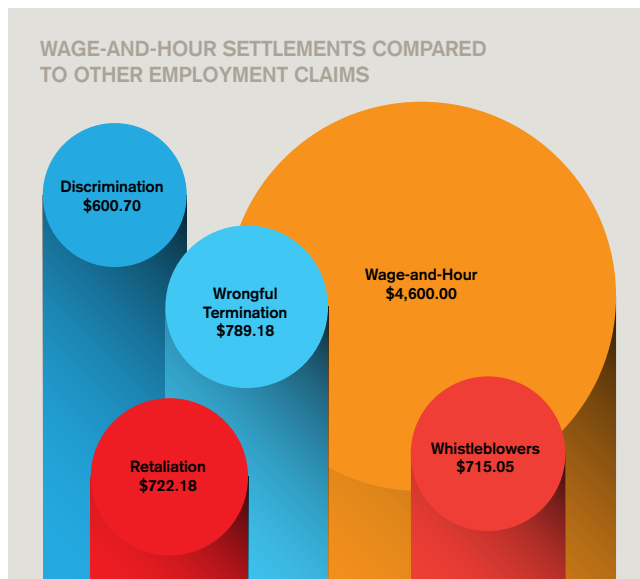
One sign of this increasing interest: the National Labor Relations Board has been paying close attention to the issue of employers' control over employee social media usage as a means for raising workplace concerns. "Recently, the NLRB issued a decision in the *Costco Wholesale Corp.* ruling that the company's policy prohibiting employees from posting statements that could damage the company was overly broad and could be reasonably interpreted to chill employees' right to engage in concerted activity under the National Labor Relations Act," says Trina Fairley-Barlow, a partner at Crowell & Moring. "Although the NLRB decided that such language invalidated the policy, it didn't give specific guidance on what language would be enforceable. There is currently no clear road map for parsing unlawful and lawful social media policies."

Meanwhile, several recent cases have confirmed that social media content is discoverable if it is relevant in employment litigation cases—regardless of whether a party has "locked" the information or kept it private. "That can include information that the company uses to promote or market its goods and services, as well as information that its managers or other employees put on a social media site, not just official company communications," says Fairley-Barlow. "That means that in evaluating the merits of cases, employers will need to consider whether there is evidence on social media sites that will either help or hurt their cases."

Wage-Hour Class Actions: No End in Sight

Wage-and-hour litigation continues to be the fastest-growing area of employment litigation. According to a 2011 NERA Economic Consulting study, employers paid \$5.8 million, on average, to settle a wage-and-hour case. There is some evidence that such settlement amounts have declined somewhat in recent years, but the average employer liability in wage-and-hour cases continues to far exceed liability in other employment cases.

There is every reason to believe that wage-and-hour litigation will continue and even outpace most other forms of employment litigation. Some of this will be due to uncertainty: in misclassification cases, the question of whether an employee is an exempt or non-exempt employee requires a detailed, qualitative analysis, and the answer is often not straightforward. In addition, technology and decentralized business operations



↑ The number of wage-and-hour cases is increasing—and the awards involved are, on average, dramatically higher than awards in other types of employment litigation.

The EEOC is filing fewer lawsuits—a shift in strategy designed to focus its resources on a smaller number of high-impact cases.

have made monitoring employee work time more difficult than ever, making employers more vulnerable to overtime and “off-the-clock” claims. “A key challenge employers face in those cases is how to handle the problem of the eager, non-exempt employee who performs work functions after hours remotely,” says Tom Gies, a partner at Crowell & Moring. “While strong workplace policies and periodic audits are part of the solution, they unfortunately are not a panacea.”

The EEOC’s Tighter Focus

From 2011 to 2012, the number of enforcement actions filed by the Equal Employment Opportunity Commission decreased dramatically—signaling an apparent shift in strategy. The EEOC has confirmed that it is now focusing on “quality, not quantity.” Rather than pursue enforcement in numerous cases, it will tend to look for cases that can address systemic discrimination and have a broader impact. Although this change means that companies will face fewer enforcement actions, it also means that the EEOC will have more resources to put into those that it does pursue.

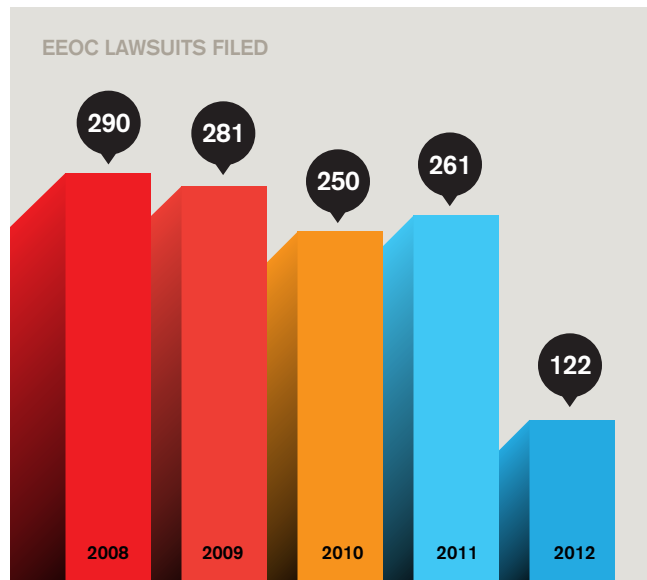
Fairley-Barlow points out that companies may be able to adjust their strategies to match the new approach. “In some cases,” she says, “companies might want to be more aggressive at the investigative stage to convince the EEOC that the issue is not the type of claim the agency should pursue, either because the facts are not good or because the law is against them.” Kris Meade, co-chair of Crowell & Moring’s Labor and Employment Group, adds that “employers should also proactively assess whether they are vulnerable to claims of systemic discrimination by conducting privileged statistical analyses of personnel actions and compensation systems.”

KEY CASES

RODRIGUEZ V. BRINK’S* The L.A. Superior Court turned down a statewide certification motion to compensate more than 3,500 hourly employees for time spent on the premises prior to their scheduled start time, finding a predominance of individual over common issues.

LANGER V. DEWOLFF BOBERG & ASSOCIATES* In a trial in federal court in Dallas, a jury decided against plaintiffs in a collective action filed by a class of management consultants who claimed their position was misclassified as exempt from the overtime pay requirements of the FLSA.

CHRISTOPHER V. SMITHKLINE BEECHAM In June 2012, the Supreme Court ruled that two pharmaceutical sales representatives were “outside salesmen,” and thus exempt from federal law requiring overtime wages.



Whistleblowers Get More Protection

A federal court ruling has opened the door for a growing number of whistleblower retaliation claims. The Dodd-Frank Act, for example, increased the time an employee has to file a complaint with the Department of Labor, guarantees the plaintiff the right to a jury trial, makes mandatory arbitration provisions on retaliation claims unenforceable, and extends the deadline for filing claims in federal court. “The statute of limitations went from 180 days to six years,” says Trina Fairley-Barlow. “The longer statute of limitations alone will likely result in more claims.”

Traditionally, whistleblowers had to go through a fairly elaborate process to successfully file a retaliation claim—taking their case to the Labor Department, exhausting administrative remedies, etc. As a result, whistleblower cases under Dodd-Frank have often been dismissed because the whistleblower didn’t follow the proper process. But in 2012, a U.S. District Court in Connecticut refused a motion to dismiss in *Kramer v. Trans-Lux*, essentially saying that whistleblowers did not have to follow that narrow procedure. “For companies, that means that if a plaintiff files suit, disposing of the case on a motion to dismiss will likely be more difficult, which means that companies may find themselves spending more time and resources defending these cases,” says Fairley-Barlow.

* Crowell & Moring representation

Patents

A series of decisions and reforms has been raising the bar for patent owners seeking recoveries on claims—but NPEs are alive and well.



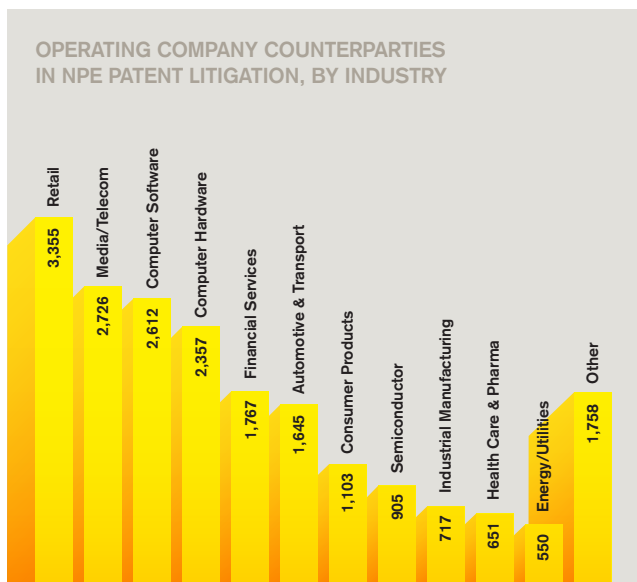
Recent court decisions and legislative action have offered corporations hope of significant relief from the flood of patent suits filed by nonpracticing entities (NPEs). The early returns, however, suggest that these measures have done little to deter the proliferation of the NPE business model.

In recent years, the courts have imposed significant restrictions on the scope of patent infringement remedies. For example, permanent injunctions are no longer granted as a matter of course and instead are generally only available to patent owners that actually compete in the market for patented goods. Likewise, damages can no longer be awarded based on the overall value of a product unless the patented feature is the basis for consumer demand. Still further, the standard for proving willful infringement has been raised, making it much more difficult to secure treble damages. “The pendulum has clearly been swinging away from patent owners in terms of the relief that’s available to remedy infringements,” says Mark Supko, chair of Crowell & Moring’s Intellectual Property Group.

Congress also has taken action, most notably with the recently enacted America Invents Act. While the AIA legislation did not go nearly as far as many had hoped, it did implement significant patent enforcement reforms, such as enhanced procedures for bringing administrative challenges to granted patents as an alternative to litigation. The AIA also made it far more difficult for a patent owner to file multidendant infringement cases—a tactic that NPEs often used in an attempt to more efficiently extract settlements from a large pool of often unrelated targets.

These various judicial and legislative reforms would seem to work against NPEs. “In practice,” Supko says, “NPEs appear to be undaunted, and the NPE business model continues to proliferate at a rapid rate.” The PatentFreedom organization recently identified nearly 650 NPEs, and the number of patent cases involving NPEs has more than doubled since 2011. “Clearly, NPEs still find it worthwhile to obtain patents and pursue infringement claims, and there is nothing on the horizon that seems likely to change that,” he adds.

“In this environment,” Supko continues, “we’re seeing more companies faced with patent-infringement claims resorting to post-grant review procedures at the Patent Office, particularly when faced with NPE claims that often seek to extend a patent well beyond its original focus.” If such a procedure is initiated relatively early in a litigation, a court may be willing to stay the case pending a final decision by the Patent Office, which could mean avoiding litigation costs entirely if the challenged patent is invalidated. Many companies are choosing to pursue *ex parte* reexaminations. These are relatively low-cost and carry little risk in terms of the



While headlines often focus on high-tech patent disputes, NPEs are actually targeting companies across a range of industries, including retail, media, and consumer products.

Many observers have hoped that recent court actions and legislation would slow the flood of NPE-driven litigation—but the rising number of NPE-related cases suggests otherwise.

challenger's ability to later assert prior art defenses in litigation, but the *ex parte* nature of the proceeding gives the patent owner an advantage. And, says Supko, "the statistics show that in a majority of *ex parte* reexaminations, the claims of the patent are either invalidated or have to be significantly amended. However, claims that survive the process may be stronger."

With the advent of the AIA, companies can also take advantage of a new *inter partes* review procedure (essentially a beefed-up version of the former *inter partes* reexamination). "This is a more litigation-like procedure than reexamination, and therefore is generally more expensive, but it offers a more level playing field because the challenger participates in the proceeding, which is supposed to be completed within one year," says Supko. However, there is risk involved. If the challenge is unsuccessful, the challenger will be prevented from asserting in litigation any prior art defense that was or could have been asserted before the Patent Office.

Overall, the "swing of the pendulum" means that organizations on both sides should take a step back and look at their options. "Patent owners will want to be more judicious in asserting patents and look more closely at the potential recovery to see if it justifies the risk and disruption of litigation," says Supko. "On the defense side, accused infringers can be more aggressive because the risks are significantly lower, especially when facing an NPE, though gains may be offset somewhat by the rising cost of litigation." In any event, as the perseverance of NPEs shows, the challenges presented by patent-infringement litigation are not going to abate any time soon.

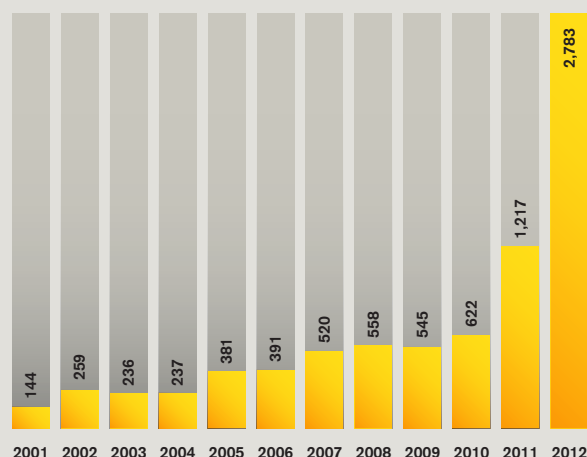
KEY CASES

FTC V. WATSON PHARMACEUTICALS The Supreme Court is reviewing the legality of "reverse payment" settlements, in which an incumbent firm agrees to pay a potential competitor to stay out of the market in connection with settlement of a patent infringement suit.

NINESTAR V. ITC The Supreme Court is expected to address the issue of "international exhaustion," which deals with whether the authorized sale of a patented item outside the U.S. terminates all patent rights to that item, so that a subsequent resale in the U.S. is not actionable as an infringement.

CLS BANK V. ALICE CORP. In early 2013, the Federal Circuit will take up the question of whether Alice Corp.'s computerized trading platform is patent-eligible. The case is expected to clear up much of the uncertainty surrounding the patenting of software.

PATENT LAWSUITS INVOLVING NPES



Inequitable Conduct: Tougher Standards

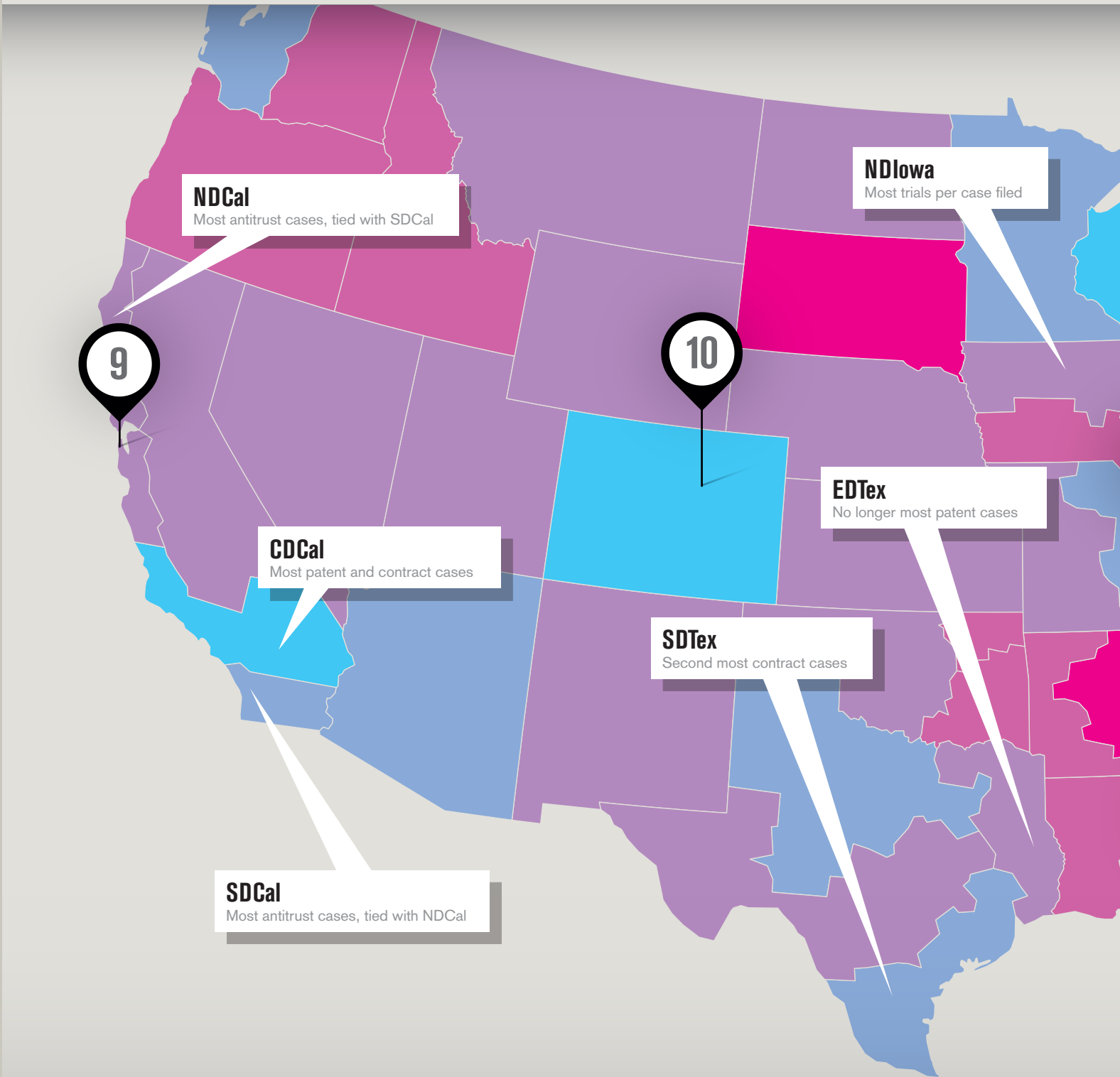
Although the legal pendulum may be swinging in favor of patent infringement defendants, there is at least one countervailing trend—increasing limitations on the inequitable conduct defense.

Not long ago, inequitable conduct was pled almost as a matter of course in patent litigation, with the defendant charging that the inventors or their attorneys had purposely withheld important information from the Patent Office during prosecution of the patent. But that began to change in 2009 with *Exergen v. Wal-Mart*, which imposed stringent pleading requirements for inequitable conduct claims. According to Mark Supko, "there has been a series of Federal Circuit decisions tightening the standards not only for pleading inequitable conduct, but also for actually proving it." These cases include those in which the Federal Circuit said the defense required proof that the patent applicant both knew of material information and deliberately decided to withhold it.

"The type of smoking-gun evidence the courts are demanding is rarely found," says Supko. "It's gotten much more difficult to get in the door with an inequitable conduct defense—and once in the door, it requires substantial effort and strong supporting evidence to prevail."

* *Crowell & Moring representation*

JURISDICTIONAL ANALYSIS



DISTRICT COURTS

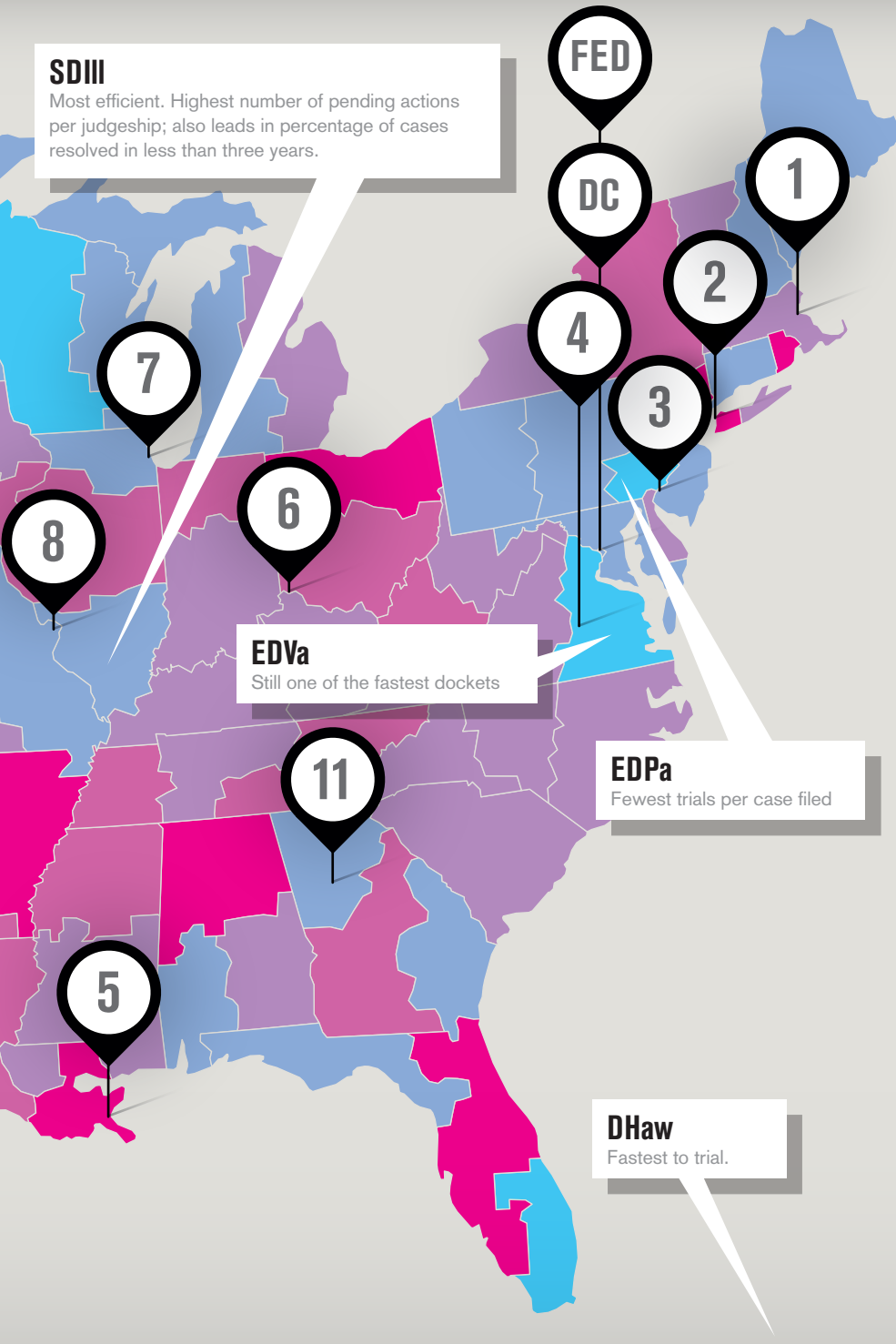
Average No. of Months from Filing to Disposition



NON-CONTINENTAL STATES AND PROVINCES
NOT TO SCALE



TIME TO CASE DISPOSITION ANALYSIS SHOWS WHICH COURTS ARE THE REAL “ROCKET DOCKETS”



GUAM

PUERTO RICO

ALASKA

HAWAII

RATIO OF TERMINATIONS TO TRIAL

Shows how often cases are resolved by trial versus another form of termination.

ALL DISTRICT COURTS 29.3

HIGH NUMBER OF TERMINATIONS TO TRIALS (TRIAL LESS LIKELY)

EDPa.....	169.6
EDCal.....	76.2
SDNY.....	68.7
DMinn.....	53.5
MDFla.....	48.5
CDCal.....	48.5
SDCal.....	46.1

LOW NUMBER OF TERMINATIONS TO TRIALS (TRIAL MORE LIKELY)

NDIowa.....	7.1
DVI.....	7.8
WDVa.....	7.8
DMont.....	8.6

UNITED STATES COURTS OF APPEALS

CIRCUITS-COURT LOCATIONS (CORRESPONDS TO NUMBERS ON MAP)	MEDIAN TIME FROM NOTICE OF APPEAL TO DISPOSITION	SUPREME COURT REVERSAL RECORD
1ST-BOSTON	11.6 months	1 OF 2
2ND-NEW YORK	12.1 months	2 OF 2
3RD-PHILADELPHIA	9.2 months	4 OF 7
4TH-RICHMOND	7.9 months	0 OF 2
5TH-NEW ORLEANS	9.8 months	0 OF 3
6TH-CINCINNATI	15.5 months	5 OF 5
7TH-CHICAGO	9.4 months	2 OF 3
8TH-ST. LOUIS	6.7 months	N/A
9TH-SAN FRANCISCO	16.8 months	17 OF 25
10TH-DENVER	9 months	2 OF 4
11TH-ATLANTA	8.3 months	3 OF 4
DC-WASHINGTON	10.8 months	1 OF 4
FED-WASHINGTON	9.9 months	2 OF 3

Torts and Environmental

Companies face an evolving set of litigation risks from environmentalists and the plaintiffs' bar.



In the United States, environmental groups have been fighting a long battle against fossil fuels. Over the years, their efforts have expanded from coal to oil and, now, natural gas—and these efforts continue to be a major source of litigation.

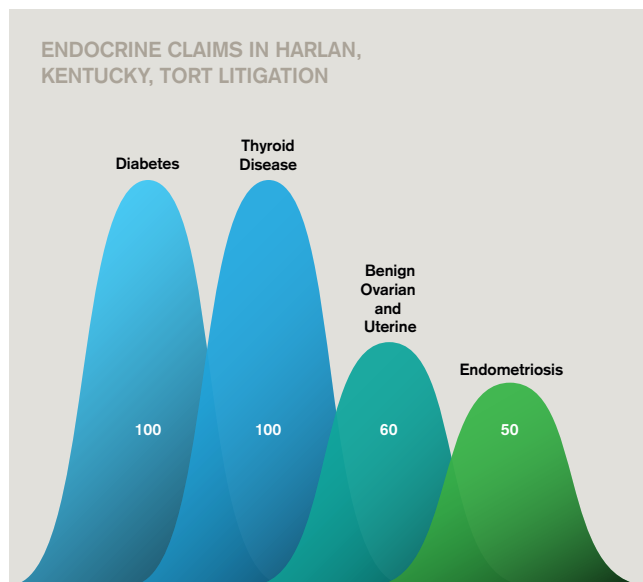
For many environmental groups, hydraulic fracturing in natural gas extraction in states such as Pennsylvania and New York has become a key target, says Tim McCrum, a partner in Crowell & Moring's Environment, Energy & Resources Group. For example, a 2009 settlement between the Sierra Club and the U.S. Forest Service resulted in a *de facto* drilling ban on National Forest lands in four western Pennsylvania counties. The Pennsylvania Independent Oil and Gas Association and others obtained a preliminary injunction against that agreement; further appeals followed with the U.S. Court of Appeals for the Third Circuit affirming the preliminary injunction, and in September 2012, the U.S. District Court for the Western District of Pennsylvania issued a final judgment on the merits, vacating the original settlement.* The case is now being appealed once again by the Sierra Club—a move that “indicates a level of perseverance on the part of environmental groups on the issue,” says McCrum.

Environmentalists are also focusing on metals mining in the western U.S., where foreign investment—attracted by mineral resources and a relatively stable U.S. legal and political environment—is driving increased mining activity. Environmentalists' level of interest, says McCrum, can be seen in the Pebble Project—a proposed multibillion-dollar mine in Alaska backed by companies from the U.K. and Canada. “The project is attracting a lot of environmental opposition before they've even applied for permits,” he says. “The EPA has been asked to heavily scrutinize the project at this early stage, which is an unusual move.”

Torts: The Endless Search for New Ground

In the torts arena, plaintiffs are also adjusting their focus. “We're seeing a drop-off in plaintiff filings in their traditional jurisdictions in ‘classic’ toxic and environmental litigation,” says Kevin Mayer, a partner at Crowell & Moring. “The plaintiffs' bar is turning its attention elsewhere.”

Some of that attention is centered on food and consumer-product false-labeling litigation, which is increasing significantly in plaintiff-friendly jurisdictions such as California. That state's Proposition 37 referendum, calling for more stringent labeling, lost in November, but it's an indicator of



↑ More endocrine disruption claims are likely to be on the horizon, as plaintiffs look to tie exposure to various materials to illnesses, as seen in claims in one Kentucky tort case.

The growing use of hydraulic fracturing is increasing the U.S. natural gas supply, bringing prices down—and driving legal action on the part of environmental groups.

where things might go. Says Mayer: “It said that plaintiffs would not have to show reliance and damages, just that the label was wrong. That’s a pretty big change from existing law.” Before long, he adds, plaintiffs are likely to follow a path forged in Big Tobacco cases and attempt to represent states in the interest of public health—perhaps on the theory that false labeling drives obesity among citizens.

Looking further ahead, Mayer cites the “nascent but likely” emergence of endocrine disruption claims, based on the idea that even very small exposures to certain substances can be harmful. “We haven’t seen any cases yet,” he says. “But the EU has come out with a report on this. It’s been savaged by the scientific community, but plaintiffs’ attorneys seize on these things and use them to support their experts’ causation opinions.” Increased litigation is even more likely, he says, if the EPA comes out with a similar report.

Meanwhile, new twists on asbestos claims may be coming—on two fronts. “There has been a lot of conflicting research about the presence of so-called asbestiform minerals in talcs, which are used in all kinds of product and industrial operations,” says Mayer. “If plaintiffs can open that can up, then there will be a whole new group of companies that they can try to bring into these lawsuits.” Also, with few U.S. asbestos companies left to target, plaintiffs are likely to turn to foreign companies—either acting in cooperation with overseas firms or “importing” cases by finding ways to get U.S. courts to exercise jurisdiction over those foreign companies.

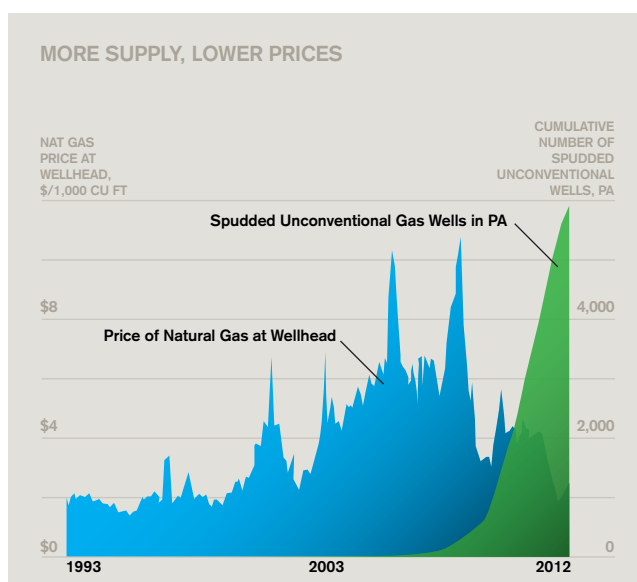
On both the environmental and torts fronts, adds Mayer, plaintiffs’ strategies are always evolving—and companies need to understand these emerging risks and evolve along with them.

KEY CASES

MINARD RUN OIL V. U.S. FOREST SERVICE* The Pennsylvania Independent Oil and Gas Association was involved in a case that culminated in the vacating of a Sierra Club-U.S. Forest Service settlement, protecting jobs and property rights and enhancing industry’s ability to challenge federal settlements and regulatory delays.

U.S. V. BRIGHAM OIL & GAS* Brigham faced criminal action for the death of birds under the Migratory Bird Treaty Act but won dismissal in a decision that rejected strict liability enforcement for oil and gas operations.

MUTUAL PHARMACEUTICAL V. BARTLETT In a case to be argued this spring, the Supreme Court will determine if federal law preempts state law design-defect claims against generic pharmaceutical products.



Finding Help with Superfund Projects

Over the years, the EPA has required companies to clean up metals mining sites at a number of western U.S. locations under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or “Superfund.” As it turns out, however, many of those sites—such as uranium mines and other metallic mines—were originally developed on federal lands with active encouragement and incentives from the federal government. Several companies have sued the government for relief—and in some cases, at least, the courts have listened.

“In the past year or so, the U.S. has settled at least three cases in litigation accepting a substantial share of CERCLA at mining sites developed in past decades on federal lands,” says Tim McCrum. For example, in a case involving GE and its United Nuclear Corp. subsidiary,* the government accepted responsibility for one-third of the cost of site remediation at a closed uranium mine from the 1970s.

Cases seeking CERCLA recovery are not entirely new. But, says McCrum, “there appears to be an increasing recognition of government liability in the context of these western metallic mining sites. And there are many more of these types of sites across the western states.”

* *Crowell & Moring representation*

Trade Secrets

Trade secret cases are on the rise as thieves get more sophisticated—and companies become more aggressive about stopping them.



Trade secret theft and the resulting litigation have seen dramatic, double-digit growth, and that trend is likely to continue—or even accelerate—in the coming year.

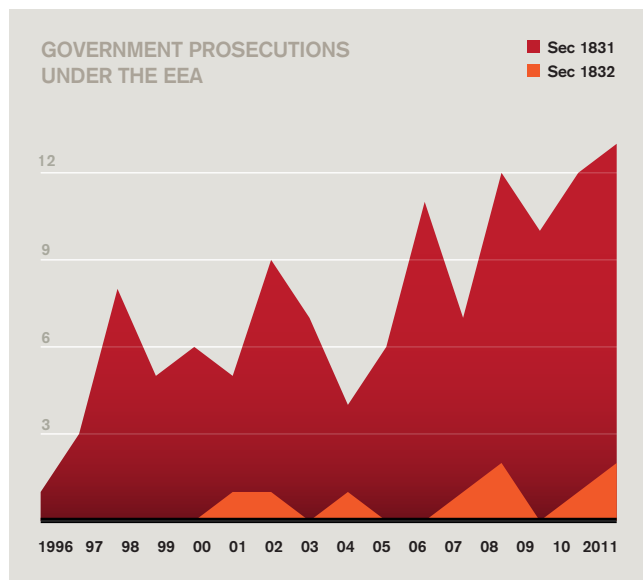
Recently, that increasing growth has been driven “by a combination of a difficult economy, the changing calculus between patent and trade secret protection and, most importantly, the dramatic rise in international theft,” says Mike Songer, a partner in Crowell & Moring’s Litigation and Intellectual Property groups.

Today, intellectual property holders are pursuing misappropriation more vigorously than ever before. “Many companies used to be reluctant to report theft of confidential information, much less pursue redress in court,” says Songer. But in an era of global competition and growing awareness of trade secret theft, he adds, “there is far less resistance today.”

Among technology companies in particular, international theft is a growing area of concern—and activity. There is more opportunity, with U.S. and European companies expanding and partnering in Asia and developing economies, where the legal regimes protecting intellectual property may be less developed. What’s more, says Songer, “we’re seeing cases involving state-owned enterprises, and with connections to China, Russia, and beyond.” These cases can be much more sophisticated than a former employee leaving to set up shop down the street; they now involve situations where employees are recruited years in advance—with active recruitment up and down a company’s supply chain—as well as concomitant electronic data theft.

Such problems are being attacked on several fronts. In early 2012, says Mark Klapow, a partner in Crowell & Moring’s Litigation Group, “there was a lot of excitement that the ITC might be another venue to pursue international cases, when the Federal Circuit ruled that the ITC could issue an exclusion order covering misappropriated technology, even if the misappropriation occurred outside of the U.S.” Protection of IP in general, and trade secrets in particular, has also become a priority for the FBI, the DOJ, and the White House.

There is also a growing consensus around the need to “federalize” trade secret law for technology cases. “Unlike patents, copyright, and trademarks, trade secret protection is principally a matter of state law, making prosecution across national boundaries difficult,” says Klapow. One of those attempts—last year’s Protecting American Trade Secrets and Innovation Act of 2012 garnered much attention and is expected to be taken up again, in some form, this year.



↑ The number of indictments under the Economic Espionage Act—one tool for fighting international trade secret theft—has shown an overall upward trend since the act’s passage in 1996.

With increasing global competition, a premium on innovation, and increasing international theft, companies—and the government—are increasingly willing to fight to protect trade secrets.

The High Price of Theft

One sign of the intense pursuit of trade secret theft is the increasingly significant awards, fines, and criminal sentences coming out of trials. In a recent landmark case* DuPont sued Kolon Industries, a Korean manufacturer, for the theft of trade secrets related to the manufacture of Kevlar fiber technology used in bulletproof vests and other applications. In September 2011, a jury in the Eastern District of Virginia found that Kolon had indeed stolen those secrets, and DuPont was awarded \$919.9 million in damages—the largest-ever contested verdict in a trade secrets case and the largest verdict of any kind in the Commonwealth of Virginia. A month later, the court entered punitive damages against Kolon. And in August 2012, it issued a precedential injunction barring Kolon from producing body armor material for 20 years. “So you had a U.S. court telling a company from another country that it was being barred from certain activities anywhere in the world,” says Songer, who led the Crowell & Moring team that represented DuPont and won Law360’s IP MVP award for his handling of this case.

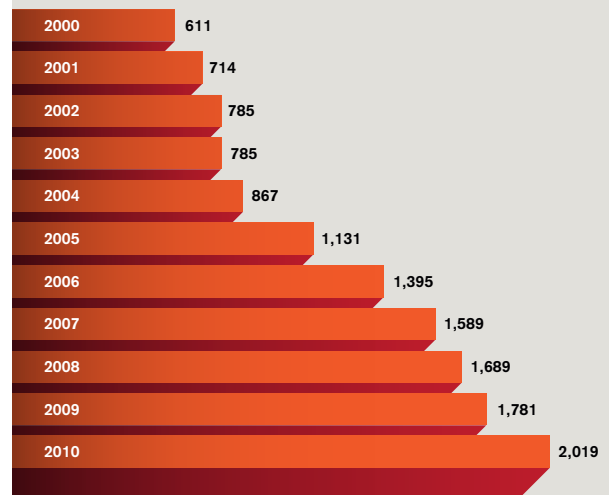
In today’s environment, companies should be aware not only of the growing threat of theft, but also of the possibilities for taking action—especially when international theft is involved, says Klapow. Businesses and the government are more willing to defend trade secrets. And as more such cases make their way through the system, the growing track record of dealing with theft is likely to drive increases in trade secrets litigation.

KEY CASES

DUPONT V. KOLON* In September 2011, a jury in the Eastern District of Virginia found that Kolon had stolen DuPont trade secrets, and DuPont was awarded \$919.9 million in damages. In August 2012, the court issued a precedential injunction barring Kolon from producing body armor material for 20 years. In a parallel criminal investigation, the Department of Justice in October 2012 indicted Kolon and several of its executives and employees for allegedly engaging in the trade secret theft.

TIAN RUI V. USITC The Federal Circuit affirmed the ITC’s ability to exclude the importation of products into the U.S. when they involve stolen trade secrets in situations where the theft took place entirely outside the U.S.

ALL REPORTED TRADE SECRET CASES



Computer Fraud: Does It Apply?

The federal Computer Fraud and Abuse Act is a criminal statute aimed at hackers, but it also allows for civil cases when there has been harm due to unauthorized computer access. Many corporate trade secret plaintiffs seek to add claims under the CFAA simply because trade secret theft often involves a computer—and because doing so allows them to pursue the case in federal, rather than state, court.

However, some have questioned the meaning of “unauthorized access,” and federal circuit courts are now split on the issue. Circuits taking the broad view focus on whether the employee used the information in an authorized way. “Under this standard, employees who violate explicit usage policies or exceed the scope of their job duties when accessing the information may be liable for CFAA violations,” says Mark Klapow. Courts taking the narrow view, he says, focus on whether the access itself was authorized. Thus, where an employee had proper access to computer systems, the CFAA does not apply. “Corporations need to pay close attention to this split in writing their computer policies and employment procedures,” he says. “And, of course, it’s important to determine where a given court is on this issue in assessing where to bring suit.”

* Crowell & Moring representation

White Collar

Empowered and incentivized, whistleblowers will increasingly become drivers of intensifying white-collar enforcement and litigation.



Whistleblowers are playing a growing role in white-collar criminal cases and related civil enforcement litigation—and the related awards can be significant. In 2012, whistleblower payouts of \$104 million in the UBS tax-evasion case and \$94 million in the GlaxoSmithKline false-claims case made headlines. It is likely that such outsized rewards will continue, and expand to the securities arena, as well.

The Dodd-Frank Act authorized the SEC to reward whistleblowers with payments of up to 30 percent of the funds collected in cases involving more than \$1 million in sanctions. In August 2012, the SEC made its first whistleblower award, paying out a relatively modest \$50,000 in connection with a financial fraud case. But the pace is likely to pick up significantly.

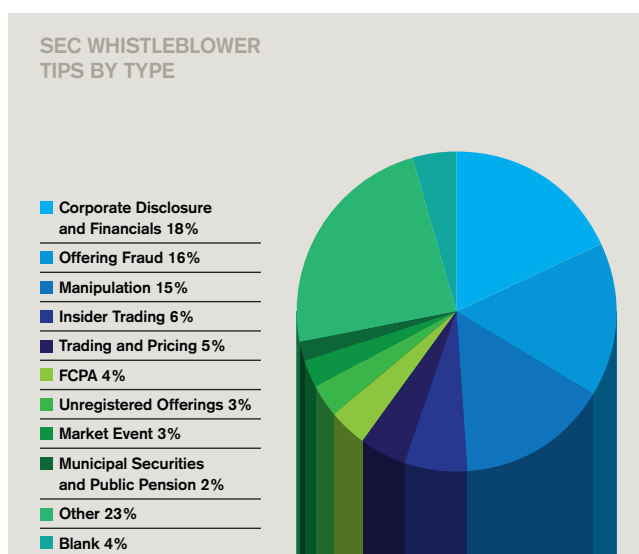
“It is apparent that there are more whistleblower complaints flowing into the SEC, and that will likely result in the SEC bringing some cases it would not have otherwise known about,” says Janet Levine, chair of Crowell & Moring’s White Collar & Regulatory Enforcement Group. “We anticipate the volume and size of the awards will increase dramatically.”

FCPA: Growing Risk

Whistleblowers are also likely to play a larger role in the enforcement of the Foreign Corrupt Practices Act. “A whistleblower can make an FCPA allegation because it is within the province of the SEC. When you combine that with the government’s aggressive FCPA enforcement stance, you get a heightened risk for any company doing business globally,” says Stephen Byers, a partner in Crowell & Moring’s White Collar & Regulatory Enforcement Group. “Over the past year or so, we’ve seen headlines about the FCPA and major companies from Wal-Mart to Tyco to Morgan Stanley. And that’s not going to change.”

The government has also expanded its definition of what constitutes a “foreign official” under the FCPA, arguing that the term can include not only direct representatives of a foreign government but also employees of state-owned or -controlled enterprises, such as telecom, health care, and manufacturing companies. This means companies doing business globally have a potentially broader set of transactions and relationships that must be scrutinized for compliance. The DOJ also continues to look closely at mergers and acquisitions, and recent settlements have required increased due diligence with respect to FCPA risks, as well as timely compliance audits after a transaction.

In late 2012, the DOJ and SEC released detailed FCPA guidance, which broke little new ground but nonetheless can serve as a useful primer on various issues. “One of the government’s motives for issuing the guide was clearly to spur more intensive corporate compliance efforts,” says Levine.



↑ With strong financial incentives in place, the SEC has received thousands of whistleblower tips covering a range of allegations. Corporate disclosure and financial issues top the list.

The DOJ's FCA enforcement activity has been increasing. Whistleblowers have been playing a significant role in that growth—and benefiting from the resulting awards.

For example, the guidance highlighted the benefits of self-reporting violations to the government in conjunction with beefed-up compliance, and noted that corporate compliance programs need to be dynamic and marked by “continuous improvement and sustainability.” On top of all this, says Levine, is “a growing number of matters in which foreign governments are pursuing FCPA-like cases, including the U.K.”

For many years, the DOJ has established a fairly successful track record of FCPA enforcement, driven largely by big corporate settlements and pleas. But over the past year or so, cases have made their way to trial or pretrial litigation, and in that context, the government’s record of success has been challenged. For example, in an FCPA bribery case against an ABB executive, the court acquitted the defendant when the government rested its case for lack of adequate proof, without even hearing the defense.

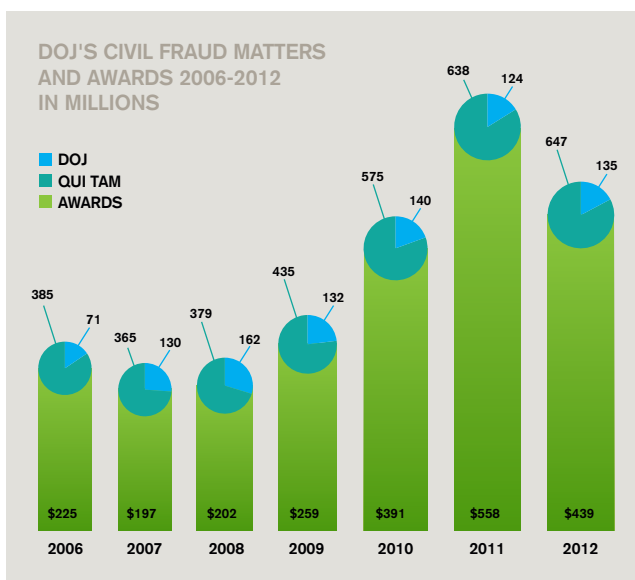
“While the government has had some well-publicized setbacks in the past year on FCPA enforcement, overall, they’ve had a lot of success, with a steady flow of corporate convictions and settlements,” says Levine. “Anticorruption efforts are a priority for the White House, and the DOJ has the resources and teams in place to back that up.” As a result, she says, “we are going to continue to see the government bringing these cases and pushing the enforcement envelope, regardless of the recent setbacks.”

KEY CASES

U.S. V. NORIEGA, ET AL.* Lindsey Manufacturing and two officers were accused of bribing officials under the FCPA. After trial, the court dismissed the indictment with prejudice, finding that the jury verdict was tainted by prosecutorial misconduct. In May 2012, the DOJ dismissed its appeal.

SHOT SHOW INVESTIGATION What began as a marquee FCPA prosecution ended when the DOJ failed to net any convictions. The centerpiece of DOJ’s case was a sting operation featuring a fictional corrupt African minister. Twenty-two individuals were eventually indicted. After a series of missteps—including two consecutive mistrials and several acquittals and dismissals—the DOJ dismissed all charges against all defendants.

U.S. V. HAYES In the first prosecution to come out of the Libor scandal, two former UBS traders are charged with rigging global interest rates. This is part of a larger effort pursuing several large banks for their role in the scandal.



The Longer Arm of the FCA

The False Claims Act was in effect the first federal statute to employ whistleblower bounties. Today, it is a key tool in government antifraud efforts. And, says Stephen Byers, “the sweep of FCA cases is expanding rapidly beyond traditional defendants such as defense contractors and health care companies, to include companies such as Home Depot, Maersk, Bank of America, and others.” To a large extent, he explains, “we are seeing the results of 2009 amendments to FCA that made it easier for whistleblowers to bring suit and dramatically expanded the definition of a ‘claim’ to include activities that involved federal dollars, even indirectly.”

An example of this trend is the government's FCA suit against Bank of America, based on alleged misrepresentations by Countrywide Financial Corp., which the bank purchased, in connection with home loans sold to Fannie Mae and Freddie Mac. Freddie and Fannie are not federal agencies, but according to the government's complaint they received more than \$180 billion in federal funds following the 2008 financial collapse. And that, says the government, makes the FCA applicable. The upshot, says Byers: “The law is now very broad, and that means that it will affect a lot of companies that haven't had to worry or think about it in the past.”

* *Crowell & Moring representation*

Class Actions

When it comes to class action settlements, courts are increasingly likely to examine the details of the settlement terms before approval.



Many class action suits resolve through settlement, and once the parties reach an agreement, the settlement process can be fairly routine. But many critics

have pointed out that settlements often don't result in a significant benefit to class members or that class action plaintiffs' attorneys' fees may be excessive. A number of state and federal courts appear to agree—and they are now giving class action settlements a much closer look.

“We’re seeing a trend where the courts aren’t just rubber-stamping settlements, but are instead asking for more detail about what, exactly, is the benefit to the class,” says Jennifer Romano, a partner in Crowell & Moring’s Litigation Group. “Over the past year, this has resulted in a number of refusals to approve class action settlements at both the preliminary and final approval stage and at the trial court and appellate court level.”

With this increased scrutiny, courts are focusing on three aspects of settlements.

- **The value provided to the class.**

How do class members benefit? Are the cash and/or voucher awards sufficient? Are nonmonetary benefits, such as changed business practices, appropriate and of value to the class? Have enough of the class members “redeemed” the benefits of the settlement? If not, should the remainder of the benefits revert to the defendant or to a charitable organization?

- **Charitable or cy pres payments.**

Is the organization receiving the payment relevant to the challenged conduct? Will the payment benefit the class? Are these payments better than making payments directly to class members?

- **Class plaintiffs’ attorneys’ fees.**

What exactly was done? What rates were used to calculate fees? Are the fees out of proportion to the value delivered to the class? “This is a very significant development, with courts sometimes not approving settlements because fees are too high or there is not enough information to back them up,” says Romano. “And more and more, we’re seeing courts say, ‘We’ll approve the settlement, but we’re going to give the plaintiffs’ attorneys much less money.’”

Companies should recognize that it is likely that it will take more time and resources to obtain final approval of a settlement and to survive a challenge on appeal. “The parties need to focus on potential settlement components early and think about how to design things such as changes in business practices or compensation to the class—and how the court is going to value the settlement,” says Romano. “This can also help in designing settlement terms that will be defensible to the court and feasible for the company.”

Reshaping the Class Action Landscape?

In its current session, the U.S. Supreme Court is hearing two cases that may have a far-reaching effect on class action litigation:

American Express Co. v. Italian Colors Restaurant focuses on whether merchants can pursue federal antitrust claims as a class, even though they had previously agreed to pursue disputes individually through arbitration and waived their right to pursue a class action. The Second Circuit ruled that the class action waiver was unenforceable because it would

effectively bar the merchants from pursuing their federal statutory claims due to high individual costs. If the Supreme Court reverses that decision and upholds the class action waiver and agreement to arbitrate, the impact may go beyond class actions and further confirm the strong public policy in favor of arbitration agreements generally.

Under the Class Action Fairness Act of 2005, defendants can remove class action suits from state to federal court—where

there is often more rigorous scrutiny—if damages exceed \$5 million. In *Standard Fire Insurance Co. v. Knowles*, the question is whether a class plaintiff may avoid CAFA’s reach by stipulating to potential damages of less than \$5 million. The lower court held that the class plaintiff could limit its claims to avoid CAFA jurisdiction. If the Supreme Court disagrees, it will close an avenue that class counsel often use to forum-shop for more favorable jurisdictions.

ITC

NPEs have turned to the ITC for patent disputes. But changes at the Commission may be making it a less attractive venue for their efforts.

The International Trade Commission investigates a wide range of trade matters, but a growing percentage of its work is devoted to intellectual property disputes.

From 2002 to 2012, the ITC's Section 337 caseload, which is mostly patent-related, increased by 530 percent.

Some of this increase is based on filings of nonpracticing entities (NPEs). These firms began turning to the ITC post-*eBay*, essentially looking to replace court injunctions with the ITC's exclusion orders, which stop infringing imports from entering the country, and ITC cease-and-desist orders, which target domestic respondents that have infringing products in the U.S. NPE filings constituted only about a quarter of the Section 337 cases from January 2011 through June 2012, but nearly half of the total respondents appearing before the ITC during that time were there because of the NPE-initiated cases. "The NPE cases have a disproportionately large impact because a single investigation is filed against a large number of respondents in an entire industry," says Kathryn Clune, a partner in Crowell & Moring's Intellectual Property Group.

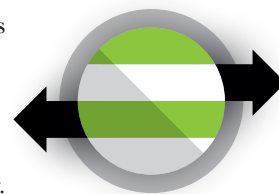
However, several changes may be making the ITC a less attractive venue for NPEs. For example, NPEs have had problems meeting the ITC's domestic industry require-

ments because the ITC has refined its policy to give less weight to revenue-driven licensing activity that targets existing production, compared to production-driven licensing that encourages adoption of a technology. The ITC has also made significant changes to how it obtains evidence on the potential effect of exclusion orders on the public interest—the impact on public health, safety, etc.—which often works against NPEs. And in late 2012, the ITC proposed new discovery rules that will essentially eliminate the traditional NPE advantage in discovery.

"In the face of these changes, we've seen three NPEs voluntarily withdraw their ITC complaints in the past year," says Clune. "NPEs will probably continue to use the ITC, but with more caution and with cases that involve fewer simultaneous respondents so as to minimize any public interest backlash."

Meanwhile, the ITC has become the preferred forum for competitors to resolve economically significant, technologically complex patent disputes involving imported products. The ITC's ability to resolve the investigation in less than half the time of a federal district court is particularly important to industries, such as high tech, that have short life-cycle products. Despite growing workloads, the ITC has continued to improve its time from institution to resolution—in FY 2011, that reached 13.7 months, compared to 18.4 months for FY 2010 and 17.9 months for FY 2009.

Clune adds that with the ever-growing importance of IP rights to the U.S. economy, the ITC's role in patent disputes will continue to grow in 2013.



KEY CASES

CERTAIN AUTOMOTIVE GPS NAVIGATION SYSTEMS* After significant challenges to its domestic industry claims, the NPE was convinced to terminate the investigation six months into the effort.

CERTAIN COMMUNICATION EQUIPMENT* In an NPE-filed investigation related to Power over Ethernet (PoE) features, Avaya achieved a favorable settlement.

CERTAIN GAMING AND ENTERTAINMENT CONSOLES Microsoft asserted and Google agreed to withdraw two FRAND-encumbered patents from this case based on Google's settlement with the FTC.

* Crowell & Moring representation

E-Discovery

As discovery becomes more complex, changing standards for sanctions based on spoliation of evidence are presenting new challenges.



Not long ago, spoliation claims were uncommon and limited to cases involving intentional destruction of documents. “But there is now a growing trend of pursuing them, and litigants should expect to run into them more and more in complex cases,” says

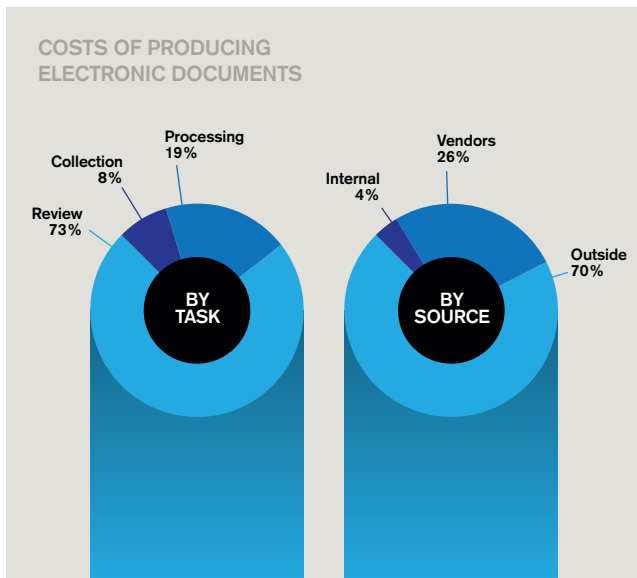
David Cross, a partner in Crowell & Moring’s Litigation and E-discovery and Information Management groups.

Electronic documentation has created huge pools of potential evidence, while emerging technologies such as cloud computing are bringing new opportunities and challenges to e-discovery. At the same time, no discovery process is perfect. Thus, there is now some risk of spoliation in just about any case, especially in complex cases involving a large number of documents and electronic systems that are difficult to manage. But spoliation claims are on the rise, driven by the uncertainty of evolving—and even conflicting—standards in the courts and litigants seeking a tactical advantage by exploiting the imperfection inherent in discovery processes.

Some courts grappling with these claims—and the complexity of electronic systems—have even gone so far as to apply tort principles and impose sanctions for conduct that amounts to negligence. And, Cross explains, “these principles are not being applied consistently across the courts, sometimes leaving litigants and their lawyers without clearly defined standards. This heightens the risk of spoliation claims by setting relatively lower thresholds for sanctions and by undermining the predictability of clearer and more concrete principles.”

For example, Cross says, a few years ago, a court in the Southern District of New York held that the failure to issue a written litigation hold order in a case was *per se* negligence that could lead to sanctions. That ruling—though not without dissent from other courts—was influential until the Second Circuit recently rejected it as a bright line rule (*Chin v. Port Authority of New York & New Jersey*). More recently, a magistrate held that failure to suspend automated email deletion and preserve backup tapes constituted gross negligence and warranted sanctions, despite the lack of any evidence that relevant emails were “missing” as a result of these failures (*State Nat. Ins. Co. v. County of Camden*). The district court affirmed the magistrate’s ruling.

While many courts are reluctant to impose sanctions in spoliation cases that don’t involve bad faith, some are not—which provides a real incentive for pursuing such claims. Litigants in federal court, however, may soon find relief through amendments to the federal rules. The Standing Committee on Rules of Practice and Procedure is considering an amendment to Rule 37(e) that would require a finding of



↑ Document review and outside help account for a large proportion of electronic discovery costs. Advancing analytics tools can help companies reduce expenses in those areas.

Social media use has ballooned to encompass hundreds of millions of users. Often, the content is related to employees and business—and subject to discovery if a company faces litigation.

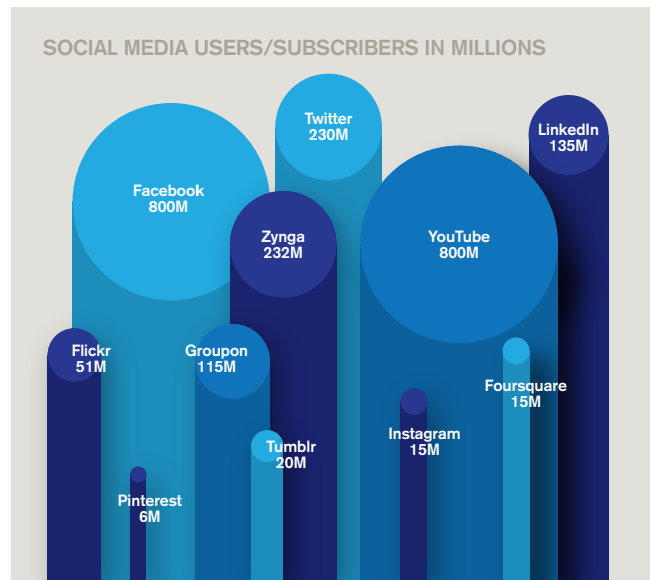
willful or bad faith conduct *and* substantial prejudice before “serious” sanctions, such as adverse inference instructions, may be imposed, unless the spoliation deprives a party of “any meaningful opportunity to present a claim or defense.” The proposed amendment identifies the factors the courts should consider in deciding spoliation claims, including reasonableness, proportionality, and cooperation. The proposed amendment would permit remedial measures and cost awards without a finding of willfulness or bad faith. To move forward, the Standing Committee will first have to approve the proposed amendment for publication and comment, and then recommend an amendment to the Judicial Conference, which would in turn have to recommend any amendment to the U.S. Supreme Court. The proposed amendment could bring greater uniformity, predictability, and fairness to spoliation rulings in the federal courts—and perhaps provide guidance for adoption of similar principles for state courts.

But until something changes, says Cross, “you need to be very conscientious about how you’re preserving and producing documents. The odds are increasing that you will run into a spoliation claim at some point, and you want to be ready for it given the severity of sanctions that can be imposed under the current state of the law.”

KEY CASES

DUPONT V. KOLON* In prosecuting claims for trade secrets theft and defending against counterclaims, DuPont obtained significant sanctions against Kolon for that company’s failure to cooperate throughout the litigation and other misconduct, including extensive spoliation and what the court characterized as a “dilatatory approach” to discovery. The court awarded DuPont substantial fees and costs and granted an adverse inference instruction in the trial of DuPont’s trade secrets claims.

APPLE V. SAMSUNG In a patent infringement case, the magistrate judge granted an adverse inference instruction against the defendant, but denied a similar instruction against the plaintiff where both parties were accused of spoliation. On appeal, the district court found that an adverse inference instruction was appropriate against each party for spoliation. With both facing such instructions, the parties requested that neither instruction be given, and the court granted that request.



The Technology Edge

Advancing technology is continuing to change discovery. Technology-assisted review tools are now highly effective in sifting through large numbers of documents to determine which ones are likely relevant to a case. This approach saves time and money. Just as important, says David Cross, “it greatly diminishes your risk of producing documents in discovery that you shouldn’t be producing, because of the higher accuracy rate.” And courts are embracing these tools. In a few instances in 2012, some even ordered their use.

Cloud technology is changing the way companies manage and store information. But companies turning to third-party cloud providers must consider the legal risks that come with systems they cannot entirely control.

Social media is also presenting challenges. Nearly 1 billion people use Facebook monthly, and more than 230 million Twitter users post 340 million Tweets a day. Preserving and producing content from such sites can be difficult—and not just because they often reside with third-party providers. “Companies need to consider litigation risk and expense from social media before embracing it for business purposes,” says Cross.

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Page 4: U.S. Department of Justice. **Page 5:** U.S. Department of Justice. **Page 6:** U.S. Government Accountability Office. **Page 7:** U.S. Department of Justice
Page 8: AmWINS Insurance. **Page 9:** U.S. Equal Employment Opportunity Commission. **Page 10:** PatentFreedom. **Page 11:** PatentFreedom. **Pages 12-13:** Federal
Court Management Statistics: www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx; Scotus Blog: www.scotusblog.com/statistics/. **Page 15:** www.eia.gov and www.depweb.state.pa.us/. **Page 16:** AIPLA. **Page 17:** Beck Reed Riden. **Page 18:** U.S. Securities and Exchange Commission. **Page 19:** U.S. Department
of Justice. **Page 22:** Rand Institute for Civil Justice. **Page 23:** Official and estimated statistics. Facebook, YouTube, Zynga, Twitter, LinkedIn, Groupon, Google,
Flickr, Tumblr, Instagram, Foursquare, Pinterest.