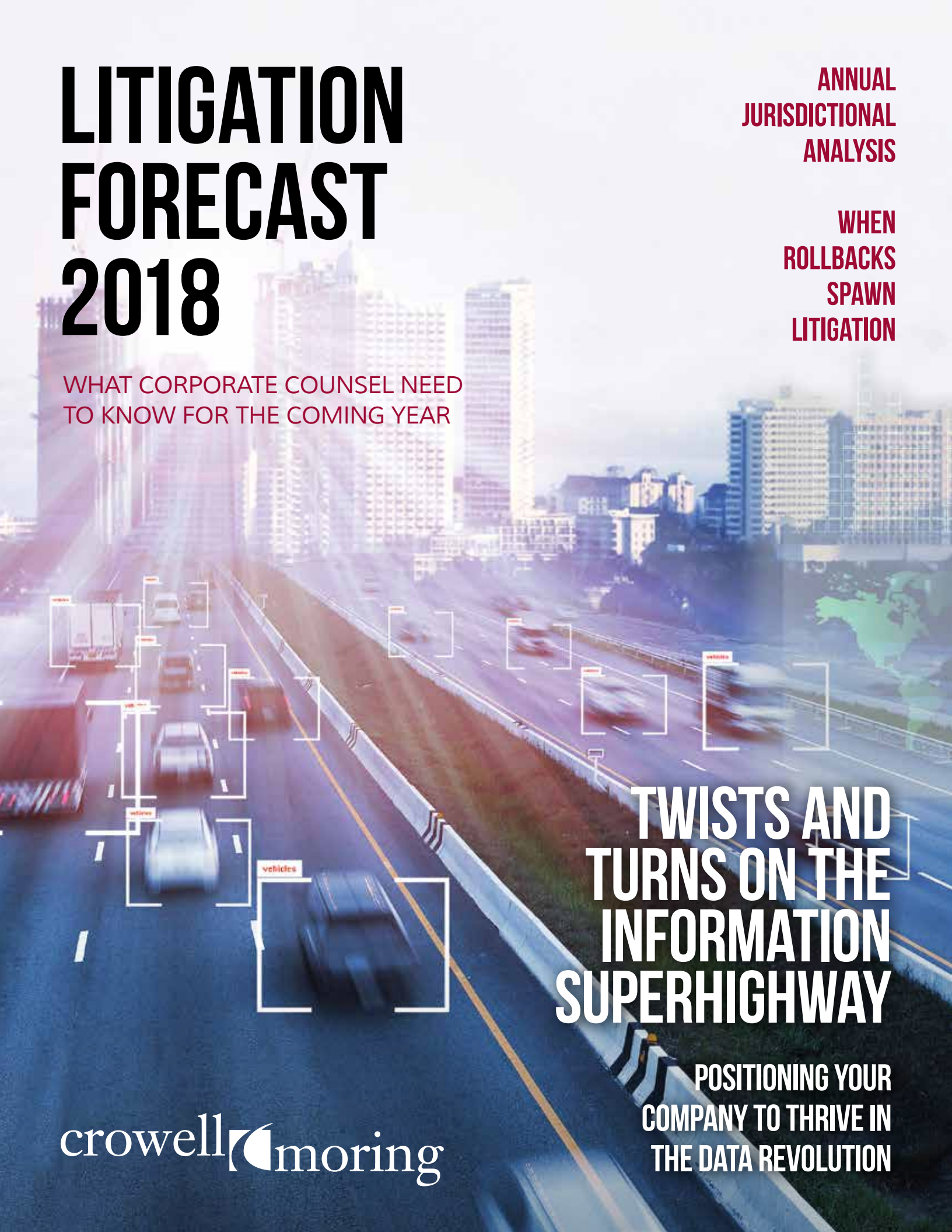


LITIGATION FORECAST 2018

ANNUAL
JURISDICTIONAL
ANALYSIS

WHEN
ROLLBACKS
SPAWN
LITIGATION

WHAT CORPORATE COUNSEL NEED
TO KNOW FOR THE COMING YEAR



TWISTS AND
TURNS ON THE
INFORMATION
SUPERHIGHWAY

POSITIONING YOUR
COMPANY TO THRIVE IN
THE DATA REVOLUTION

crowell  moring

LITIGATION FORECAST 2018

Beyond Trend-Spotting



For the fourth time in a decade, the IP litigation landscape is undergoing a seismic shift in the wake of the Supreme Court's ruling in *TC Heartland*. One of those shifts could be undone as the Court examines IPRs in the *Oil States* case in 2018.

Simultaneously, as predicted in our 2017 Forecast, regulatory rollbacks by this administration are being challenged in court, and further litigation is a certainty. As Crowell & Moring Partner Kirsten Nathanson puts it, "What we're seeing is a very ambitious and aggressive policy agenda that's running up against the realities of our judiciary and our existing laws." At the same time, citizen suits are filling in the potential regulatory void.

That's a theme you'll find running through this *Litigation Forecast*: actions bring reactions. And it's the reactions that are at the heart of the trends we'll be watching through 2018. While the administration works to unravel regulations, the real trend is litigation intended to restore those rules—and the trials that may keep that change from occurring.

Following, discerning, and predicting those trends is what we, as a firm, have been doing since we launched the *Litigation Forecast*. More important is helping our clients understand what these trends mean for their businesses—and engaging with them to help make sure they're responding productively, effectively, and profitably. To keep the conversation going, please visit www.crowell.com/forecasts.

—MARK KLAPOW
Partner, Crowell & Moring
Editor, *Litigation Forecast 2018*



4 DATA, DATA EVERYWHERE

Positioning Your Company to Survive and Thrive in the Data Revolution

In our data-driven world, technological advances are coming fast and furious. But as data becomes more valuable, companies face more, and often new, legal risks. Crowell & Moring attorneys discuss some of the challenges for businesses in the years ahead.

16 FEATURE

Jurisdictional Analysis



The impact of *TC Heartland* on patent case filings and an increase in antitrust filings in the Eastern District of Pennsylvania are just two trends to watch for in 2018, according to **Keith Harrison**.

CROWELL & MORING LLP

Creator and Editor **Mark Klapow**
Associate Editor **Rebecca Suarez**
Project Manager **Ezra Crawford**
Contributing Editor **Nicole Quigley**

LEVERAGE MEDIA LLC

Editorial Director **Michael Winkleman**
Art Director **Carole Erger-Fass**
Writer **Peter Haapaniemi**
Chartist **Alex Reardon**
Copyeditor **Sue Khodarahmi**
Project Manager **Andrea Olstein**
Production Manager **Rosemary P. Sullivan**

Copyright © 2018 by Crowell & Moring LLP. All rights reserved. This material is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does it represent any undertaking to keep recipients advised of all relevant legal developments.

COVER: MNBB/GETTY IMAGES

FOCUS AREAS



10 ANTITRUST

Large banks need to remain vigilant about the risk of government antitrust litigation and enforcement, says **Juan Arteaga**—and about the potential for private litigation, too.



12 ENVIRONMENTAL

The Trump administration's efforts to roll back Obama-era environmental regulations face significant challenges from private citizen groups, according to **Kirsten Nathanson**.



14 GOVERNMENT CONTRACTS

With more companies competing for fewer federal contracts, **Stephen McBrady** says, look for increased interest—and litigation—to recover money owed by the government.



18 INTELLECTUAL PROPERTY

The Supreme Court's *TC Heartland* decision puts venue front and center in federal patent lawsuits. **Jim Stronski** explains what that means for both sides.



30 IP FOCUS: COPYRIGHT

The advent of 3D printing is opening the door to a range of copyright issues. **Valerie Goo** suggests companies look to technology as well as the courts to protect themselves.



20 LABOR AND EMPLOYMENT

Trina Fairley Barlow explains how states and municipalities are picking up where federal legislation for pay equity and other workplace issues left off.



22 TORTS/PRODUCTS

States have long engaged outside counsel to sue companies for damages, says **Rick Wallace**, but some are now looking to expand the nature of their claims beyond regulatory enforcement.



24 WHITE COLLAR

As experience with external compliance monitors has grown, it has become clear that they can sometimes create as many problems as they solve, says **Philip Inglima**.

SPECIAL COVERAGE

26 E-DISCOVERY

Recent changes to the Federal Rules of Civil Procedure aim to address the challenges for companies and courts in the discovery process, according to **Mike Lieberman**.

28 ARBITRATION

Touted as the ideal “better, faster, cheaper” approach to dispute resolution, arbitration is facing some pushback. However, says **Aryeh Portnoy**, the solution may lie in how the arbitration clauses are structured.

29 HEALTH CARE

Health care companies should expect continued enforcement of the False Claims Act, says **Laura Cordova**, but with perhaps different emphasis on key areas like opioids.

31 TAX

The IRS has taken a contrary stance on certain tax incentives, in some cases “undermining what Congress intended,” says **Dwight Mersereau**. Companies might need to take the IRS to court in order to receive the tax incentive.



/Autonomous
/Sensing
/Communication
/Battery
/Navigation
/Mirrorless
/Ecology

100m

48
mph



/Autonomous
/Sensing
/Communication
/Battery
/Navigation
/Mirrorless
/Ecology



COVER STORY

DATA, DATA EVERYWHERE

POSITIONING YOUR COMPANY TO SURVIVE AND THRIVE IN THE DATA REVOLUTION

If you've spent much time driving in San Francisco, Detroit, or Pittsburgh, you may well have shared the road with an autonomous vehicle guiding itself down the highway. The same is true in a variety of other locations, as dozens of companies conduct trials of their self-driving cars and trucks.

While the development of fully autonomous vehicles has a ways to go, the technology is moving fast. Many predict this is just the beginning of the biggest change in transportation in 100 years—all made possible by the pervasive and expanding use of digital technology,

which is used for everything from tracking the movements of triathletes to powering robots working in dangerous environments.

The range of possibilities seems endless. Artificial intelligence can help factory machines "learn" to perform better over time. Analytics can be used to predict everything from customer needs to when industrial equipment will require maintenance. Bots can be used to handle basic compliance questions. Networks of sensors con-

nected through the Internet of Things (IoT) can enable automation, agility, and safety in production plants. And the list goes on.

These varied developments rely on one common foundation—data. Today, data is not just financial transactions and customer lists. It also includes information coming from smartphones, cars, cameras, and a wealth of connected sensors embedded in homes, businesses, equipment, and devices. This flood of data is powering innovation in new ways and making data more of a business asset than ever. As *The Economist* recently noted, "Data are to this century what oil was to the last one: a driver of growth and change." Even traditional brick-and-mortar businesses are increasingly data-driven.

But as data becomes more valuable, companies also face more, and sometimes new, legal risks. "Businesses know how important data is to innovation, but you also have to think about the unprecedented implications it poses for things like regulatory enforcement, product liability, cybersecurity, and IP," says Cheryl Falvey, a partner at Crowell & Moring, co-chair of the firm's Advertising & Product Risk Management Group,

and former general counsel of the Consumer Product Safety Commission. If those kinds of factors are not addressed, she says, “data can become less of an asset and more of a liability.”

IOT FOR THE LEGAL DEPARTMENT

The opportunities and challenges presented by today’s growing flood of data can be seen in a wide range of products and systems, from the emergence of blockchain technology to digital health—and especially today’s high-profile autonomous vehicle initiatives. Experts say that a typical autonomous vehicle will generate about 4,000 gigabytes of data per day—roughly the same daily amount generated by 3,000 people using their computers. Companies expect this data about the car, the road, and the passengers will open the door to new revenue-generating offerings and business models.

However, significant legal questions surround these developments. “Autonomous vehicles are going to be a game-changer for our economy and entire transportation system, but companies will first have to navigate real regulatory issues like physical safety, cybersecurity, and privacy,” says Paul Rosen, the former chief of staff at the Department of Homeland Security who is now a Crowell & Moring partner. “What happens to the consumer data these connected cars collect and transmit? How detailed is that information? Where and how is it stored? And who is legally at fault if a self-driving car crashes?” Such questions are being sorted out, and, Rosen says, “litigation and the courts will likely weigh in on the answers to many of them.”

One challenge is managing the sheer volume of data that companies hold. “Today, e-discovery in a case is going to seek not just traditional things like email,” says Falvey. “It’s going to ask for information such as location data from phones, activity data from wearable technologies, and operational and testing data from drones and autonomous vehicles.”

The challenges go far beyond data volume, however. Today, general counsel need to develop a deeper understanding of the data the company owns. “Do you know what the data could be telling you about the performance of the company’s medical device, for example, or the electrical grid or factory operations?” asks Falvey. “If there is an issue

that ends up causing harm to someone, the question will be what did the data show in advance and were reasonable steps taken to understand that data and address any potential risks it revealed?”

That question is key, Falvey continues, “because at a high level, the laws concerning corporate liability come down to whether your actions were reasonable. Did you know or should you have known about the issue?” With the wealth of data that is now under corporate control, the answer to that question is likely to be yes. As Big Data tools become more powerful and more mainstream, courts increasingly may find that companies should have such insight into potential safety and security issues with new products and new technologies. “When it comes to data collection, the lawyer for the business should probe what data is available and what it means in order to mitigate the legal risks of having data and not acting on it,” she says.

WHAT YOU SHOULD HAVE KNOWN

Government agencies also have an evolving perspective about what companies “should know” from their data. “There is a growing expectation that companies are going to be using Big Data to monitor and protect their supply chains,” says Cari Stinebower, a Crowell & Moring partner and former counsel for the U.S. Department of the Treasury’s Office of Foreign Assets Control. Increasingly, she explains, agencies believe that a corporation should be able to track its goods from the extraction of natural resources at the mine through production to finished product—including the activities of suppliers and subcontractors. “So if your product is a piece of electronic equipment containing gold mined in Zimbabwe or cobalt coming from the Congo, they think that you should know about it,” she says.

Regulators today expect companies to have the same kind of data-driven insight into their customers, as well. For example, a company could be held responsible for selling items to individuals and other companies on a blacklist under a Bush-era counterterrorism executive order or the 2008 Foreign Narcotics Kingpin Designation Act. “Increasingly, enforcement agencies expect companies to screen not only their customers but their ‘ship-to’ information, as well.



“Businesses know how important data is to innovation, but you also have to think about the unprecedented implications it poses ...” —Cheryl Falvey



“Companies will first have to navigate real regulatory issues like physical safety, cybersecurity, and privacy.” —Paul Rosen

In the retail space, that’s an incredible volume of data,” says Stinebower.

Here again, the ability to collect and analyze large amounts of data is something of a double-edged sword. It can open the door to increased collaboration across the supply chain for faster innovation and increased efficiency. But, says Stinebower, “along with that also comes the liability of having to track that data to manage the risk of litigation.”

MORE RISK ON MORE FRONTS

Because data is used throughout the business, companies need to monitor litigation risk across a growing range of activities—and problems can now arise in unexpected areas. In some instances, data-related issues can expand into criminal investigations from regulators. For example, if a company analysis shows that someone in the supply chain is diverting products from one jurisdiction to another, that could indicate a corruption issue involving financial transactions and payoffs to government officials or others to move goods across borders. “That can get the attention of regulators,” says Stinebower. “And if there is a tie to the U.K., it may fall under the U.K. Bribery Act, which prohibits private bribery as well as bribes to government officials.”

Data is likely to play a growing role in the antitrust world, as well. “Some officials have suggested that ownership of large amounts of data could be an attribute of market power, like a dominant manufacturer owning more production capacity than anyone else,” says Ryan Tisch, a partner in Crowell & Moring’s Antitrust Group. “With the growing importance of data in business, we may see cases where the regulators look

closely at the data troves being held by companies trying to merge. They might see that one has 70 percent of the available data of a specific type and the other has 20 percent. They could then decide that this would be a merger to monopoly from a data standpoint, based on the idea that the merged company would be able to raise prices when they monetize that data, or use that data to erect barriers to upstart competitors.” It is also possible that regulators or private litigants could allege theories of monopolization or attempted monopolization based on companies’ efforts to build or maintain supremacy in a given data ecosystem.

Big Data can also be a concern in the IP arena. With the ease of storing and sharing electronic content, lax compliance with key license agreements creates exposure to claims for trademark and copyright infringement. This problem may arise when a company continues to post content after the license period is over, shares it with subsidiaries not covered by the license, or moves it across platforms—for example, taking content licensed only for a company website and using it on a mobile app. “So, without realizing it, a company could be infringing on trademarks and copyrights licensed in a commercial agreement,” says Kent Goss, a partner in Crowell & Moring’s Litigation Group. He adds that this infringement, even if unintentional, could potentially expose a company to a claim for damages in the six to seven figures, depending on the number of images, videos, or other works involved.

In these situations, whether a company is infringing may depend on where a suit is filed. “There is inconsistency in the Circuit Courts about just what constitutes infringement for online content,” says Goss. “Some say that if users view and



“Increasingly, enforcement agencies expect companies to screen not only their customers but their ‘ship-to’ information, as well.” —Cari Stinebower

click on the unauthorized content, that's infringement. Others say that simply making the content available is enough, regardless of whether users are viewing it—a very low bar for a plaintiff to reach.” The Copyright Office has recently adopted the latter view.

WHEN MACHINES MAKE BUSINESS DECISIONS

A more immediate antitrust concern lies in the growing use of analytics and computer algorithms to automate pricing, particularly on e-commerce platforms. These tools can monitor prices and buyer behavior to constantly reset prices to keep up with demand and the competition, without human intervention.

There is nothing wrong with employing such algorithms *per se*. But the speed and efficiency that some algorithms bring to pricing means that these tools can be misused—or appear to be misused—by parties wanting to fix prices. “One company might have an agreement with another company to use the same algorithm to get to the same price output. Or, competitors might agree on the output they want and build similar algorithms to get to that,” says Tisch. “Companies investing in pricing algorithms will need to account for the inevitable efforts of regulators and the plaintiffs’ bar to portray them as tools of anticompetitive collusion.”

The DOJ is increasingly looking at how competitors use their data to collaborate with one another, particularly with the use of algorithms in pricing strategies. “The DOJ is concerned that consumers are at a disadvantage online, and that algorithms could make it easier for businesses to raise prices,” says Tisch. “But companies must use technology to optimize their strategy to reach customers at prices that make sales. It’s time to consider practical, realistic compliance measures to make sure pricing algorithms don’t raise undue risk.”

The use of pricing algorithms is likely to grow. As that happens, companies should recognize that this is an area where appearances can matter. That is, when competitors’ prices are following each other closely, it could look like price-fixing to regulators and plaintiffs. Even if it is not, says Tisch, “the sheer unfamiliarity with technology will often drive risk in a way that’s unfortunate. People who don’t understand it might have doubts about how those prices change—and plaintiffs’ lawyers could exploit that.”

DATA PROTECTION: STILL KEY

Ensuring the privacy and security of data has been a key challenge for years, and the digital revolution is making it more important and more complicated than ever. Data flows through a universe of connected devices and systems, creating more points of vulnerability. And the stakes of security breaches can be high. “What if the autonomous car is hacked and crashes? What about the impact of hacking into connected homes or medical devices?” asks Falvey.

Today, data is shared widely. It often moves across political boundaries, and in a cloud-enabled world, a company’s data might be spread across servers in the U.S. and around the globe, creating significant challenges in terms of litigation, data privacy, and even export controls.

In the U.S., for example, there is no federal data-breach notification law, but many states have them, leaving companies to deal with varying statutes and regulations. European law has been fairly strict in terms of protecting data privacy. “There is a sort of battle of wills between the Europeans, who value data privacy over financial transparency, and the U.S., which wants financial transparency in order to fight things like money laundering and terrorist financing,” says Stinebower. As a result, American companies often have trouble accessing their overseas data for U.S. compliance efforts. Nevertheless, she says, “U.S. regulators expect enterprise-wide knowledge from the U.S. component of the business. It kind of sets companies up for conflicting legal obligations.”

In 2016, the Second Circuit said that the U.S. government could not compel Microsoft to produce data stored on a server in Ireland. Then, in 2017, the Northern District of California ordered Google to comply with a U.S. warrant requiring it to hand over information related to a specific Google account holder—data that was kept overseas. The Supreme Court may resolve the issue this term.

“These rulings create uncertainty for businesses moving and storing data around the world,” says Rosen. This reality, according to Rosen, is driving a growing call for Congress to update the 30-year-old Stored Communications Act that drives many of these cases. The European Union’s General Data Protection Regulation will take full effect in May 2018, requiring breach notification and stiff fines for privacy violations.

Overall, says Rosen, varying laws and regulations in the



“Some officials have suggested that ownership of large amounts of data could be an attribute of market power, like a dominant manufacturer owning more production capacity than anyone else.” —Ryan Tisch



“Without realizing it, a company could be infringing on trademarks and copyrights licensed in a commercial agreement.” —Kent Goss

United States and elsewhere are creating “a uniquely challenging environment for companies trying to figure out how to build products and provide services while complying with a patchwork of data security and privacy regulations and laws.”

NAVIGATING THE CHANGING LANDSCAPE

To reduce litigation risk in a data-driven world, companies need to continue to focus on the basics—having sound governance and strong compliance programs in place. In addition, GCs need to develop a better understanding of what the company “should know” from its data and, where appropriate, use analytics to proactively identify risks lurking in the data.

With the pervasiveness of data in business, legal departments should also consider a layer of central control over the groups focusing on specific risks. “Compliance specialists have become very specialized,” says Stinebower. “There is a need to pull back and have a bird’s-eye view of all the different compliance functions so you can cross-check your data privacy program, your fraud program, your anti-corruption program, your export controls, your customer complaints. You need someone in place to coordinate and cross-pollinate that work.”

It’s also good for legal departments to ensure compliance programs are in step with technological change. “One of the novel qualities of a digital product is that it may not be the same thing two years from now,” says Falvey. “If you sell a digital system today, you might upgrade functionality, change how the software works over time, and wake up responsible for a product entirely different than the product designed today. So the GC needs to recognize that the legal risks mapped out at the product launch could be different just a few months later, and the compliance program must allow for that evolution to catch future risks that may be unknown to you at the product launch.”

This highlights a key point: with fast-changing technology becoming the foundation of business, corporate law departments operate in a world where “what I do this year won’t be good enough next year,” says Falvey. “The technology is evolving, cybercriminals are becoming more sophisticated, and the law is creating higher and higher levels of responsibility. You have to keep up with those moving targets.”

In the coming year and beyond, adds Rosen, “companies will need to stay nimble and adjust to an evolving legal and regulatory landscape around technology, Big Data, and litigation.”

HOW MUCH IS ENOUGH?

The use of Big Data is still fairly new, and just what regulators expect companies to know from their data is still evolving. “Their thought is, if you’re collecting it, you should have compliance programs around it,” says Crowell & Moring’s Cari Stinebower. “Then the question is, how much should you be using Big Data and artificial intelligence to do things like make sure your products are not going to prohibited parties? How far do you need to go?”

With no formal standard in place, it’s a good idea for companies to keep an eye on what competitors and peers are doing with these tools in terms of compliance—and monitor what regulators seem to expect from industry.

Meanwhile, the financial services industry has been doing a lot to raise those expectations. Following a flurry of compliance problems and fines a decade or so ago, “institutions have invested heavily in building out their compliance functions,” says Stinebower. “Groups of financial institutions have been putting together tests and pilot projects to use Big Data to detect, for example, patterns in human trafficking or problems in the customer due-diligence space.” Eventually, she says, “the rest of the world is going to have to follow their lead, because regulators are watching this and saying, ‘If the banks can do it, everybody else can do it, as well.’”

At the same time, Stinebower continues, the financial industry has been essentially pushing compliance responsibilities out to their clients. Using the “know your customer’s customer concept, they are requiring their customers to maintain robust compliance programs that protect the financial institutions from exposure to money laundering, corruption, or export controls violations. This is just putting more pressure on the average retailer and average manufacturer to use sophisticated compliance tools.”

ANTITRUST

MAIN STREET VS. WALL STREET: PLAINTIFFS' BAR CONTINUES TO COME AFTER LARGE BANKS



Historically, Wall Street banks were rarely the focus of government antitrust investigations or private antitrust litigation. But that changed in the wake of the Great Recession. While most observers believed that antitrust scrutiny of the financial

services sector was reaching its end, recent lawsuits filed by the private antitrust bar—which has secured hundreds of millions in settlements in the last few years—strongly suggest otherwise. It appears that banks will continue to have to defend themselves in costly antitrust litigation for the foreseeable future, regardless of whether the Trump administration makes antitrust enforcement in the financial services sector a priority.

In the years following the 2008 economic crisis, government antitrust agencies in the U.S. and Europe ramped up their scrutiny of the financial services sector. In particular, there were lengthy investigations into whether a number of banks manipulated foreign exchange markets and the benchmark rates (such as LIBOR and EURIBOR) for various types of financial instruments. These investigations resulted in a number of large banks and their employees pleading guilty to criminal charges and agreeing to pay billions in fines.

As soon as these government investigations became public, the private antitrust bar filed a number of lawsuits alleging billions in damages. “Those and other government investigations resulted in a steady stream of private antitrust lawsuits alleging that banks unlawfully colluded to manipulate LIBOR and other benchmarks, fix the prices of various commodities, set ATM fees, and so forth,” says Juan Arteaga, a partner in Crowell & Moring’s Antitrust Group and a former deputy assistant attorney general in the Antitrust Division of the U.S. Department of Justice.

EMPLOYERS BEWARE: CRIMINAL LIABILITY FOR ANTICOMPETITIVE EMPLOYMENT PRACTICES

In recent years, the hiring practices of large corporations have come under attack from federal antitrust agencies and the plaintiffs’ bar. DOJ’s Antitrust Division, for example, brought a series of cases against a number of tech giants for entering into “no-poach” agreements whereby they agreed not to hire each other’s employees. “Plaintiffs’ lawyers filed follow-on actions that settled for close to a billion dollars, and they have recently challenged the HR practices of several Fortune 500 companies,” says Crowell & Moring’s Juan Arteaga.

Last October, the stakes increased considerably when DOJ and the Federal Trade Commission issued new guidance regarding employment practices. “This guidance upped the ante by announcing that companies and employees that engage in naked wage-fixing or no-poaching agreements will be prosecuted criminally,” says Arteaga. “That means that companies and employees that engage in these practices could be forced to pay significant fines and spend time in jail. It also means that plaintiffs’ lawyers have another potentially powerful tool to use in litigation.”

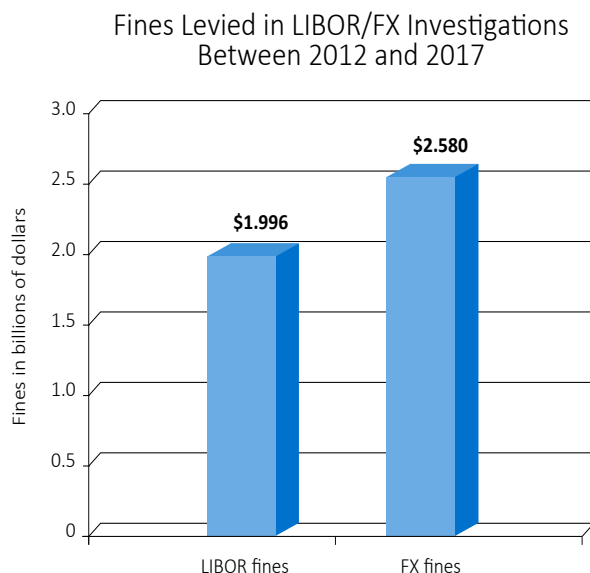
In a recent speech, a senior DOJ official signaled plans to enforce these guidelines, saying the business community “should be on notice” that wage-fixing and no-poach agreements will be prosecuted criminally. Consequently, companies should institute the appropriate safeguards, including training HR and other employees who participate in hiring and compensation decisions, says Arteaga.



“Any hope that reduced government antitrust enforcement in the financial services sector under a Trump administration would result in less private litigation is being dampened by the filing of these recent lawsuits.” —Juan Arteaga

ANTITRUST COMES TO WALL STREET

For the financial services industry, the antitrust enforcement activities pursued by government agencies have had a tremendous impact—and set the stage for today’s ongoing private antitrust litigation. In recent years, U.S. government agencies have obtained billions in fines in LIBOR and foreign currency exchange (FX) related investigations. In 2015, for example, the DOJ Antitrust Division secured the three largest fines ever imposed for a criminal violation of the Sherman Act as part of its FX investigation. Overall, this division has prosecuted 10 corporations and 21 individuals in its LIBOR and FX investigations.



By early 2017, however, many in the legal and financial services industries believed that the spike in antitrust litigation was starting to run its course. Cases were being settled and a new administration in Washington was signaling a pullback in regulatory enforcement. But that optimism now appears to be premature, and private antitrust litigation is still very much part of the landscape for the financial services sector—but with a new twist.

PLAINTIFFS’ BAR TAKES THE LEAD

A number of cases filed within the last year show that plaintiffs’ lawyers are no longer waiting for the announcement of a government investigation before filing antitrust lawsuits against banks. “They are starting to file on their own, thereby ensuring that litigation will continue even if there is less enforcement by federal antitrust authorities,” says Arteaga.

At the same time, plaintiffs are expanding their toolkit of legal theories. For years, private antitrust litigation focused largely on the alleged collusion among banks to manipulate various types of markets, as plaintiffs followed the lead of government enforcement efforts. More recent lawsuits, however, have shifted their focus to potentially anticompetitive conduct premised on group boycott and abuse of market power theories.

Arteaga cites a recent example in which six of the largest banks in the world formed a joint venture to facilitate the lending and borrowing of stock in support of short selling. In August 2017, several public pension funds sued those banks, alleging that they had collectively blocked other companies that had tried to enter this market with more efficient and lower-cost platforms and services.

“The complaint asserts that the banks illegally colluded with each other and agreed that they were going to boycott, as a group, these other companies in order to drive them out of business and protect the fees that they were getting from these transactions,” says Arteaga.

Large banks are dealing with other, similar cases. In June 2017, for example, a small trading exchange filed an antitrust suit that accused a dozen banks of conspiring to keep it out of the credit default swap market through a coordinated boycott of its trading platform. And, in a case currently working its way through the judicial system, investors are suing a number of large banks for allegedly working together to keep business away from three electronic exchanges set up to handle interest rate swaps.

Overall, says Arteaga, “any hope that reduced government antitrust enforcement in the financial services sector under a Trump administration would result in less private litigation is being dampened by the filing of these recent lawsuits. They indicate that antitrust litigation is going to continue to be a live issue for large banks. Looking ahead, banks need to think of this as their new normal.” In that environment, he adds, it is all the more important for financial institutions to implement robust antitrust compliance programs and consult with antitrust counsel before participating in any competitor collaborations.

To gauge the future level of litigation risk, banks can keep an eye on a number of private suits, including the financial benchmark litigations that began a while ago and may be resolved in the near future. “See how those play out,” Arteaga says. “If banks are still paying millions of dollars in settlements, that’s going to incentivize the private plaintiffs’ bar to continue to go after these institutions in new and creative ways.”

ENVIRONMENTAL

REGULATORY ROLLBACK—AND PUSHBACK



The Trump campaign made it clear that it wanted to roll back Obama-era environmental regulations, and the new administration started doing so almost immediately after the inauguration. But those actions have triggered significant litigation by citizen groups—and this is

likely to be just the beginning of a long-lasting trend.

History has shown that when there is a decrease in federal implementation and enforcement of environmental laws and regulations, the response is typically a surge of private legal action—and that seems to be very much the case now. Much of the recent citizen-group litigation has focused directly on the administration's efforts to change the environmental regulatory regime. For example, in April 2017, the EPA announced a delay in implementing an Obama-era rule limiting methane emissions in oil and gas drilling operations. That move was quickly challenged in court by several environmental groups. Then, in July, the D.C. Circuit blocked the EPA's action, saying that the agency did not have the authority to stop the implementation. As a result, the rule remained in effect.

Similar litigation is waiting in the wings. For instance, the EPA and the Army Corps of Engineers are in the process of trying to roll back the Waters of the United States rule—a broad definition of the waters under agency control—which had already been stayed by the courts. When that effort is complete and when the agencies issue a replacement rule, "it is almost certainly going to be litigated," says Kirsten Nathanson, a partner in Crowell & Moring's Environment & Natural Resources Group. And the courts have been delaying action on the Clean Power Plan, which is designed to cut electricity-generation emissions, as the EPA moves forward with its repeal effort. When the EPA does finalize its repeal action, that, too, is likely to bring environmentalists to the courtroom. Overall,

says Nathanson, "what we're seeing is a very ambitious and aggressive policy agenda that's running up against the realities of our judiciary and our existing laws."

Meanwhile, other citizen-initiated litigation is focusing on enforcement—or the perceived lack thereof. Nearly every major federal environmental statute includes a citizen suit provision that allows private parties to sue government agencies when they fail to carry out their duties under the law. The administration is working to cut back on EPA resources and enforcement activity—and as it does so, "citizen suits are starting to fill in the resulting enforcement vacuum, with claims that the agency is failing to perform as required," says Nathanson.

Citizen suits are being pursued against corporations for vio-

KEY POINTS

Filling the void

As government enforcement declines, environmental citizen suits are increasing.

New tools are fueling litigation

Citizen suits can draw on advancing technology to collect data and identify violations.

A growing list of players

Environmental groups, activists, and state governments are pursuing litigation at the federal, state, and local levels.



"What we're seeing is a very ambitious and aggressive policy agenda that's running up against the realities of our judiciary and our existing laws." —Kirsten Nathanson

lations of environmental laws, such as illegal emissions or the release of hazardous waste. A prominent example could spark an uptick in the coming years: in April, the Southern District of Texas ordered ExxonMobil to pay a \$19.95 million fine as a result of an air pollution suit brought under the Clean Air Act by the Sierra Club and Environment Texas. A statement from those environmental groups noted that it was the largest penalty ever levied in an environmental citizen suit. Says Nathanson: “If that penalty is upheld on appeal, it will generate lots of interest among the plaintiffs’ bar in filing similar suits.”

A COMPLICATED—AND EXPANDING—PLAYING FIELD

While such federal litigation continues, citizen suits are increasingly common at the state, federal, and even municipal levels. Here, drinking water and environmental justice are areas of growing focus, driven in part by the high-profile lead-contamination crisis in Flint, Michigan. Environmental justice cases are not a priority for the EPA, says Nathanson. “But the activist groups, the community groups, the citizen groups, and the environmental groups at the local level are continuing even without policy support from the federal government,” she notes.

There are other factors fueling the increase in citizen suits, including advancing technology. For example, new devices can detect very low levels of chemicals in water. “They are finding new, different forms of contaminants we didn’t know about before because the science didn’t exist to measure their presence and their impact,” says Nathanson. Indeed, there is a growing toolkit of inexpensive monitoring technologies that make it easier for private groups and individuals to detect environmental violations and collect evidence. Drones with cameras can give people a closer look inside facilities, for example, while infrared cameras can be used to spot otherwise invisible emissions.

At the same time, the rhetoric from the new administration—and moves such as withdrawing from the Paris Agreement on climate change—is itself a driver of citizen suits. These factors are not only motivating environmentalists, they’re also helping to fund activist litigation. In the three months following the election, for example, the Sierra Club reported a sevenfold increase in money raised compared to the same period the previous year. And ironically, the administration’s efforts to cut back on EPA resources and enforcement could lead to the agency’s failing to meet some mandated duties—creating more litigation opportunities for environmentalists.

It’s worth noting that citizen suits are not the whole story when it comes to litigation pushing back on the administration’s changes. State governments, too, have been weighing in. For example, in March 2017, the U.S. Interior Department lifted a ban on the leasing of federal lands for coal mining. In May 2017, four states—California, New Mexico, New York, and Washington—sued the department to challenge the lifting of the ban, saying the move would aggravate climate change,

CLIMATE CHANGE LITIGATION: THE NEXT WAVE(S)

In its 2011 *American Electric Power Company v. Connecticut* ruling, the U.S. Supreme Court said that corporations cannot be sued for greenhouse gas emissions under federal common law. However, it did leave the door open to state law-based suits for damages from climate change—and the plaintiffs’ bar is working hard to find a theory to take advantage of that.

In recent years, says Crowell & Moring’s Kirsten Nathanson, “There has been a series of cases in which plaintiffs sued fossil fuel companies for the effects of Hurricane Katrina. And there was a case in which natives in Alaska sued companies for rising sea levels that were flooding their island.” Both of those approaches failed in court.

Now, environmentalists are turning to new theories. In July 2017, two counties and one city in California sued dozens of fossil fuel companies under the public nuisance doctrine, saying the companies’ actions were contributing to increased flooding and rising seas, which the plaintiffs would have to pay for. And in another case now with the U.S. District for Oregon—*Juliana, et al. v. United States of America, et al.*—21 young plaintiffs, including children, have sued the federal government for violating the public trust doctrine and the plaintiffs’ due process rights. The government’s actions, they say, are preserving a system that drives greenhouse gas emissions, threatening future generations.

violate the federal government’s duties to protect public lands, and burden the states with expenses related to mining. In addition, says Nathanson, “the California attorney general has committed to taking legal action against future moves of the Trump administration to roll back the Obama administration’s regulatory legacy.”

All of this points to ongoing court battles. While a broad range of companies could find themselves targeted by citizen suits, the industries at highest risk are those that are seeing the biggest reductions in enforcement, such as mining and oil and gas drilling.

As the reshaping of the regulatory landscape makes its way through the courts, corporations can expect to face more uncertainty—and in some cases, troubling dilemmas. With the D.C. Circuit’s decision that left the Obama-era methane rule in effect, for example, companies have had to continue to make investments in reducing emissions—in essence, going to the trouble of complying with a rule that the EPA clearly intends to eliminate. Altogether, says Nathanson, “we’re going through a major transition in environmental regulation, and the growing pains will continue for some time.”

GOVERNMENT CONTRACTS

CONTRACTORS: GETTING THEIR DUE



With tight competition for government contracts, more companies can be expected to dispute federal payments in court—a strategy that can boost the bottom line and strengthen the law department’s position as a partner with the business.

Companies everywhere are under constant pressure to keep costs down and find more revenue, but that is especially true for those working under government contracts. “There are more companies competing for fewer dollars in the federal market,” says Stephen McBrady, a partner in Crowell & Moring’s Government Contracts Group. “That leads them to keep getting leaner and leaner—and that expectation is now being extended to the legal department.”

This pressure is translating into an increased interest in pursuing the recovery of funds that the government owes companies. “We’re already seeing an increase in litigation focused on recovery,” says McBrady. “That trend is expected to accelerate over the next couple of years. The government contracting market is extremely competitive, with margins that tend to be razor thin, which means that more corporate legal departments are going to be seeking new and different ways to recover money from the government.”

There is a broad range of activities that lend themselves to potential recovery efforts. These include increased contract performance costs attributable to government action or delay, costs stemming from government-initiated contract termination, or other costs that contractors are entitled to by contract or statute.

“Each of these circumstances shares one central feature: when performing on behalf of the government, the contractor incurred additional expenses that the government has a legal obligation to pay,” says McBrady. “This is not a windfall for the contractor—it’s a way of being made whole for their work. Corporate legal departments in the government contracts market are starting to view recovery claims that way—as a method for recouping funds owed to them, which would otherwise be lost to the business. Not pursuing them is like providing a windfall for the government.”

HOLDING THE GOVERNMENT TO ITS WORD

This trend is already well underway. For example, under the American Recovery and Reinvestment Act—part of the 2008 congressional stimulus package—the government has an obligation to make payments to companies that made certain investments in renewable energy. “In a variety of cases, the government has not lived up to that obligation,” says McBrady. So there are now lawsuits proceeding in federal court that aim to collect that money. Those suits got a boost late in 2016, when the U.S. Court of Federal Claims rejected the government’s arguments for reducing renewable energy grants called for by the act and awarded a group of wind farms more than \$206 million.

Perhaps most notable are the Affordable Care Act “risk corridors” cases currently working their way through the courts. The law says that if insurers participating in ACA health care exchanges incur a certain level of losses, the government is required to provide payments to mitigate a portion of those losses. Due to a variety of factors, a number of insurers did incur such losses. However, says McBrady, “the government has failed to make statutorily mandated payments, and instead made a series of arguments about why it’s not obligated to pay. And the only way to resolve that is by resorting to court.”

KEY POINTS

Focusing on collections

More companies are seeking to recover money owed by the federal government.

Court successes

Claims litigation is helping recoup millions required by contract or statute.

Sharing the risk

Law departments are interested in alternative fee arrangements that help reduce risk and costs in pursuing federal claims.



“Corporate legal departments in the government contracts market are starting to view recovery claims as a method for recouping funds owed to them.” —Stephen McBrady

McBrady notes that there are currently three dozen of these lawsuits pending in federal court as companies look for funds they are owed under the statutory mandate. And there’s a lot at stake. In early 2017, the U.S. Court of Federal Claims ordered the government to pay \$214 million to Oregon-based Moda Health for such claims, and the total claims currently being litigated run into the billions. Given the high-profile politics and constant changes surrounding the ACA, it seems likely that more ACA-related litigation will emerge in the coming year.

Beyond statutorily mandated payments, companies are scrutinizing government contractual obligations—at times holding the government accountable for agreements made long ago. For example, from World War II through the end of the Cold War, companies that manufactured munitions and other military equipment for the government were often given contracts with broad indemnification clauses in them—aimed, typically, at inducing companies to provide critical goods and services, and avoiding delays in defense programs. Years later, however, some of those companies have run into toxic tort suits related to their plants and former plants. Now, says McBrady, “more companies are looking at those indemnification clauses and trying to get the government to pay its share of remediation costs and legal fees associated with environmental problems arising from their work for the U.S. government.” And some are finding success: In January 2017, the U.S. Court of Federal Claims ordered the government to pay a group of oil companies \$99.6 million for site-cleanup costs incurred in the 1990s and later litigation costs, all stemming from contracts to supply high-octane aviation fuel during World War II.

STRENGTHENING THE BUSINESS PROPOSITION

As legal departments pursue these recoveries, many are also looking to alternative fee arrangements with outside counsel. “Law departments will now proactively go to law firms with a potential claim and ask if they are willing to share in the risk through success fees and contingency arrangements,” says McBrady. Recovery litigation lends itself to these kinds of approaches. “There are really straightforward metrics for measuring success,” he says. “Did we win the case? Did we lose the case? Did we win half of what we claimed? Did we win all of what we claimed?”

Alternative fee arrangements can also bolster the business case for recovery efforts, helping legal departments allocate resources more effectively, reduce up-front legal spending, and limit litigation risk. Moreover, says McBrady, “the legal department does not have to go to the business and ask for money to file a claim.” But the business can still benefit. “As one client told me, the first time he ever got a hug from his business client was when he dropped off a \$20 million check from the government,” says McBrady.

Overall, with a proactive approach to identifying and pursuing recovery opportunities—and the use of cost-effective partnering models with outside counsel—legal departments can play a more prominent role in helping the business. They can deliver significant funds to their internal business clients and thereby break out of the traditional mold of being viewed as a cost-and-compliance center—potentially becoming a revenue center contributing to the company’s financial success.

A SIMPLER APPROACH?

As legal departments turn their attention to recovering money from the government, they can consider an option that may save time and money—alternative dispute resolution.

ADR can take various forms, from informal mediation to trial-like arrangements that include witnesses. And these approaches can be effective. The Armed Services Board of Contract Appeals, where many government contracts claims are litigated, reports that 93 percent of its cases that went to ADR in FY 2016 were settled successfully.

Often, ADR can be faster and less expensive than full-scale litigation, and when it is successful, it can lead to a quick and *non-appealable* resolution. With legal departments keeping a closer watch on the bottom line, says Crowell & Moring’s Stephen McBrady, “ADR is likely to play a growing role in government contract disputes in the coming year or two, particularly in matters where both sides have an interest in quickly reaching a final resolution, and where confidentiality is key.”

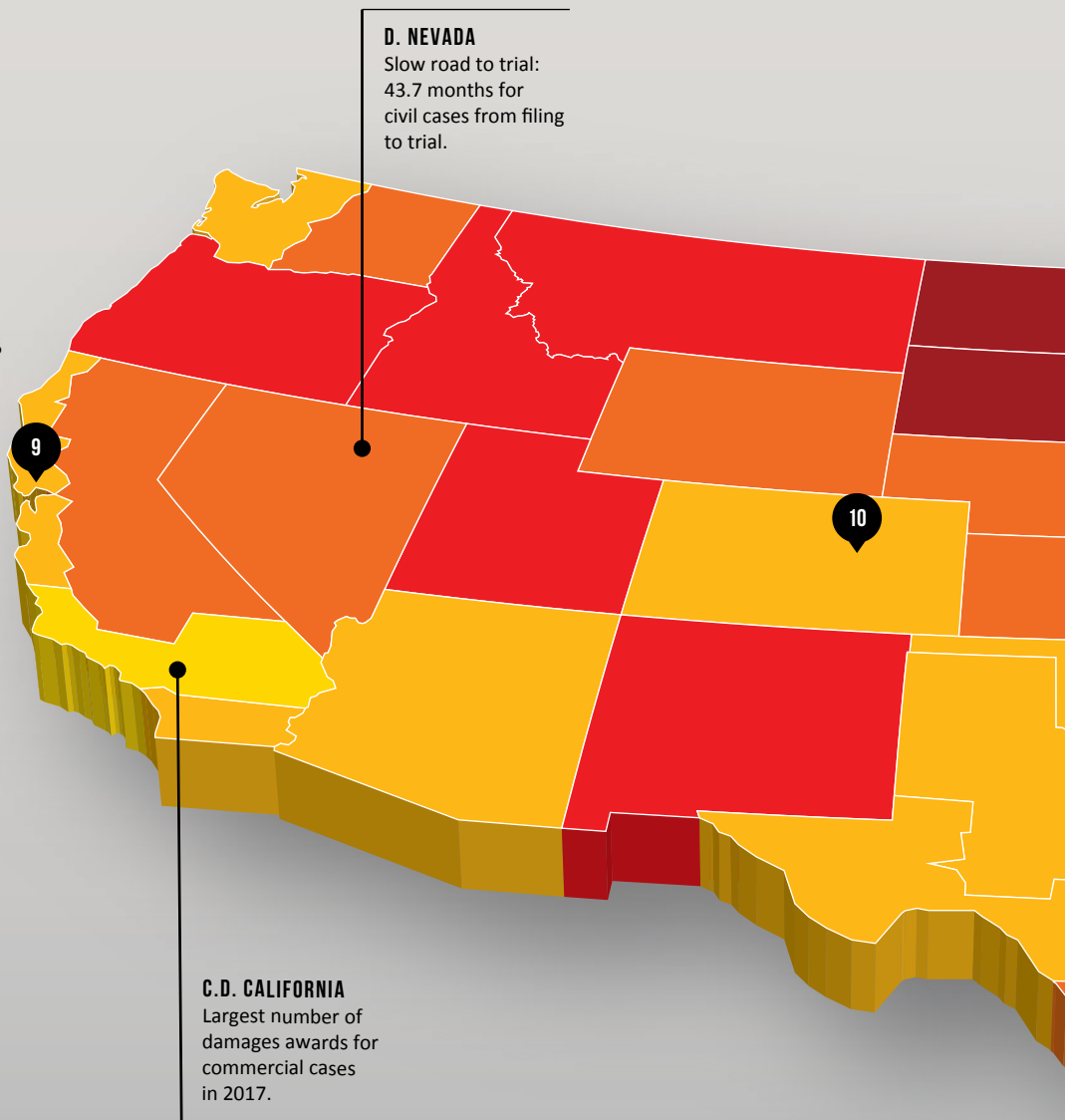
JURISDICTIONAL ANALYSIS

TIME TO TRIAL, FAVORABLE COURTS, AND OTHER LITIGATION TRENDS

“The future will be determined in part by happenings that it is impossible to foresee; it will also be influenced by trends that are now existent and observable.”

—Emily Greene Balch

California currently has the most FCA cases by state.



UNITED STATES COURTS OF APPEALS

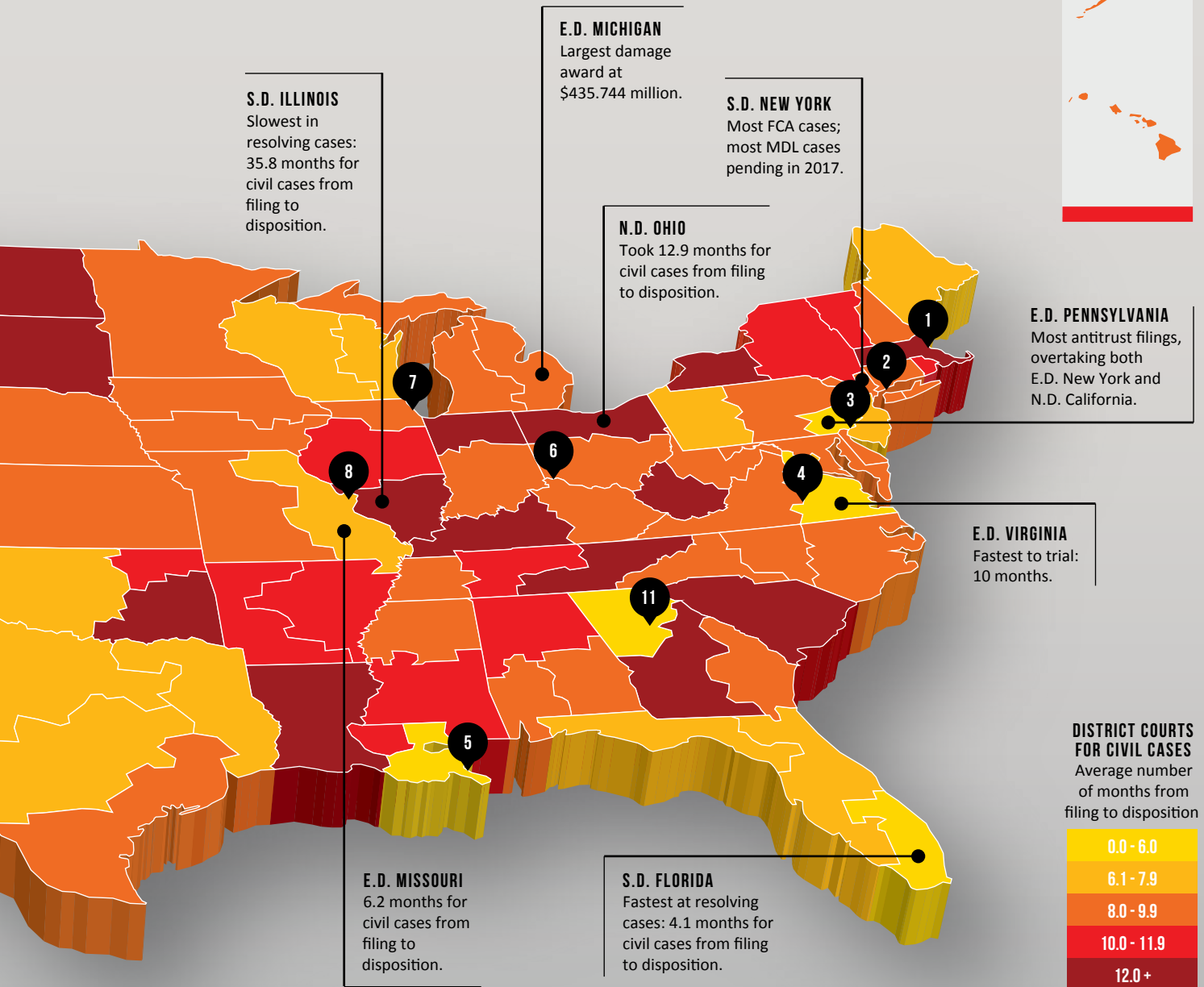
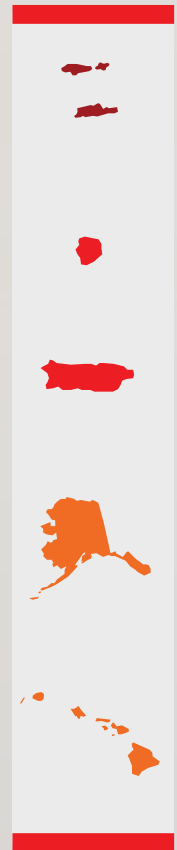
CIRCUIT	NOTICE OF APPEAL TO DISPOSITION IN MONTHS	S. CT. REVERSAL RECORD
1ST	12	0 OF 1
2ND	10	4 OF 5
3RD	9.2	2 OF 2
4TH	5.1	1 OF 2
5TH	9.4	2 OF 4
6TH	7.9	6 OF 7
7TH	7.3	2 OF 2
8TH	6.8	2 OF 2
9TH	13.3	7 OF 8
10TH	7.7	3 OF 3
11TH	6.6	3 OF 5
DC	11.4	2 OF 3
FED.	13	6 OF 7



While past events are no guarantee of the future, certain litigation trends can be useful barometers. For example, the national downward trend for patent litigation has continued since the advent of the America Invents Act. But while the overall trend is downward, E.D. Texas still maintains its place as the most popular location for new patent cases—at least for now. But that trend may not hold. Patent case filings in D. Delaware have exploded due to the Supreme Court’s May 2017 decision in *TC Heartland*, and Delaware is now a close second to E.D. Texas. N.D. California

also saw a dramatic rise in patent filings. Instead of flocking to E.D. Texas, patent owners are pivoting to D. Delaware and N.D. California, where venue can be established based on corporate headquarters. While E.D. Texas may still have more total IP filings due to its pre-*TC Heartland* head start, since that decision, Delaware has had the most filings and that trend will continue. Another trend is the dramatic increase in antitrust filings in E.D. Pennsylvania, which is largely due to the many pharmaceutical companies based there, and the *In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, which is ongoing.

—KEITH HARRISON, Partner, Crowell & Moring



INTELLECTUAL PROPERTY

TC HEARTLAND RESHAPES THE PATENT LITIGATION LANDSCAPE



The recent U.S. Supreme Court ruling in *TC Heartland* has resulted in a significant shift in how litigants in patent cases choose a venue. As the ruling redraws the map of patent litigation, it promises some relief for defendants and some new challenges for plaintiffs.

For three decades, federal courts essentially allowed patent holders to sue for infringement in almost any federal district court. Lawsuits could be brought wherever personal jurisdiction could be established. As a result, non-practicing entities—such as patent trolls—have gravitated toward venues that favored plaintiffs. By choosing venues that tend to have large jury verdicts, set early trial dates, and allow broad discovery, they have been able to put heavy pressure on defendants to settle and avoid costly litigation. This practice has famously made the Eastern District of Texas the number one venue for patent litigation in the country.

That all changed in May 2017 with the Supreme Court's *TC Heartland LLC v. Kraft Foods Group Brands LLC* decision. Reversing a prior Federal Circuit decision, the Court limited patent litigation to districts in states where the defendant is incorporated or has a regular and established place of business. The ruling clearly curtailed the ability of plaintiffs to simply pick the venue that they liked best.

Weeks later, however, the Eastern District of Texas broadened the definition of a regular and established place of business, essentially ruling that a case against the Cray supercomputer company could be heard in the district because two of the company's salespeople lived there. But days later, the U.S. Court of Appeals for the Federal Circuit overturned it. The appeals court reiterated that patent cases could be heard in a jurisdiction only if the defendant resided there—that is, if a company was incorporated in the state where the district is found—or if an act of infringement took place in the district and the infringer had a “regular and established place of business” in the district. To meet the “regular and established place of business” venue requirement, the Federal Circuit held that first, the presence must be a physical place, such as a building or part of a building. Second, it must be regular and established and not transient. And third, the place must be the defendant's and not just its employees living in a jurisdiction, even if they work from home. “Litigants may now argue that patent venue is defective against a corporation that is not incorporated in that state and lacks an office or other physical presence in the district,” says Jim Stronski, a partner

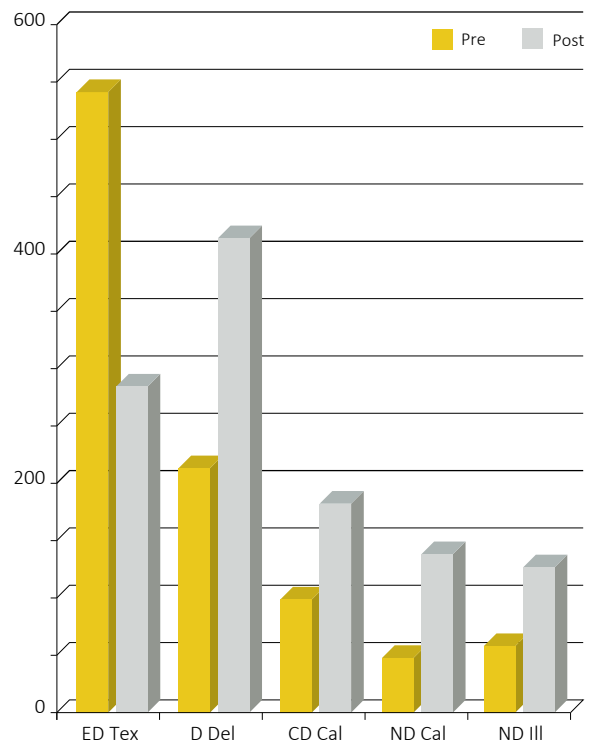
in Crowell & Moring's Intellectual Property Group.

In another post-*TC Heartland* decision, the Federal Circuit in November 2017 held that *TC Heartland* represented an intervening change in patent venue law. Consequently, defendants that had already either moved to dismiss on other grounds or answered without preserving the defense—thus arguably waiving defective venue—may nonetheless raise it. Courts facing these new challenges can be expected to develop law on which pre-*TC Heartland* pending cases will be transferred based on many factors, including how far the case has progressed in its present venue, delays in raising *TC Heartland*, or resulting prejudice.

“The Federal Circuit now has further narrowed patent venue with its construction of ‘regular and established place

NEW PATTERNS

Patent cases in key districts rose or fell significantly in the four-plus months after *TC Heartland*, compared to the four-plus months prior to the decision.



Source: Unified Patents



“After *TC Heartland*, no defendant should answer a complaint or move to dismiss a complaint without at least considering if there is a preferable venue or forum.” —*Jim Stronski*

of business.’ At the same time, its precedent has opened the door for patent venue challenges that may have otherwise been waived in ongoing cases,” says Stronski.

THE NEW NUMBER ONE VENUE

The *TC Heartland* decision was widely expected to limit the practice of forum shopping in patent cases, increase the number of cases pending in the District of Delaware, and reduce the number of cases going to the Eastern District of Texas—and that seems to be happening. The District of Delaware, which also has a high level of patent expertise, has seen a spike in cases, presumably because more than half of the public companies in the U.S. are incorporated there. Before *TC Heartland*, about 34.3 percent of new patent cases were filed in Texas; five months after, that figure stood at 16 percent, according to the Unified Patents organization. Meanwhile, the Delaware court went from 13.5 percent to 21.6 percent, making it the country’s top venue for patent cases. The Central and Northern Districts of California and the Northern District of Illinois have also seen significant increases.

As time goes on, says Stronski, “we’re likely to see an uptick in patent cases in major centers like New York, Chicago, Atlanta, Houston, and Los Angeles—places where corporations tend to have headquarters or established places of business.” This shift from the Eastern District of Texas to other venues should continue, he says, “and that’s something many people would consider a pro-defendant trend.”

Going forward, the question of venue is going to play a larger role in patent litigation. “The potential for venue challenges is more powerful than ever before,” says Stronski. “After *TC Heartland*, no defendant should answer a complaint or move to dismiss a complaint without at least considering if there is a preferable venue or forum.” As for plaintiffs, he says, “they need to evaluate, in light of the new Federal Circuit standard, where there would be acts of infringement and whether the defendant is sufficiently present to meet a regular and established place of business requirement. Otherwise, they’re likely to get involved in a lot of expensive litigation—not on the merits, but on the choice of forum.”

TC Heartland will affect different types of businesses in different ways. For example, says Stronski, “a business with a lot of brick-and-mortar stores arguably will be subject to lawsuits in more places than a business, regardless of its size, that is simply an online business.” In addition, companies that have small satellite facilities might want to take a hard look at their

locations. “If you have a limited or unnecessary footprint in jurisdictions where you don’t want to be sued, and you get sued regularly for patent infringement, you may want to evaluate that in light of the litigation risks that it creates,” he says. “If you have just one office in the Eastern District of Texas, it may not be worth keeping.”

THE END OF IPRS?

In 2012, the U.S. Patent and Trademark Office began its *inter partes* review process, in which the office’s Patent Trials and Appeals Board allows parties to question the validity of patents that have been granted. Since then, the PTAB has seen growing caseloads, as corporations that are defending patent infringement claims use the process to challenge the validity of plaintiff’s patents. “Patent holders have a right to file an IPR within a year of being sued for infringement,” says Crowell & Moring’s Jim Stronski. “The process is often used by defendants who feel like they are being sued on patents that are weak.”

In June 2017, the U.S. Supreme Court agreed to hear *Oil States Energy Services v. Greene’s Energy Group*, which challenges the constitutionality of the IPR process. The fundamental question is whether those reviews are something that should be heard in court, rather than at the Patent Office. “The plaintiffs argue that it’s unconstitutional and violates the separation of powers because it takes authority from the judicial branch and gives it to the executive branch,” says Stronski.

“Some observers contend that the Court probably wouldn’t have taken the case if it didn’t see a reason for doing something on the issue,” says Stronski. But based on the oral argument conducted in *Oil States* on November 27, 2017, it appears that the justices are split and the outcome of the constitutional challenge is difficult to predict with any level of certainty. If the Court does do away with IPRs, he says, “it would be a dramatic and fundamental change for patent holders and accused infringers and require the rethinking of many of their litigation strategies. Although it is difficult to predict what the Court in this case will ultimately do, we should know whether this potential sea change in patent litigation occurs no later than June 2018, when the Court’s term ends.”

LABOR AND EMPLOYMENT

PAY EQUITY: THE SHIFTING LANDSCAPE



Pay equity is one of the most significant workforce issues facing employers today. Over the past several years, there has been a substantial increase in high-profile pay-related litigation, with plaintiffs relying primarily on federal laws to establish their claims. At the same

time, federal agencies have continued to pursue pay disparity enforcement actions under federal laws, including Title VII, the Equal Pay Act, and Executive Order 11246. And boards of directors for large companies have been fielding requests from shareholder groups demanding disclosure of pay data for male and female employees. All of these developments have increased the risk of pay equity litigation for employers of all sizes and industries.

During the 2016 presidential campaign, it appeared that new federal legislation was imminent, as both candidates brought the issue to the forefront. Since the election, much of that momentum has waned, culminating with the Trump administration's decision in August 2017 to suspend implementation of the EEOC pay data disclosure rule, which would have required covered employers to make certain disclosures by March 31, 2018. The rule would have required employers with 100 or more employees to report wage and hour information for all employees by race, ethnicity, and sex.

"While halting the onerous document collection requirements imposed by the federal pay data disclosure rule was welcome news to many employers, the lack of progress on updated pay equity legislation at the federal level has left many companies wondering what to expect on the pay equity front, and what this signals for the litigation landscape," says Trina Fairley Barlow, a partner in Crowell & Moring's Labor & Employment and Government Contracts groups. The Equal Pay Act and Title VII are still in effect, but it is unclear whether and when we will see new federal pay equity legislation, she says.

For the time being, the spotlight has shifted away from Washington when it comes to new equal pay legislation. "State and local legislatures, from California to New York, have enacted their own equal pay laws that impose obligations beyond those under existing federal law," Barlow says. Every indication is that we will see more such laws, which will likely result in increased pay equity litigation in the coming years.

This increase in state and local activity began in earnest in 2016, when California implemented amendments to its Fair Pay Act to add two significant provisions. First, says Barlow, "the amended California law changed the standards for prov-

ing pay disparities." Previously, a woman arguing that her pay was unlawfully discriminatory needed to compare her situation to that of a man who was doing "equal work." Now, Barlow says, "California law requires only that she prove that she and her male co-worker engaged in 'substantially similar' work based on a composite of skill, effort, and responsibility. This change in the law significantly broadens the definition of who can be considered a comparator." Second, Barlow says, "employees can be compared even if they don't work in the same office or geographical location." Thus, the pay of an employee in a company's suburban Bakersfield office could be compared to that of someone in its downtown Los Angeles office.

The California law also requires employers to justify differences in pay. "If John and Mary receive different compensation, the employer has an affirmative obligation to prove that the entire difference is based on seniority, merit, or some other bona fide factor, not on gender," explains Barlow.

When the California law was passed, it seemed fairly aggressive, but other jurisdictions responded by enacting legislation that is in many ways even broader. For example, Maryland updated its law to prohibit unfair pay based not only on gender but also on gender identity.

COMPLICATION AND LITIGATION

Overall, says Barlow, "these emerging state and local laws are lowering the required threshold for employees' and plaintiffs' counsel to prove pay disparity claims, while simultaneously creating an affirmative obligation for employers to demonstrate that their pay practices are not discriminatory." These new statutes also leave potential uncertainties about what constitutes prohibited conduct, which is likely to open the door to litigation. Maryland's fair pay law, for example, doesn't just prohibit disparities in pay between men and women. It also prohibits employers from providing "less favorable employment opportunities" for women. "Determining what constitutes a 'less favorable employment opportunity' is likely to be the subject of litigation under the Maryland statute," Barlow explains.

To minimize litigation risks, employers should be thinking, for example, about formalizing selection procedures for professional development opportunities that have been historically ad hoc, and documenting the reasons for those selection decisions. Furthermore, because each of the state and local fair pay laws have their individual nuances, employers with operations across several states and localities will need to think about whether to establish different policies and procedures



“The lack of progress on updated pay equity legislation at the federal level has left many companies wondering what to expect on the pay equity front.” —*Trina Fairley Barlow*

for each jurisdiction, or whether a single policy that satisfies the requirements of all relevant laws makes better operational sense.

Decision making around these issues is further complicated by other types of legislation focusing on pay equity. Some jurisdictions, including Delaware and New York City, have recently enacted laws that ban employers from asking job applicants about their pay history. Other jurisdictions, such as Colorado and Nevada, have changed their laws to embrace “wage transparency” and prohibit companies from punishing employees who discuss and compare their pay with co-workers.

DOCUMENTATION MINIMIZES RISKS

For employers, this expanding mosaic of state and local laws makes it more important than ever to document and monitor pay-related processes. “Companies should consider conducting privileged, internal audits and analyses of their compensation systems, evaluation processes, and pay-related decision making to determine if there are pay disparities that cannot be justified under applicable law. If there are problems, employers should take steps to fix them,” says Barlow. Equally important, employers should establish procedures for real-time documentation and review of the rationale behind hiring, promotion, and pay decisions.

Such efforts can help companies minimize litigation risks and provide the basis for a sound legal defense if litigation does ensue. In a nutshell, the emerging pay equity laws require that compensation-related decisions be based on a bona fide factor. “Employers don’t want to put themselves in the position of having to go back and reconstruct the bases for decisions,” says Barlow.

Finally, companies need to monitor evolving legislation—and the resulting litigation risks—in various jurisdictions. There have been numerous bills proposed at the state and local levels, and many are still pending. Notably, these efforts are backed by politicians from across the political spectrum, with proposed legislation in both “red” and “blue” states. Not all of these bills will be enacted, of course. Already, many have been stalled or voted down, and some have been vetoed by governors. But the trend seems clear. “These new laws, coupled with ongoing interest in this topic by federal enforcement agencies, provide fertile ground for continued litigation,” says Barlow. “We have yet to see the end of states enacting such laws—and, in fact, it appears to be just the beginning.”

UPPING THE ANTE IN EMPLOYMENT DISCRIMINATION

Federal laws such as Section 3730(h) of the False Claims Act allow plaintiffs to file independent claims for whistleblower retaliation even if the employee has not filed a *qui tam* action under the FCA. One result, says Crowell & Moring’s Trina Fairley Barlow, “is a recent and seemingly ongoing spike in plaintiffs adding whistleblower retaliation claims to single-plaintiff employment-discrimination lawsuits.”

This tactic raises the stakes considerably for employers. “A typical workplace-discrimination claim may not get the attention of a company’s upper management,” Barlow explains. “But whistleblower retaliation claims that suggest that a company or its senior-level executives have defrauded the government or have engaged in other unlawful conduct do get upper management’s attention.” This attention can give plaintiffs significant leverage in terms of achieving resolution of their disputes.

At the same time, the inclusion of a whistleblower retaliation claim can create some tough decisions for companies. While employers might be inclined to settle such claims, they often don’t know if there is an underlying *qui tam* action or a governmental investigation pending.

If there is, however, obtaining a release of claims from the individual employee asserting the whistleblower retaliation claim might not be the best resolution, because the release may not be valid. Even if it is, settlement of the claim with the individual employee may not resolve the underlying matter.

As a result, says Barlow, “employers must simultaneously manage risks posed by threatened litigation of individual discrimination complaints while they are weighing whether and how the threatened employment litigation may affect a suspected *qui tam* action or a related government investigation.”

TORTS/PRODUCTS

THE NEW STATE LOTTERY: LITIGATION RATHER THAN REGULATION



A number of state attorneys general are partnering with the plaintiffs' bar to find new ways to go after companies and industries—and often using litigation in place of regulatory enforcement.

For many years, states have engaged outside counsel on a contingency basis to sue companies for damages. Today, the practice is burgeoning, even amidst growing concerns that firms that contributed to campaigns of attorneys general won lucrative contingency agreements, raising questions of propriety and legality. At the same time, courts are struggling with the question of when and how states can deputize outside lawyers to sue on their behalf and share judgments and settlements with them. “This is an area of the law that is still unsettled,” says Rick Wallace, a partner in Crowell & Moring’s Mass Tort, Product, and Consumer Litigation Group. Nevertheless, he adds, “outside attorneys are frequently pitching claims to state AGs for contingency cases.”

States are also expanding the nature of their claims. Instead of suing on their own behalf to recover government costs, they are often bringing suits purportedly on behalf of citizens. In many instances, says Wallace, “they are seeking damages from companies based on product liability or nuisance claims or other nebulous common law tort theories.” In a very real sense, they are shifting away from traditional regulatory enforcement and using litigation to go after companies—and large payouts. And quite often, says Wallace, “we see states suing companies for conduct that is permitted by the states’ own statutes and regulations, raising serious questions about due process, separation of powers, and preemption.”

For example, a number of state attorneys general have sued oil companies for using an additive that made gasoline burn more efficiently. In the mid-1990s, the federal government mandated the use of “oxygenates” in gasoline to reduce

harmful air pollution, which effectively required companies to blend into gasoline an oxygenate known as MTBE. “The EPA approved the use of MTBE, and Congress knew when it enacted this requirement that MTBE would be the primary oxygenate used,” says Wallace. Years later, states sued over the use of MTBE—including states that had previously joined the federal government in effectively mandating the use of the product. The litigation caused MTBE to be taken off the market.

“The cases have usually focused on product liability claims based on the allegation that gasoline with MTBE was a defective product,” says Wallace. The cases place companies in a kind of Catch-22, in which states seek to penalize them for actions they took in order to follow regulatory mandates.

States are now applying common law tort theories to other industries. Earlier this year, the state of Washington brought a

KEY POINTS

States partner with plaintiffs’ bar

States are moving complex issues from the regulatory arena to the courtroom.

Catch-22

States are often suing companies for conduct permitted under their own laws.

New tools, new risk

Advancing technology is opening the door to more litigation.



“Companies should monitor these RFPs because they’re an early indication that the state is contemplating a suit—and they will typically lay out the nature of the case the state is considering.”

—Rick Wallace

suit against Monsanto and other chemical companies that had manufactured PCBs, which were used in a variety of products through the late 1970s. “The state of Washington says that it now has PCBs in waterways across the state and has alleged that this constitutes a public nuisance and a trespass on their land, and they want money to remove it,” Wallace says. To handle the case, the state has engaged a prominent plaintiffs’ firm on a contingency basis. Other state attorneys general have recently targeted financial services companies—alleging unfair trade practices on behalf of citizens—and pharmaceutical companies based on various tort theories.

These kinds of cases present special challenges for litigators. As they move such complex issues from the regulatory arena to the courtroom, they open the door to having a lay jury essentially override the careful analyses done by scientists and policy experts—penalizing companies for complying with existing rules.

Companies are not defenseless, however. Wallace recommends that they encourage their industry groups to stay in touch with state attorneys general to try to fend off unwarranted litigation. “They may not avoid it, but at least they can be heard,” he says. In addition, some states are responding to the controversy surrounding the use of outside contingency firms and passing legislation making the process more transparent. “We are now seeing more AGs issuing public requests for proposal rather than going through private single-source negotiations with a law firm. Companies should monitor these RFPs because they’re an early indication that the state is contemplating a suit—and they will typically lay out the nature of the case the state is considering,” he says.

TOXIC TORTS: SMALL LEVELS, BIG PROBLEMS

Some states have recently sued companies over chemicals found in water when the amounts involved are well below the levels recognized to cause harm—again, contrary to government guidelines. “We see cases where states are seeking damages based on infinitesimal levels of a chemical, even though the state statutory and regulatory standard sets a clean-up level far above the level that the state AG contends is actionable in court,” Wallace notes. The argument here, often, is that these small amounts may cause harm that no one yet knows about.

That’s a tactic likely to be more common as advancing technology makes it possible to identify very small levels of chemicals. Many substances can now be measured in parts per

trillion—tiny levels that were unimaginable not long ago.

As the technology becomes more and more sophisticated, “we’ll see more litigation, as well as regulation, over the presence of these chemicals,” says Wallace. With the wide availability of such tools, that litigation is likely to involve municipalities and individuals, as well as states. And in instances where chemicals are unique enough to be traced back to specific sources, he says, “we’ll see companies surprised by suits over the presence of minute levels of their products or chemicals in locations that they could not have anticipated.”

In that world, the *Daubert* standard for admitting expert testimony becomes all the more important. “The viability of claims or the admissibility of evidence can turn on these micro detections,” says Wallace. “Defendants can raise the question of whether exposure to a given substance is even capable of causing injury or harm, and *Daubert* is central to resolving that question.” The *Daubert* decision, he adds, will be 25 years old in 2018—“and when applied properly, it can get better with age.”

CLASS ACTIONS: SOME RELIEF FOR DEFENDANTS

Statewide class actions will continue against companies that manufacture and market allegedly defective products. Now, however, defendants have a new basis for escaping so-called “judicial hell-holes,” thanks to the 2017 U.S. Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*.

In that case, the California Supreme Court would have allowed statewide claims by classes of plaintiffs from other states to proceed along with claims by a class of Californians. The U.S. Supreme Court disagreed. It held that state courts cannot assert jurisdiction over product liability claims by out-of-state plaintiffs against out-of-state defendants, unless the plaintiff purchased the product within the forum state or suffered injury from the product there. The mere fact that a defendant sells its product in a given state is not enough for it to be sued there by non-residents. Plaintiffs should find forum shopping a bit harder as a result.

WHITE COLLAR

CORPORATE MONITORS: PEACE, AT WHAT COST?



The use of independent compliance monitors in U.S. Department of Justice resolutions has grown so common that they are now almost a given in the department's disposition of corporate criminal and regulatory enforcement actions. But as experience with monitorships has grown, it has become

increasingly clear that they can sometimes create serious problems for the companies they are intended to help.

Ideally, a monitor is “an honest broker who assesses whether the company is living up to the specific commitments it has made,” says Philip Inglima, a partner in Crowell & Moring's White Collar & Regulatory Enforcement Group and chair of the firm's management board. The monitor's role is not to punish the company in question but rather to help it improve its compliance programs in order to avoid problems in the future. “A monitorship can be an effective tool for a company to achieve remediation, because it forces the C-suite to listen to an independent authority who has a perspective on how to steer clear of violations,” he says. “A monitorship can give the government a lot of leverage with a board of directors and executive management to move the needle and achieve real, lasting reform and compliance.”

In practice, however, monitorships don't always work as intended, frequently carrying prohibitively high price tags. Monitors are usually lawyers—typically, former prosecutors—who are well equipped to investigate compliance issues. However, the monitor's investigation and recommendations need to take into account the context of the company's operations, industry, and competitors—areas where his or her legal expertise may not be sufficient. Thus, monitors typically need to bring on board consultants and advisors with the right business-specific expertise to help advise them, thereby driving up costs.

Monitors are usually given fairly broad authority to oversee corporate compliance efforts. Charged by DOJ with ensuring that the company does not run into trouble again, many tend to cast a wide net. “There is an incentive to leave nothing undone—to gold plate almost every level of the compliance effort,” says Inglima. “And gold is not inexpensive.”

That mind-set can lead monitors to look not just for deficient compliance practices, but any practices that can be improved at all. The effort to create the “perfect” approach to compliance and eliminate virtually all risk of violation

tends to expand the scope of their work. While corporate executives often need to weigh compliance investments against risk in light of overall economic and competitive factors, says Inglima, “the monitor isn't obligated to make that balance and harmonize the real world with the ideal world. That can result in ambitions that are completely divorced from a commercially viable rationale.”

At the same time, there are usually few controls placed on the monitor or the costs he or she accrues. “The monitor becomes the 800-pound gorilla in the room as soon as he or she is appointed,” says Inglima. “And the goodwill and discretion of the monitor dictates the vast majority of what happens from that point forward.” For companies that find themselves incurring huge costs due to the monitor's activities and recommendations, “there is very little recourse or ability to push back on the monthly run rate.”

The expenses associated with monitors have crept up to the point where they now can have a significant impact on a company's bottom line. “It's becoming the new normal for the costs to run well north of \$30 million to \$50 million over the course of three years,” says Inglima. And federal authorities are not the only ones employing this model. Under one recent agreement set up under New York State enforcement authority, a company spent more than \$130 million on monitor-related costs. Such costs, says Inglima, “can dissipate resources that ideally would be available to sustain long-term compliance programs.”

PUSHING BACK ON THE AGREEMENT

Faced with such potential risks, companies facing the imposition of a monitor should take action up front. As an agreement is being hammered out, counsel “should negotiate hard to place some limits in the monitor's appointment documents,” says Inglima. Typically, companies have little leverage and great eagerness for a quick deal with DOJ at this stage, largely because boards and executives are under market and shareholder pressure to resolve such matters quickly. But the rising stakes that come with monitorships now make it critically important to create leverage and breathing room in these defining deal documents.

In negotiations, companies can draw on two department memos that address monitorships. The first—the Morford Memo—states that the financial impact associated with the monitor should be calibrated to the egregiousness of the underlying misconduct. “If it's heinous conduct, you're go-



“The monitor isn’t obligated to make that balance and harmonize the real world with the ideal world. That can result in ambitions that are completely divorced from a commercially viable rationale.” —Philip Inglima

ing to have to give a lot more authority to the monitor,” says Inglima. “But very often, you have more localized conduct in a specific division or conduct associated with just a few individuals who have been banished from the company. In those cases, it may be that the monitorship should be focused just on auditing compliance efforts.” In other words, the Morford Memo supports proportional limitations on a monitorship.

DOJ’s Grindler Memo in 2010 added a specific expectation that although the monitor is independent, DOJ can be an arbiter of disagreements that emerge between the monitor and the company. “Under this principle, DOJ specifically anticipates that on at least an annual basis, the company will be conferring with DOJ and the monitor about the monitor’s work,” says Inglima.

These memos open the door to discussions about how the monitoring arrangement will be set up. “They provide a basis for shaping the agreement so that you don’t later have an unchecked mandate for the monitor and runaway financial cost or scope issues,” says Inglima. Companies might ask to have projections of expected costs, for example, or a definition of the progress that would trigger an early termination of the agreement. The company may not get exactly what it wants in these negotiations. But, says Inglima, “through this process, you’re getting DOJ to have eyes on those issues at the very beginning of the relationship. Later, if the company is challenging the amount of spend or the expansion of inquiry by the monitor, there is some collective memory that this function has to be reined in at some point.”

Meanwhile, companies are well advised to get out in front of the problem by aggressively undertaking their own remedial actions while the DOJ investigation is still underway. “These investigations are often long, slow burns,” says Inglima. “That gives the company time to bring in its own change agent, the internal equivalent of a monitor, and begin embracing her findings and implementing solutions before DOJ has brought the hammer down in terms of what the final deal will be.” The idea is to show substantial progress in making improvement and a commitment to the required investment prior to the DOJ disposition—which ideally will be factored into a more limited monitoring arrangement.

Overall, Inglima says, these types of early, up-front actions can position the company to “avoid working with a monitor who has carte blanche. Companies can preemptively establish some practical limitations to help ensure the monitors do not throttle the very businesses they are meant to support.”

THE ULTIMATE “PARALLEL PROCEEDINGS”

When DOJ conducts a white collar investigation, it expects and often rewards admissions and cooperation from the company being investigated. But for the vast number of companies doing business internationally, that cooperation can quickly get complicated.

With the varying legal regimes involved in international business today, conduct that constitutes fraud in the U.S., for example, might simply be a regulatory infraction under other nations’ laws. While DOJ and enforcement agencies in other countries often coordinate their efforts in pursuing fraud cases that cross borders, they are typically on separate tracks and subject to disparate timing and form of resolution. As a result, says Crowell & Moring’s Philip Inglima, “a multinational probe can present the ultimate ‘parallel proceedings’ challenge for corporations.”

For example, a company resolving a DOJ investigation will need to pledge disclosures and cooperation to lessen its potential impact. However, says Inglima, “coming clean and making peace in that one venue creates an inevitable floor of fact-finding and admissions that it can be difficult to get below again.” Since it is virtually impossible to resolve a complex issue simultaneously across borders, the “floor” established in the U.S. can eliminate defense arguments that would otherwise be viable elsewhere, because “DOJ routinely requires settling companies not to contradict factual admissions made to them anywhere else.” Moreover, cooperation with DOJ can implicate sensitive data privacy or confidentiality standards of other countries where the company does business, creating trip wires in the ongoing U.S. probe.

Overall, says Inglima, “It can be very challenging strategically to decide the timing and the extent of admission to provide in each jurisdiction. Company counsel need to look far down the road in assessing what the liability triggers will be in other enforcement venues.” In short, while peace with U.S. prosecutors may be the company’s immediate priority, it must be balanced with a full appreciation for the consequences it will present in other nations’ enforcement arenas, and maximum coordination of resolution timing and obligations should be pursued.

E-DISCOVERY

WHAT IS “PROPORTIONAL” IN THE ERA OF EXPANDING DATA?



Burgeoning amounts of electronic data are presenting a range of challenges for companies responding to discovery and for courts that have to manage the discovery process. Several recent changes to the Federal Rules of Civil Procedure

have tried to address these challenges, though the full impact of these changes is still being sorted out.

In 2015, Federal Rule of Civil Procedure 26(b)(1) was amended to state expressly that to be discoverable, information must be not only relevant, but “proportional” to the needs of the case. In weighing proportionality, courts are directed to consider the importance of the issues at stake, the amount in controversy, the parties’ relative access to the information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

“Proportionality tries to strike a balance between the needs of both parties,” says Crowell & Moring Litigation Group Partner Mike Lieberman. “In essence, it asks how much discovery makes sense in the context of this specific case. What is proportional in one case may very well not be proportional in another.”

Applying the proportionality standard, courts have taken varied approaches and reached different conclusions. In one case, a court denied as disproportionate discovery into a defendant’s communication with foreign regulators because the point of the discovery—to show inconsistency with the defendant’s similar communications with the U.S. regulator—was only marginally relevant and the burden to obtain the discovery was high. In another case, a court rejected as disproportionate a request for additional documents where the party had already produced other documents on the same topic.

On the other side of the coin, a court held that the fact that a company would have to look in multiple databases within multiple departments did not render a discovery request disproportionate. Another court applied the proportionality standard and similarly permitted discovery even though the target company would have to do a manual review of scattered electronic and hard copy files for roughly 2,000 people.

“The challenge for litigants,” says Lieberman, “is to show proportionality in a way that brings the concept to life for the judge.”

Parties resisting discovery often try to show a lack of proportionality through hard numbers. They will quantify for the judge the millions of dollars it would cost to review the documents sought. They will emphasize the thousands of documents they would have to search to find the handful

KEY POINTS

Proportionality strikes a balance

Scope of discovery depends on the needs of the parties and the case.

Higher bar for spoliation

Severe sanctions reserved for unreasonable and intentional electronic record loss.

New self-authentication rules

Careful electronic collections can save money and avoid the need for testimony.



“The challenge for litigants is to show proportionality in a way that brings the concept to life for the judge.”

—Mike Lieberman

of documents (if any) that really matter to the litigation. And they will highlight the discovery costs already incurred and how the new discovery would be cumulative of information already provided.

Parties seeking discovery often argue the potential impact of the information sought. They will talk about the importance of the discovery to the case and why the discovery is necessary for fair adjudication of the issues. They will highlight why the discovery is unique and distinct from other materials they already received. And they will downplay the costs of discovery by comparing them to the recovery sought, the size of the target companies, or the harm suffered by their clients.

“For the party seeking discovery, proportionality is about the risk of missing that one case-breaking document without which justice would not be done in the case,” says Lieberman. “For the party opposing discovery, proportionality is about a fishing expedition by their opponent, the costs of which are high and the benefits of which are low.

“The more concrete the parties make their arguments, the higher their chance of success,” he adds.

As the universe of searchable, discoverable data continues to grow, what it means to be “proportional” will be a primary frontier for discovery litigation.

THE CHANGING DYNAMICS OF SPOILIATION

Another significant change to the Federal Rules of Civil Procedure involved the rules around spoliation. Under prior iterations of the Federal Rules, companies risked claims for sanctions where the loss of documents was inadvertent.

“The plaintiffs’ bar in particular recognized the threat of spoliation as a leverage point and used this threat as a way to put settlement pressure on defendants,” notes Lieberman.

In 2015, Federal Rule of Civil Procedure 37(e) was amended to clarify that spoliation sanctions are only permitted for loss of electronically stored information when a party failed to take reasonable steps to preserve. If a party suffered prejudice from the loss of information, the court may order measures no greater than necessary to cure the prejudice. More severe sanctions are reserved for when the party acted with intent to deprive another party of the information’s use in litigation.

“To be sure, parties still need to be careful to avoid spoliation, and the potential penalties under the rules are still severe,” says Lieberman. “But these rule changes lower the risk

STREAMLINING AUTHENTICATION OF ELECTRONIC DOCUMENTS

In December 2017, the Federal Rules of Evidence were amended to add two new categories of self-authenticating documents: (1) records generated by an electronic process or system that produces an accurate result—for example, structured data processed from a company database; and (2) records copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification—for example, emails verified by hash values. To be self-authenticating, companies must support these documents with a declaration certifying that they are records of regularly conducted business activity.

“These new rules bring the Rules of Evidence into the digital age,” says Crowell & Moring’s Mike Lieberman. “This should allow parties to authenticate large swaths of information without the need for IT teams to travel all over the country to offer authentication testimony.

“This change should also impact how companies manage data,” Lieberman adds. “Now, if companies are careful in document collections on the front end, they can save themselves a lot of headache on the back end. Prudent companies should be putting systems in place that will let them take advantage of these new self-authentication opportunities and better manage their litigation costs in the process.”

that an inadvertent loss of documents will break a case open for the other side.”

Courts are still defining what are reasonable steps to preserve, what is needed to show intent to deprive a party of information, and what sorts of cures are necessary to alleviate prejudice. Litigants, in turn, are only just beginning to adjust their tactics to these new requirements.

Lieberman is optimistic, though, that these rule changes will serve the interests of justice. As he notes, “These rule changes make it more likely the parties will have their case decided on the merits, rather than having the case derailed by discovery mistakes.”

ARBITRATION

UNLOCKING THE PROMISE OF ARBITRATION



At the turn of the last century, arbitration was all the rage as a more efficient dispute resolution process. Arbitration, its proponents promised, would help parties achieve finality faster, ensure focused arbiters with relevant expertise, streamline the overall timeline, and

minimize costly discovery. As a result, many companies included mandatory arbitration clauses in contracts as a matter of course.

Nearly two decades later, the bloom is off arbitration in many corporate legal circles. Some argue that the promise of arbitration has often not been realized and, worse, that the dispute resolution “alternative” to litigation has ended up more burdensome than the litigation process it sought to replace.

But statistics provide some meaningful pushback to these criticisms. According to the American Bar Association, as of 2011, the typical domestic commercial arbitration took about seven months, while U.S. District Court civil cases averaged about 23 months. “There is definitely an expectation that if you have an arbitration clause, things are going to happen more quickly and cheaply than they would in litigation,” says Aryeh Portnoy, a partner in Crowell & Moring’s Litigation Group. “But that does not mean that in practice it always happens that way.” Portnoy says that one key to avoiding problems is to address several issues early on, long before there is an actual dispute—that is, during the writing of the contract.

Portnoy explains that the problem is not arbitration per se, but rather the way the process is set up in the contract’s arbitration clauses. “The dispute resolution process is a creature of that contract,” he says. “If the parties use a short and standard form dispute resolution clause, the generic wording of that sort of provision may fail to define the process clearly enough, opening the door to a range of potential disagreements and arguments.” Portnoy suggests paying more attention to three areas:

■ **Arbitrator selection.** Clauses should define the selection process and put time limits on it. How many candidates can be proposed? How many can be stricken? What fallback process will be used if no arbiter is selected within the set time? Clauses should also describe any special expertise arbitrators will need to have—will they have to be retired judges, for example, or licensed architects or engineers? Overall, it’s important to strike a balance between being too broad and too specific. Going too far in either direction can create potential for arguments that slow the process. Portnoy points to a recent engagement in which “it took six months just to appoint the arbitrator. That never happens in a court—you’ve got your judge on day one.” The goal, he says, is to set up a practicable pool of qualified and competent arbitrators to select from efficiently.

■ **Discovery.** Clauses should specify the type and scope of discovery, based on the type of disputes likely to arise. They should also define limits for depositions, an especially costly discovery device. These clauses, Portnoy adds, “should also include some wiggle room to allow the parties and arbitrator to modify discovery as needed to ensure fairness.”

■ **Expedited track.** Many arbitration bodies have a specific process for “expedited matters.” Companies may want arbitration clauses that call for proceeding under those rules.

In short, arbitration is an area where an ounce of upfront prevention can be worth a pound of cure. “It is prudent to think through these things at the contract phase and set up a structure so that if there is a disagreement, you have some certainty as to how it will be handled,” says Portnoy. In the coming years, companies that take those steps will be in a far better position to use arbitration as the effective tool that it once promised to be.



“It is prudent to think through these things at the contract phase and set up a structure so that if there is a disagreement, you have some certainty as to how it will be handled.”

—Aryeh Portnoy

HEALTH CARE

FCA ENFORCEMENT: DIFFERENT, BUT STILL HERE



Earlier this year, many health care companies wondered if changing priorities at the Department of Justice would reduce the threat of False Claims Act actions. Now, however, it seems clear that the FCA should still be on the general counsel's radar.

Certainly things are changing at DOJ. Parts of DOJ continued to be affected by a hiring freeze; while some new staff have been brought on for health care fraud cases, others have seen their responsibilities shift to handling other types of work, such as Controlled Substance Act cases. The net result: "Over the coming year, we're going to continue to see DOJ enforcement of FCA cases in the health care industry," says Laura Cordova, a partner in Crowell & Moring's White Collar & Regulatory Enforcement and Health Care groups.

Even when it doesn't intervene, DOJ is likely to stay involved in other ways. For example, Cordova says, "Several circuits have concluded that DOJ has absolute veto power over FCA settlements, and it has used that power to veto settlements between relators and defendants that it thinks are too low."

In addition, courts have typically allowed the department to file statements of interest in cases where it has not intervened—"and DOJ's statements of interest can have an impact on the court's decision," she says. Overall, "this approach is in keeping with the administration's priorities of reducing the federal workforce while still collecting significant amounts of money through *qui tam* enforcement of the FCA."

DOJ's continued reluctance to intervene in many cases provides health care FCA defendants with potential tools. For one, it opens the door to early arguments against a plaintiff's



"In some cases, DOJ will be willing to step back and let relators' counsel move forward with the cases, so the department can conserve its own resources." —Laura Cordova

DOJ's role in cases may be shifting a bit, however. DOJ leadership recently indicated that the department might start taking a closer look at cases brought by relators and moving more frequently to dismiss cases that DOJ believes lack merit. While DOJ has always had the power to move to dismiss *qui tam* cases, it has taken this step only rarely. In cases where DOJ does not intervene and does not move to dismiss a *qui tam* complaint, thereby allowing the relator to pursue the case, the department is likely to watch relator actions closely and then weigh in where it thinks it needs to.

"In some cases, DOJ will be willing to step back and let relators' counsel move forward with the cases, so the department can conserve its own resources," says Cordova, who formerly worked in the fraud section of DOJ's criminal division. That said, DOJ is going to be keeping watch to ensure that these cases do not create bad law or precedent from their perspective.

pursuit of a case. In its May 2017 *United States ex rel. Petratos v. Genentech, Inc.* decision, the Third Circuit, applying the materiality standard established by the Supreme Court in *Escobar*, noted the government's refusal to intervene in a *qui tam* suit as further evidence that the false certifications alleged in the complaint were not material to the government's payment decisions on the underlying claims.

In the same vein, the Fourth Circuit concluded in *United States ex rel. Badr v. Triple Canopy Inc.* that DOJ's immediate intervention in a case was evidence that the alleged falsehood affected the government's decision to pay the underlying claims.

Looking ahead, there are several key areas where DOJ will likely take an interest in relators' cases, or even pursue its own litigation. "The government is looking at drug pricing—which folks across the political spectrum are talking about," says Cordova. "And cases involving opioids are going to rise to the top of the pile."

IP: COPYRIGHT

3D PRINTING COMPLICATES COPYRIGHT



Additive manufacturing, or 3D printing, is quickly becoming a mainstream technology—and as that happens, it is creating challenges for IP owners.

The concept of 3D printing has been around for decades, but it had been a small-scale, isolated phenomenon, rather than a widespread business technology. However, it has been evolving rapidly, making it possible to print a growing range of 3D items—everything from prototype parts for manufacturers to prosthetic devices, jewelry, and food.

With 3D printing, companies can distribute products quickly and easily. For example, a company could license 3D design software to industrial customers to allow them to make replacement parts on site and on demand—or do the same to let consumers print children’s toys at home. The technology also makes it possible to use 3D scanners to create digital designs of objects that can then be printed.

But those capabilities can be easily abused. “How do you keep track of who is printing out your products without a license?” asks Valerie Goo, a partner in Crowell & Moring’s Litigation Group. Traditionally, selling counterfeit products meant setting up a plant overseas, producing enough volume to make it cost-effective, and bringing the fake goods into the country through U.S. Customs. Now, she says, “people potentially can just download software from the internet, or even use a 3D scanner to copy a design, and then use their 3D printer to make, for example, knockoff designer sunglasses—complete with the designer name and logo—just about anywhere.”

In general, says Goo, “this is an area where the technology is out in front of the law.” She notes that there are parallels between the emerging 3D printing legal landscape and that of the Napster and other music downloading cases a decade and a half ago, where IP owners found themselves going after music-sharing platforms and even individual users. Similarly,

with 3D printing “we have enablers—people who are making the software or the programming available and indirectly infringing. And then there are the people who are actually printing the product—the direct infringers,” she says. This is likely to raise questions that will be settled in court.

Identifying and stopping that sort of infringement will be challenging. While the recent Supreme Court ruling in *Star Athletica* clarified the test for severability, allowing companies to claim copyrights in design elements that are part of a functional product, thus strengthening copyright protection in 3D products, it will be difficult to enforce these rights when it comes to 3D printing. It is not easy to trace the source of infringing products made with 3D printers or to prohibit file-sharing of infringing 3D printer design files. In addition, IP owners’ efforts are likely to be frustrated by the Supreme Court’s *eBay* decision and the Ninth Circuit’s *Herb Reed* decision—rulings that make it harder to get injunctions in copyright and trademark cases.

IP owners may also be stymied by the Digital Millennium Copyright Act. While the DMCA affords IP owners additional protection against circumvention of technological measures employed to protect digital works, it also insulates internet service providers from liability stemming from file-hosting activities that allow users to share content—unless the ISP has knowledge of the infringement. And the strength of the DMCA’s “repeat infringer” rule, which requires ISPs to terminate users who are repeat infringers, remains uncertain.

Companies can look to technology, as well as to the courts, for solutions. For example, encryption and tracking can make it harder for unauthorized parties to use or alter 3D design files. Software with built-in limits might restrict the number of items to be printed. Goo adds that some companies are exploring the use of hard-to-scan material in their copyrighted products. IP laws will need to catch up with the technology, she says, “but that is going to take some time.”



“People potentially can just download software from the internet ... and then use their 3D printer to make, for example, knockoff designer sunglasses ... just about anywhere.” —Valerie Goo

TAX

WHAT CONGRESS GIVETH, THE IRS TAKETH AWAY



Congress often uses the tax code to encourage certain actions and behaviors from businesses. But lately, the IRS seems to be working at cross purposes with those efforts.

Take, for example, the tax incentives that Congress provides to encourage public-private partnerships. “The tax code says that if the government provides funding to a corporation to perform a project that will benefit the public at large, those funds are tax-free,” says Dwight Mersereau, a partner in Crowell & Moring’s Tax Group. The idea behind that statute is that taxing such funding could either discourage private-sector participation or

Mersereau. “So the IRS is directing the incentive to the wrong party.” Thus, the primary company is likely to go with the lowest-bidding subcontractor—which could well be in another, lower-cost country.

“With these aggressive positions, the IRS is undermining what Congress intended,” he says.

DESPERATION AND LITIGATION

These kinds of disputes have traditionally been settled in IRS appeals hearings. However, the IRS has changed that process by having the traditional independent appeals officers joined by “issue specialists.” “Those specialists are basically deciding



“The company that does the work may not be the one that decides where the product will be manufactured. So the IRS is directing the incentive to the wrong party.” —Dwight Mersereau

drive up the government’s costs. For example, if a project required \$100 million and that is what the government offered, the contractor might be left with just \$65 million after taxes to complete the effort—which would not be workable. Or the government would have to increase its funding to cover the tax and make the project viable, boosting the government’s bill to something like \$154 million.

In a recent case, Congress directed the Federal Communications Commission to work with the private sector in a situation where this tax-benefit rule should apply. In its requests for proposals, the FCC specifically said it should apply. However, when a potential vendor took the question to the IRS, the agency said that it would consider the funding as taxable income for the vendor. The vendor declined to bid on the work.

Similarly, under the American Jobs Creation Act of 2004, Congress provided tax incentives for companies that locate their manufacturing in the U.S. However, the IRS has ruled that those benefits go to the company actually doing the work—which often means subcontractors. “The problem with this is the company that does the work may not be the one that decides where the product will be manufactured,” says

the issue, not the appeals officer,” says Mersereau. With that shift—and the IRS’s budget-driven staff cuts—“the appeals system has broken down on some of these issues,” he says.

The agency’s stand on congressionally mandated incentives is contentious enough that a number of companies have taken the IRS to court. On the manufacturing incentive issue alone, Mersereau says, “there already have been about a dozen cases in litigation, all on that one code section. That’s an indication of the aggressive position that the IRS is taking on these issues. Taxpayers don’t choose litigation lightly.”

Looking ahead, this Congress-IRS impasse is not likely to be resolved. That may limit the usefulness of these tax incentives, and reduce the attractiveness of public-private partnerships for contractors. If companies do decide to pursue such partnerships, they should not assume that an agency’s—or Congress’s—stated goals are a given. And, says Mersereau, “they should be thinking about the possibility of having to litigate their position and plan for that—keeping things privileged, being careful about how they marshal evidence in support of their position. They should go in with the mind-set, right from the beginning, that this is going to be litigated.”



For more information contact:

Mark Klapow

1001 Pennsylvania Avenue, N.W.

Washington, DC 20004-2595

Phone: 202.624.2500

www.crowell.com

NAVIGATING AN AGE OF EVOLUTION—AND REVOLUTION



Every day brings advancements in technology, generating mounds of new data that offer businesses and consumers greater opportunities and, from a legal perspective, even greater challenges. A revolution in government has upended regulations in such areas as antitrust, labor and employment, tax, health care, and the environment and, in many cases, spawned legal action. Keeping up is difficult enough, but the real challenge is looking ahead not

only to anticipate what's coming next but to understand how to deal with it once it arrives. And that's been the unique role of Crowell & Moring's *Litigation Forecast* since we launched the series six years ago—providing our clients with both an eye on the future and a blueprint for building their businesses in this rapidly changing world. This volume, I believe, is our strongest yet. We look forward to hearing from you, both with comments and with suggestions for next year's *Forecast*.

—PHIL INGLIMA
Chair, Crowell & Moring