LITIGATION FORECAST 2014

WHAT CORPORATE COUNSEL NEED TO KNOW FOR THE COMING YEAR

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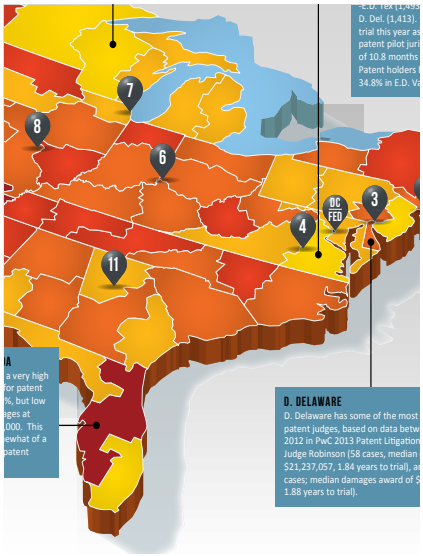
LITIGATION FORECAST 2014



CHARTING THE LITIGATION LANDSCAPE

Today, litigation is playing an increasingly prominent role in the business world, with cases frequently becoming more and more complex. This is playing out in a dynamic business environment, accompanied by the ongoing evolution of everything from federal and state laws to regulators' priorities and plaintiffs' litigation strategies. For companies and their attorneys, the result is an ever-shifting set of risks and opportunities.

Building on the foundation we established with our well-received *Litigation Forecast* last year, *Litigation Forecast 2014* is designed to foster a better understanding of this changing environment. And, in the spirit of continuous improvement, we've broadened our coverage this year to include several industry-focused sections—health care, energy, and financial services—covering areas that face their own specific litigation challenges.

Behind the reporting and analysis in *Litigation Forecast 2014* is Crowell & Moring's deep experience, both domestic and international, in the field. Two-thirds of our lawyers are litigators, and we cover a full range of practice specialties, bringing together a comprehensive knowledge and understanding of the legal, political, and regulatory landscapes to help clients find the best way forward. In recognition of this skill set and our experience, the *National Law Journal/Legal Times* named us the 2013 "Washington Litigation Department of the Year" in the General Civil Litigation category.

Litigation Forecast 2014 is an effort to distill some measure of that experience into a concise, practical overview—one designed to help both in-house and outside attorneys understand the trends shaping their world, the emerging threats, and the key cases driving change. We hope that you will see this publication as a valuable starting point for ongoing conversations that can lead to the insights and strategies needed to succeed in the coming year and beyond. In that spirit, we look forward to hearing from you.

—Kent Gardiner
Chairman, Crowell & Moring

LITIGATION FORECAST 2014

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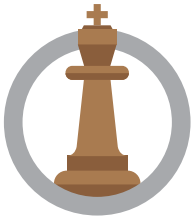
ANTITRUST

THE GOVERNMENT GEARS UP FOR MORE LITIGATION



The Department of Justice and the Federal Trade Commission have been increasingly active in using litigation as a tool in antitrust enforcement—and that provides a clear indication of what we can expect in the future.

The DOJ continues to show a growing willingness to go to court to stop mergers that it deems anticompetitive, and it has been strengthening its litigation team to handle the work. "A few years ago, DOJ anti-merger cases were few and far between. They would try to work with the parties to address concerns without instituting litigation," explains Beatrice Nguyen, a partner with Crowell & Moring's Antitrust Group. "Now they are willing to go to trial and use that to drive settlements and consent decrees, and ultimately affect the shape of mergers and acquisitions."

One of the early examples of that approach was the proposed merger of AT&T and T-Mobile*, late in 2011, a $39 billion deal that would have formed the largest wireless company in the U.S. The DOJ sued to stop the merger, and shortly after the Federal Communications Commission made it clear that it would oppose the deal too. A few months after announcing the proposal, AT&T dropped it, paying some $3 billion in cash and $1 billion worth of wireless spectrum to T-Mobile parent Deutsche Telekom to unwind the deal.

Similar activity has continued since then, up to and including the recent American Airlines-USAirways merger, which the DOJ sued to stop in August 2013. This eventually led to concessions in which the two airlines agreed to sell takeoff and landing rights at two major airports, along with gates and ground assets at a number of other facilities. The DOJ's suit surprised a number of observers. As Renata Hessee, the deputy assistant attorney general for Criminal and Civil Operations at the DOJ, recently told *The Wall Street Journal*, "I do think that parties used to come into the division and think that they could gain leverage in a negotiation with us because we were afraid to litigate, and that dynamic has changed."

KEY CASES

U.S. V. AMR CORP., ET AL. A civil antitrust lawsuit filed by the DOJ, six state attorneys general, and the District of Columbia challenged the proposed $11 billion merger between USAirways and American Airlines because it allegedly would have substantially reduced competition for commercial air travel in local markets throughout the United States and resulted in passengers paying higher airfares and receiving less service.

FTC V. ACTAVIS, INC., ET AL. The U.S. Supreme Court's opinion held that "reverse payment" pharmaceutical patent settlements are not categorically immune from the antitrust laws even when within the scope of the patent, that they may or may not violate the Sherman Act, and that they must be analyzed under the rule of reason for possible pro-competitive benefits versus potential anticompetitive effects.

* *Crowell & Moring representation*

FTC BUILDS ON KEY SUPREME COURT WIN

Like the DOJ, the Federal Trade Commission has increased its scrutiny in the antitrust arena. In the past year, the FTC has stated that it is paying particular attention to industry sectors including health care, technology, and energy, where anticompetitive activity can have a significant impact on consumers.

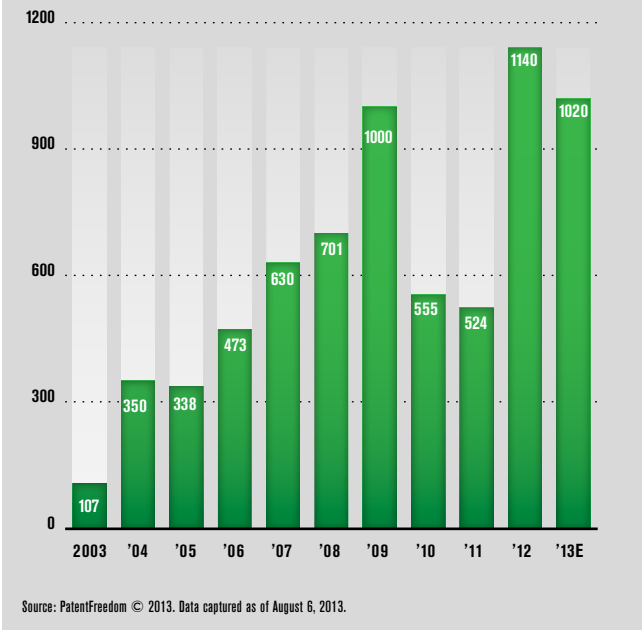
For some time, the FTC has focused on limiting the pharmaceutical industry's use of reverse payments, in which a patent-holding drug company pays a generic drug manufacturer to stay out of the market for a period of time after its patent expires—in effect allowing the patent-holder to extend the life of that patent. Over the years, courts have deemed these "pay-for-delay" practices to be legitimate based on patent law, and not subject to antitrust considerations. However, that changed with *FTC v. Actavis*, in which the Supreme Court said that antitrust implications should in fact be weighed in these cases—giving the FTC a powerful new opening to attack pay-for-delay in court. Following that ruling, FTC Chairwoman Edith Ramirez said that the pursuit of these cases is "one of the Commission's top priorities" and that "the Commission will continue to aggressively prosecute these anticompetitive settlements."

Since the Actavis decision, the FTC has been making good on those comments and following through on pay-for-delay cases, says Crowell & Moring's Beatrice Nguyen. And the Supreme Court decision is beginning to take hold in courtrooms. In September, notably, a federal court in Massachusetts refused to dismiss a pay-for-delay case involving Astra Zeneca, based on the Actavis ruling. "I'm sure we'll see more judges allowing these lawsuits to move forward past the motion-to-dismiss stage now," she says.

The FTC's activity is just the beginning, adds Nguyen—and in the near future, we are likely to see more class action firms looking at pay-for-delay cases. "Given the Actavis decision and the FTC's vow to continue to pursue these cases, we're looking at class action heaven," she says. "I think the branded and generic pharmaceutical companies are going to see more litigation from both the FTC and the private class action bar."

TOTAL CRIMINAL ANTITRUST FINES

in millions



Source: PatentFreedom © 2013. Data captured as of August 6, 2013.

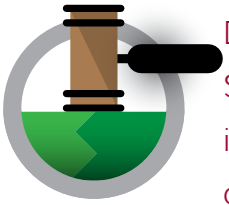
Antitrust criminal enforcement has become a key issue for the U.S. Department of Justice, and last year the total fines levied topped $1 billion for the second year in a row.

"The DOJ has been making the point that they're not going to be shy about filing litigation in order to prevent an acquisition that they think will hurt competition," says Nguyen.

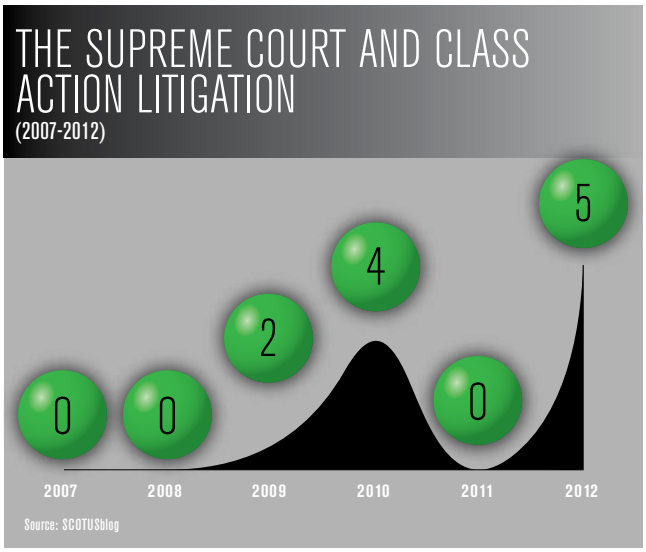
The DOJ's antitrust activity includes more criminal enforcement actions, as well. And, like the civil actions, the division can be persistent in these efforts. As Nguyen notes, "In some instances where they lost a trial or there was a hung jury, they have gone ahead and retried the case. That just shows the level of commitment they have in this area." This past year has seen significant fines—and even jail time for executives—being imposed in areas ranging from Libor manipulation to price-fixing for LCD screens and bid-rigging in real estate foreclosure auctions. In fiscal year 2013, the DOJ levied more than $1 billion in fines—including a $740 million fine announced in September in an extensive auto-parts price-fixing investigation.

CLASS ACTIONS

CLASS CERTIFICATION GETS MORE COMPLICATED



During the past year, the U.S. Supreme Court continued its quest to fundamentally change the landscape in class action litigation with its ruling in *Comcast v. Behrend*.



The U.S. Supreme Court has been weighing in on class action lawsuits, making class certification more difficult and potentially changing the traditional timelines for class action litigation.

"*Comcast* continued the job begun in *Wal-Mart v. Dukes,* extending the requirement for common answers to common questions to each and every element of class action plaintiffs' claims, including damages," says Kathleen Taylor Sooy, chair of Crowell & Moring's Class Action Litigation Practice.

Comcast puts in place additional obstacles to class certification, making it even more of an uphill battle for plaintiffs. Although the ultimate impact of *Comcast* won't be known until more cases follow it, some significant changes are clear now: Courts will be looking more at the ultimate merits of the case when addressing class certification. Plaintiffs not only have to show that they will be able to prove damages on a class-wide basis, but they also have to show that they use class-wide proof to establish causation for all class members' injuries.

"The Supreme Court got the ball rolling on this causation point in its 2011 *Dukes* ruling, finding that there was no way for employees to establish on a class-wide basis whether each of them was a victim of discrimination," says Sooy. "Because the employees would not have common answers to common questions, there could be no class action under Rule 23. *Comcast* builds on this point and takes it into a non-employment arena."

There are a number of implications that parties must take into account as they address class certification. "Expert analysis now becomes critical, with more court scrutiny on the opinions of plaintiffs' experts earlier in the case," says Sooy. "Class plaintiffs will need to have their damages experts ready to go at the class-certification stage. The experts will need to have analyzed all the data and come up with their damages model way earlier in the case. And on the flip side, defendants will need to have their opposing experts up to speed."

These changes make the road to certification more difficult for plaintiffs. But they also have a major impact on defendants, because they generate earlier and more extensive discovery demands. In the past, defendants could effectively seek phased discovery, with the first phase limited to narrower topics related solely to class certification. Discovery relating to the merits could be put off until after certification when the defendants knew they were heading to trial. This phasing saved money and effort for defendants in cases that flunked the certification test. But now, with the ultimate merits of the case playing a larger role in class certification, discovery will be frontloaded. "Bifurcation of class and merits discovery appears to be dead, or at least on life support, after *Comcast*," says Sooy.

ATTORNEYS' FEES FOR CLASS COUNSEL: UNDER THE MICROSCOPE

For some time, courts have been looking more closely at the benefits provided in class action settlements, questioning coupon deals and other arrangements that don't provide much actual value to class members. And now, courts are applying the same scrutiny to the attorneys' fees requested by class counsel as part of those settlements.

In a string of recent cases involving Apple, Bluetooth, and HP, the Ninth Circuit has carefully examined—and then called for reductions in—attorneys' fees. In the Apple iPhone 4 settlement*, for example, the courts cut fees far below what the defendant was willing to pay. "In calculating fees, courts are saying that you need to consider not only the lodestar method and how much work went into the case," says Crowell & Moring's Kathleen Taylor Sooy. "Courts are also taking a hard look at the relationship between the attorneys' fees and the actual benefits going to class members. You now have to take into account both factors."

All of this affects the overall arc of class litigation. "The timeline in a class action is shifting. There will be more time built in between when a case is filed and when class certification comes before the court. And then there will be less time between class certification and trial because discovery will largely be done," Sooy explains. "We are going to see much more compression in the traditional second phase of the class case." This may also affect where class actions are brought and what they look like. With all of the hurdles and hoops to go through in federal courts, class actions may find friendlier paths to certification in state courts. There may be another resulting phenomenon: the ever-shrinking class definition. A class that is smaller in scope and more tightly defined may more easily glide across the certification line.

* *Crowell & Moring representation*

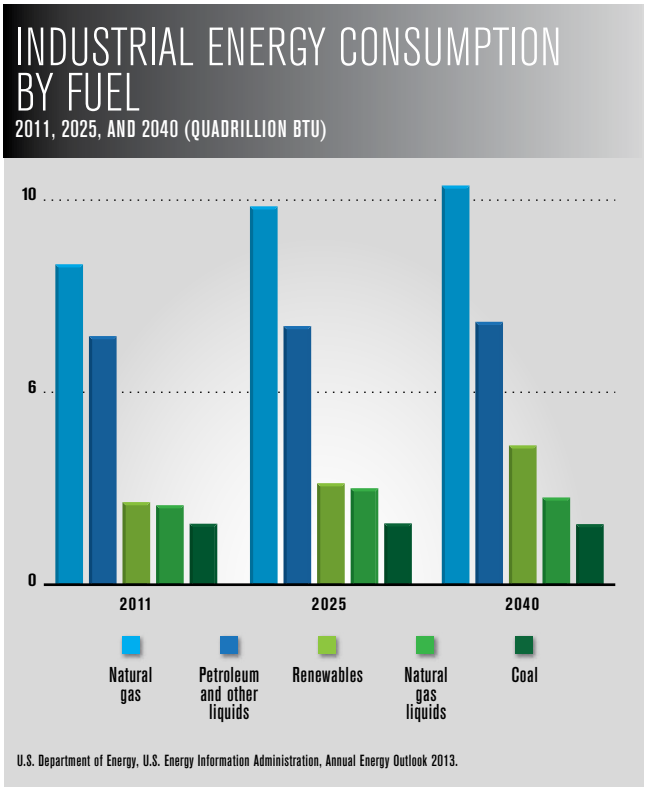
ARBITRATION CONTINUES ITS DOMINATION OVER CLASS ACTIONS

Continuing its pro-arbitration campaign and its efforts to rein in the overuse of classwide litigation during 2013, the Supreme Court held in *American Express Co. v. Italian Colors Restaurant* that a class action waiver in an arbitration provision cannot be struck down simply because individual arbitration proceedings would be financially unfeasible for the plaintiffs. The plaintiffs—merchants challenging "swipe fees" charged by American Express—argued that the class waiver barred them from "effective vindication" of their federal statutory rights because it would cost more to individually arbitrate than the plaintiffs could hope to recover. The Supreme Court disagreed, holding that where the arbitration provision does not bar plaintiffs from pursuing federal claims altogether, the provision is valid and enforceable even if its practical effect is to make arbitration too expensive to pursue. The holding also clears up any confusion remaining after the Supreme Court's landmark 2011 ruling in *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempts state laws that invalidate class waivers. It is now clear that arbitration agreements can require parties to relinquish class action rights for federal as well as state claims.

ENVIRONMENTAL

INDIRECT ATTACKS, AND LOOMING TORT LITIGATION

Environmentalists continue to attack the energy and hydrocarbon industries head on, using arguments based on climate change theories, effects on endangered species, and localized environmental impact. At the same time, they are taking more indirect approaches to litigation as well.



As natural gas plays a greater role in the industrial energy mix, environmentalists will likely increase their anti-hydraulic fracturing efforts—aided, perhaps, by evolving government regulations.

In the coal industry, for example, well-funded environmental plaintiffs are not only taking coal-producing companies to court, they are also pursuing multi-claim litigation against proposed coal export terminals, federal coal leasing decisions, and even the transport of coal. In *Sierra Club v. BNSF**, a suit pending in two federal courts in Washington state, environmentalists have sued a railroad in the hopes of imposing Clean Water Act penalties because of the coal dust that falls off trains as they travel through the state.

There is also a growing number of cases that aim to stop the development of industrial projects, especially those related to natural resource extraction and energy generation. An increasingly common tactic: rather than try to kill projects outright, delay them for as long as possible using the National Environmental Policy Act. With this approach, environmentalists sue the government agency providing the environmental analysis for the permit, questioning the process behind the analysis rather than the actual findings. "It's purely a delay tactic, but it can be effective," says Kirsten Nathanson, a partner in Crowell & Moring's Environment, Energy & Resources Group. "If they can get a court to say that the agency's analysis didn't properly consider all the right factors, the agency has to go back and do it all again."

NEPA is not a new law, but it has traditionally been used in a fairly limited and localized way—largely in "not in my backyard" efforts against highways and plants. "Now it's being used on a broader scale and with a greater diversity of projects, even including wind and solar projects," says Nathanson. "NEPA litigation has become very prolific." In the future, she adds, it is likely to play a role in slowing efforts to build coal-exporting facilities in the Northwest and in attacking the northern portion of the Keystone Pipeline project, if and when that is approved. "It's reaching the point where companies planning major projects that involve federal permitting almost have to build these delays into their schedules right from the start," she says.

AWAITING WORD ON HYDRAULIC FRACTURING

Environmentalists and the energy industry are keeping an eye on potential litigation related to hydraulic fracturing, a method used to extract natural gas. This method has led to extensive drilling in several areas of the U.S., made the practice a high-profile issue, and led to speculation that it is related to problems such as earthquakes and chemical exposure.

* *Crowell & Moring representation*

KEY CASES

MINGO LOGAN COAL CO. V. EPA The issue is whether the EPA can veto a Clean Water Act Section 404 permit after it has been issued; a petition was filed with the U.S. Supreme Court in November 2013.

SIERRA CLUB V. U.S. ARMY CORPS OF ENGINEERS In October, the U.S. Tenth Circuit Court of Appeals affirmed a district court's denial of a preliminary injunction related to construction of the Gulf Coast Pipeline. The majority opinion focused on the district court's balancing of equities in denying the injunction, while the dissent addressed NEPA-related issues. The pipeline is a segment of the planned Keystone Pipeline.

In spite of the media attention given to hydraulic fracturing, the practice has so far led to relatively little high-profile litigation. Cases have tended to be local, often involving individual property owners objecting to the intrusion or to the perceived environmental effects on them and their property. But this may well be the calm before the storm. "This is an area where the plaintiffs' bar's attention is clearly focused, and they're working very hard to develop plaintiffs, identify injuries, and bring high-value, large-scale cases," says Nathanson.

A key—and expected—development in this area will be actions taken by federal regulatory agencies. Before long, for example, the Environmental Protection Agency may issue guidelines related to groundwater contamination and the Safe Drinking Water Act. "If the EPA declares that hydraulic fracturing is causing X conditions in groundwater, that will give plaintiffs the kind of target they need, and they'll quickly develop their experts and their nexus to whatever environmental or health conditions are coming from that," explains Nathanson. The first regulatory change out of the gate may come from the Occupational Safety and Health Administration, she adds. That agency has proposed a rule setting standards for worker exposure to silica, which is found in the sand used in hydraulic fracturing, and that may become a firm regulation in the coming year.

"These are regulatory developments that are closely tied to litigation risk," Nathanson says. "Once we see more definitive federal standards, the industry will be facing more litigation from both the tort side and the environmental advocacy organizations that are trying to shut them down."

The industry is also keeping an eye on a case involving Lone Pine orders, which could shape scope and strategy in future tort litigation. With a Lone Pine order, the court essentially requires toxic tort plaintiffs to provide clear, upfront proof of their claim before a case can progress—and before the defendant has to undertake costly discovery. In July, the Colorado Court of Appeals overturned a lower court's use of a Lone Pine order in a case involving hydraulic fracturing and possible well contamination, holding that, as a general matter, such orders are not permitted under Colorado law. It bears watching whether other jurisdictions will follow Colorado's lead, which will likely drive up litigation costs for companies involved in hydraulic fracturing cases.

COMING SOON: EMERGING RISKS FROM VAPOR INTRUSION

As environmental remediation technology continues to advance, it also identifies new forms of environmental contamination and risk. An emerging area revolves around vapor intrusion—air contamination of interior spaces that results from vapors that move from contaminated groundwater up through the soil and into buildings.

The EPA is developing a regulatory approach for vapor intrusion, issuing guidance documents in 2013, while more than 35 states have developed their own standards to regulate detection and cleanup. The discovery of vapor intrusion contamination could reopen cleanup obligations—and associated litigation—at many sites that were thought to be long closed and resolved.

The fears of indoor air pollution have launched tort litigation as well. In a recent case in New Jersey, residential homeowner plaintiffs successfully survived a motion to dismiss, claiming loss in property value, emotional distress, and injury to three children in the home. Plaintiffs' attorneys have also worked around statute-of-limitation issues, successfully arguing that the injuries are latent and that they did not have a claim until they were aware of the vapor intrusion threat. Thus, even though the contamination might have occurred years or even decades ago, companies might still face litigation risk today from these newly identified forms of contamination and potential injury.

GOVERNMENT CONTRACTS

BELT TIGHTENING DRIVES LITIGATION

The economy has improved over the past few years, but government agencies are still operating under constrained budgets. That reality has been further complicated by the pressures of sequestration-driven reductions, which are likely to be even more problematic as long-term appropriations run out in the coming year. To a great extent, austerity has become business as usual for government agencies.

Competition for every federal procurement dollar will continue to be as fierce as ever—and that complicates the legal landscape for government contractors.

Having fewer resources means that agencies often struggle to keep up with workloads. "An already stretched-thin workforce has been stretched even thinner," says Crowell & Moring partner Dan Forman, who co-chairs the firm's Government Contracts Group. "That has an impact on the quality of the evaluation process. There are more likely to be mistakes in contract awards, opening the door to more bid protests." In response, short-handed agencies continue to turn to early corrective action—rather than potentially expensive and time-consuming litigation—when dealing with protests. "At some agencies, the policy used to be to litigate almost everything," Forman says. "Now the corrective action is routine, because the government just doesn't have the resources to fight every protest."

But contractors themselves are increasingly willing to enter into disputes. "There's a smaller pie in terms of federal money being spent, and in the competition for those dollars, there are going to be winners and losers," says Forman. "The contractors that are on the losing end are not likely to go down quietly. So we will likely see another record year of protests at the GAO and Court of Federal Claims."

A spike in claims under the Contracts Disputes Act can also be expected, as contractors take issue with the way agreements have been administered, interpreted, and executed. A key

KEY CASES

BAE SYSTEMS INFORMATION AND ELECTRONIC SYSTEMS INTEGRATION, INC.* BAE challenged the Department of the Navy's award of a $280 million contract to Raytheon Co. for the technology phase of the Navy's next-generation jammer program. The GAO sustained the protest, finding that the Navy failed to reasonably evaluate the technical risk as required by the terms of the solicitation, failed to adequately document its evaluation, and improperly credited the awardee with outdated experience.

HARRIS IT SERVICES CORP., B-408546.2, .3* Harris protested the award of the $3.5 billion Next Generation Enterprise Network IT contract for the Navy and Marines Corps to HP Enterprise Services, taking issue with the Navy's price evaluation. The GAO, however, found that Harris's protest reflected Harris's mere disagreement with the Navy's evaluation judgments, and therefore did not provide a basis for sustaining the protest.

UNITED STATES V. ANCHOR MORTGAGE CORP. Writing for the Seventh Circuit, C.J. Easterbrook held that damages under the False Claims Act, 31 U.S.C. § 3729(G) are calculated by first subtracting the value of the goods or services the government received from the total contract price. This amount is the government's loss, which is then trebled. The Seventh Circuit rejected the government's "gross trebling" approach, by which it sought to calculate its loss based simply on the total contract price, without deducting the value of the goods or services the government enjoyed.

** Crowell & Moring representation*

driver, says Forman: "Sequestration, which is going to lead to more descoping and partial contract terminations. That is going to give rise to more claims, with contractors seeking costs before the Board of Contract Appeals and up into the courts." And where contractors traditionally might have been willing to drop such matters and move to the next contract, they now see less opportunity. "The view is that there's not much out there in terms of new business," he adds, "so they are going to be more interested in making sure they get every dollar they can under their existing contracts."

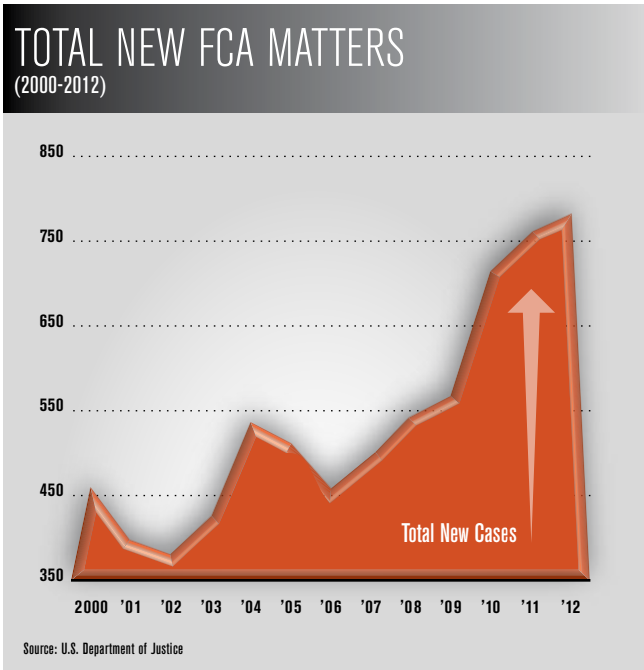
WATCHING FOR RISKY BEHAVIOR

While they contend with a stagnant market, contractors also need to think about the government's increased emphasis on compliance and reducing procurement fraud—a trend stemming in part from budget-challenged agencies' wanting to protect and reclaim scarce funds. With this focus, this past year saw an increase in False Claims Act cases being filed against contractors, and that is likely to continue.

There has also been a rise in suspension and debarment (S&D) proceedings and related litigation. As a rule, each federal agency has its own S&D officials who determine whether contractors are "responsible" enough to be eligible for government work, which essentially means being a sound business with ethical practices. A 2009 change in the law gave those officials more leeway in making those decisions, and in the past year, agencies have been making use of that increased latitude. "Agencies that were not viewed as having aggressive S&D programs have become very active in this area," says Forman. This is reflected in the data the agencies are providing to Congress.

Traditionally, S&D officials have followed clear statutory definitions that spelled out what being a "responsible" contractor means. Under the new rules, however, they are allowed to use a "fact-based" approach. This essentially means that if an SDO reads about a contractor's financial problems or ethical lapses in a news report, the SDO can initiate a new S&D matter without more WORD MISSING FROM MS.

What's more, these problems do not need to be directly related to the company's work with the government—they could be issues with quality in another division, for example. "You have to watch for collateral consequences," says Forman. "A company might run into trouble in an unrelated area, such as securities or environmental issues, and then settle and admit wrongdoing. All it takes then is for the S&D official to read a little blurb in the paper about that settlement. So, if you're doing work for the government, you have to keep the 360-degree implications of these types of actions in mind."



With the federal government's emphasis on reducing fraud—and tight budgets restricting funds—agencies are pursuing more FCA cases against government contractors.

CONSOLIDATE AND UNIFY

On October 29, 2013, the House Oversight Committee passed out of committee the Stop Unworthy Spending (SUSPEND) Act, legislation that would, starting in fiscal year 2017, consolidate agency suspension and debarment offices into a single Board of Suspension and Debarment at GSA and unify the procurement and non-procurement suspension and debarment regulations, among other changes. The SUSPEND Act contains exceptions to allow offices of major agencies to remain in place in certain specified circumstances and for the SBA to retain its authority to suspend or debar entities for misrepresentation of small business status.

LABOR AND EMPLOYMENT

WHISTLEBLOWERS: TRENDS FOR THE PLAINTIFFS' BAR

In the labor and employment arena, many plaintiffs' firms have shifted their attention from equal employment opportunity class action claims to whistleblower complaints—and, in particular, to retaliation claims.

This change is due to several factors. Certainly the U.S. Supreme Court's *Wal-Mart v. Dukes* decision, which made class certification more rigorous, has made Equal Employment Opportunity class action cases less appealing to the plaintiffs' bar. Meanwhile, a competitive labor market and lingering economic uncertainty sometimes creates an environment where employees might be more open to becoming whistleblowers—especially when a substantial reward is involved. "We often see situations where employees who recognize that they are going through performance problems and are perhaps on the brink of being terminated will raise issues about company practices," says Crowell & Moring partner Kris Meade, who chairs the firm's Labor and Employment Group.

Another driver of this change: the growing range of laws and rules that prohibit retaliation against employees who become whistleblowers—which translates into a growing range of tools that the plaintiff attorneys can draw on. "When it comes to SEC-related whistleblower activity, for example, we are seeing the whistleblower protections under Dodd-Frank coming into play in employment cases—and there is a very long statute of limitations under that law," says Meade. At the same time, he says, "we still have the Sarbanes-Oxley whistleblower anti-retaliation provisions, as well as various state statutes that prohibit retaliation."

For companies doing work for the federal government, there are other protections to bear in mind. These include safeguards for individuals who claim retaliation under the False Claims Act. In addition, this past year saw both the U.S. Department of Defense and the Federal Acquisition Regulation (FAR) Council—which coordinates government-wide procurement policy and regulation—issue rules that strengthen whistleblower protections for employees of contractors and subcontractors doing business with the government.

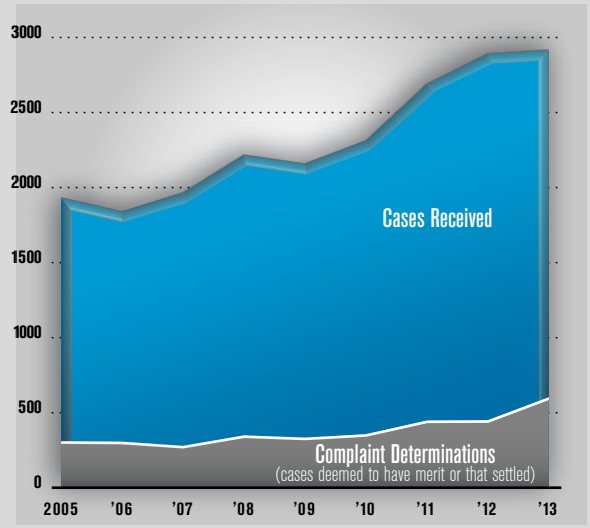
For the plaintiffs' bar, this all adds up to opportunity. "The firms we used to bump into that handled race or gen-

KEY CASES

EHLING V. MONMOUTH-OCEAN HOSPITAL SERV. CORP. The court found that an employee's posts on her personal Facebook account would have otherwise been protected by the Stored Communications Act because she had set her privacy settings on the account to only make her posts available to her Facebook "friends."

VAN ALSTYNE V. ELECTRONIC SCRIPTORIUM LTD. A former employer violated the SCA when it accessed the personal AOL email account of a former employee for several years after her termination, without her knowledge or authorization.

WHISTLEBLOWER INVESTIGATION DATA



Source: OSHA

In recent years, OSHA's Whistleblower Protection Program has fielded a growing number of complaints relating to workplace whistleblowers and found many to have merit.

der discrimination cases are now framing their issues largely as whistleblower retaliation claims, saying that someone was fired or demoted because they spoke up," says Meade. "Their websites, which had touted EEO class action discrimination expertise, now feature whistleblower retaliation cases."

THE CONTRACTOR'S DILEMMA

For government contractors, these kinds of issues are often taking on a special twist that targets the contractor as an employer, using whistleblower laws as a weapon. Often, plaintiffs will threaten to use the False Claims Act's qui tam provisions, which allow individuals—in this case, the contractor's own employees—to sue a contractor for fraud on behalf of the federal government. They then use this leverage to essentially extract large settlements from the contractor.

"Plaintiffs' firms are sending very long demand letters saying, 'Your client has been bilking the government; we have proof from this employee, and you have retaliated against the employee. But rather than go to the government with our claims, we're seeking a speedy resolution—namely, X amount of dollars,'" says Meade. "That's a concern for all contractors, but particularly the small to medium- sized companies that don't always have the robust compliance programs that the large contractors have or the resources to fight. Government contractors don't want to be on the receiving end of allegations about substantive false claims allegations, even claims without merit, and can be motivated to settle the retaliation claim, even regardless of the lack of merit."

EMPLOYEES, TECHNOLOGY, AND LITIGATION RISK

Today, employees are bringing their own smartphones, laptops, and tablets to work, as well as using company computers at home. The line between work and personal computing devices is blurring, and it is not at all unusual for employees to use a work laptop to access personal email or social media accounts. That approach helps employees stay connected and be productive, but it also promises to be a growing source of litigation in the near future.

For example, if an employee is suing an employer, the company will probably have access to that employee's work computer. "Company policy often says that the computer is subject to monitoring, that any document that is created on it is the company's document, and any communications are the company's communications," says Crowell & Moring's Kris Meade. "As part of their search of the employee's laptop, the employer might come across log-in information and passwords to the employee's personal email account. But accessing such accounts is problematic. Accessing personal email that is stored on another's server could constitute prohibited conduct under the Stored Communications Act, which prohibits the accessing of materials that are housed on servers located elsewhere without the consent of the recipient or the addressee."

Evolving technology presents other issues for employers as well. For example, if a company is involved in the discovery phase of litigation, what is the extent of its obligation to search the personal computer of an employee who may be involved in the matter?

"These types of issues are starting to surface as employers become more lenient about what they permit employees to do with company computers and as they embrace BYOD policies," says Meade. And with the continued blurring of work and personal computing, he says, "it's a real danger area for employers. We haven't seen huge litigation over it yet, but I think we will."

PATENTS

NPE CASES CONTINUE UNABATED, WHILE A NEW PTO REVIEW PROCESS TAKES HOLD

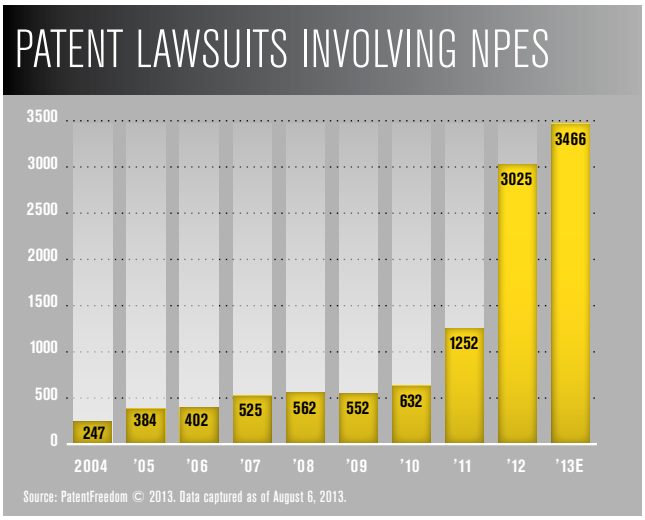
Two years after Congress passed the America Invents Act, non-practicing entities (NPEs)—often called "patent trolls"—are still very active, now accounting for about two-thirds of all patent cases filed. Some observers find this troubling, including the U.S. Congress, where 11 patent reform bills were introduced in 2013, many containing elements designed to try to curtail NPE activity.

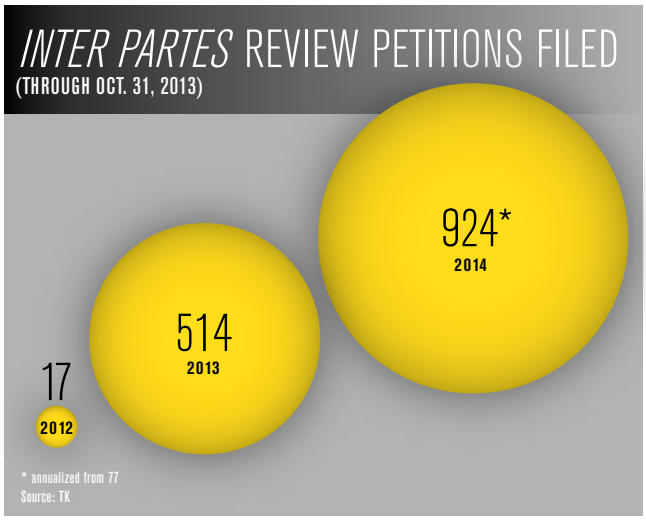
At the end of 2013, for example, the Patent Transparency and Improvements Act was introduced in the Senate. Among other things, it includes a provision designed to limit the sending of demand letters that are unfair, deceptive, or misleading in asserting a patent—a not uncommon tactic for some NPEs. "The bill would authorize the Federal Trade Commission to take action against organizations that send such letters," says Brian Koide, a partner in Crowell & Moring's Intellectual Property Group. In December, the House passed the bipartisan Innovation Act, which would require infringement complaints—which under current law can be notice pled—to include details about the patent claims, the business of the party alleging the infringement, and the parties of interest behind the demand letter and complaint.

"Both bills, as now drafted, contain fee-shifting provisions and delays for so-called customer suits. This legislative activity shows that there is a great deal of interest in patent reform and that changes are probably on the way in 2014," says Koide.

THE EVOLVING NPE

As legislators struggle with these questions, the very nature of NPEs is changing. The prevalent patent troll model was to form a small, closely held company that bought up patents from individual or small-company inventors and then sued large companies for alleged infringement of those patents.





Patent reform has not deterred NPEs from pursuing patent cases in growing numbers—and Congress is still tackling the issue. Meanwhile, the patent office's *inter partes* review process is providing an alternative to litigation for a growing number of companies.

KEY CASES

LIGHTING BALLAST CONTROL V. PHILIPS At the end of last year, the Federal Circuit sat *en banc* to address whether it should overrule the existing *de novo* review standard of district court claim construction rulings. The *en banc* ruling should clarify what deference, if any, district court claim construction rulings are given on appeal.

ALICE V. CLS BANK At the end of last year, the Supreme Court granted *certiorari* to consider whether computer-implemented patent claims are eligible subject matter under Section 101 of the Patent Statute. The case has the potential to provide much-needed clarity in this area of law.

Today, however, some NPEs are becoming large enterprises—witness Intellectual Ventures, a privately held firm that has acquired tens of thousands of patents and earned $3 billion in licensing revenue since its founding in 2000. NPEs also include technology company consortia, major operating companies with large IP portfolios, and universities—organizations that are actively pursuing the enforcement of patents that they don't use in practice. "Their business model may be to first seek to license patents, but it's clear that this is going to lead to litigation in a number of cases," says Koide.

There are several reasons for this evolution, ranging from the potentially large awards involved to companies wanting to get more value out of the older patents in their portfolio. In addition, there are more patents available. "Through the financial downturn, we saw large companies selling off their patents to produce cash and reduce maintenance costs, or even patents being sold off in bankruptcy," says Koide. He points to the example of the Rockstar Consortium—formed by technology giants such as Apple, Microsoft, and Sony—which spent $4.5 billion in 2011 to purchase some 6,000 patents from the bankrupt Nortel Networks Corp.—in part to avoid NPE suits and in part to generate revenue.

"This is all blurring the traditional idea of what an NPE is," says Koide. "It's evolving into a much more nuanced picture."

THE IPR PROCESS COMES INTO FOCUS

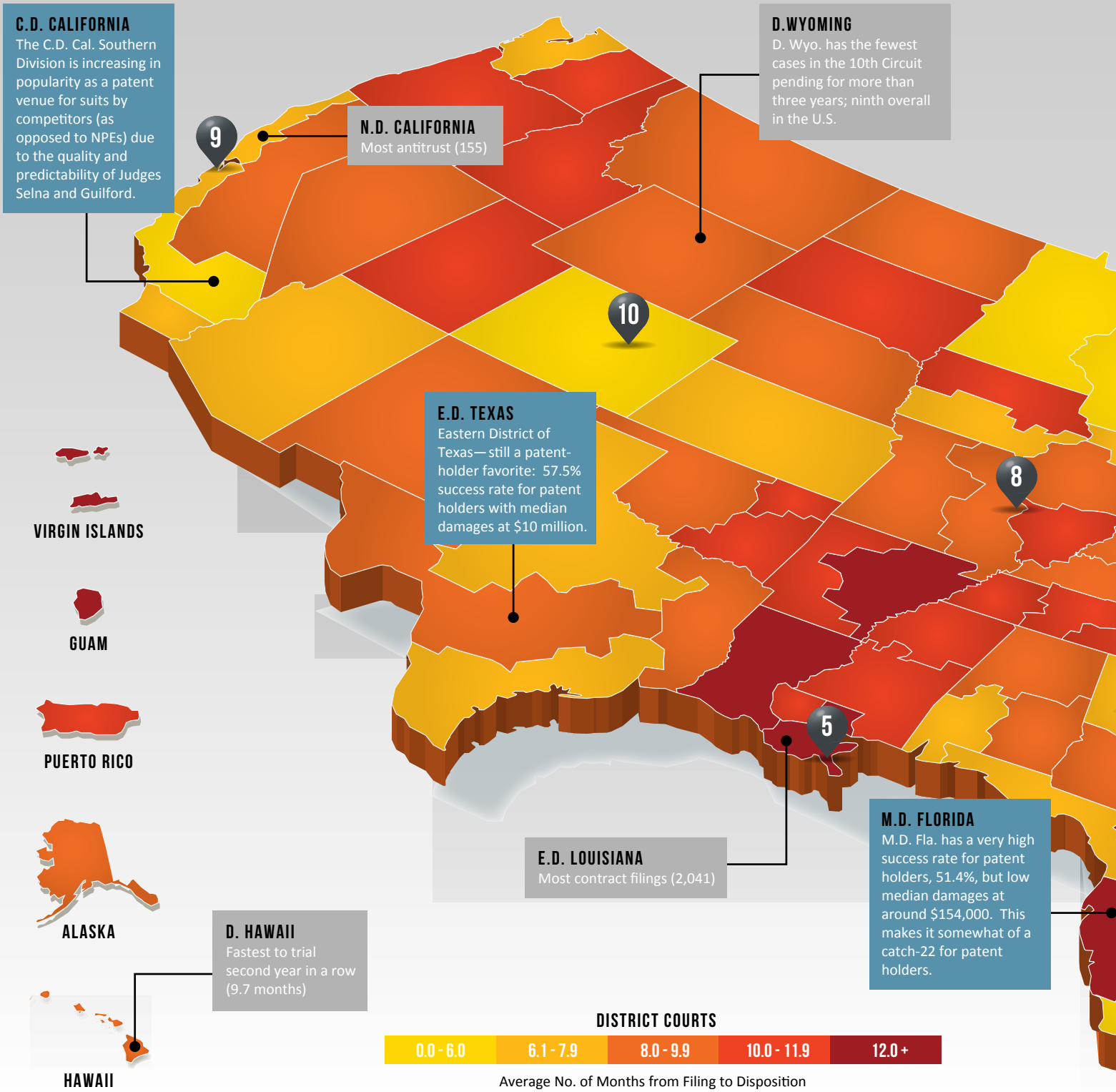
As companies deal with that rising tide, they are also considering an emerging alternative to court in greater numbers. The America Invents Act created the *inter partes* review (IPR), which provides a litigation-like procedure for challenging the validity of patent claims, heard by the Patent Trial and Appeal Board. The first of these IPR cases are now being completed, providing insight into how the process will work in practice. The first through the pipeline—*Garmin v. Cuozzo Speed Technologies*—involved a patent for a speed limit indicator linked to a GPS system. In November 2013, the PTAB sided with the petitioner, Garmin, and cancelled the claims being asserted against it.

"Because the standard to initiate an IPR is higher than the existing *ex parte* reexamination standard, some commentators have anticipated a higher cancellation rate for IPRs compared to *ex parte* reexaminations," says Koide. He adds that it seems clear that the board intends to keep discovery limited and to stick to the prescribed one-year timeline for completing cases to reduce costs.

Overall, says Koide, "the *inter partes* review process has the potential to give defendants a better result than they would have in district court or in the Patent Office's *ex parte* reexamination process." He says that the IPR might be preferable to district court litigation when a case involves significant technical complexity, because PTAB brings more sophistication to the table than a jury might—or when the alternative is a trial in a patentee-friendly forum, such as the Eastern District of Texas. Fees, too, can be a big consideration, with the IPR process typically requiring six-figure budgets, depending on the level of complexity, compared to the $2 million or more typically needed to litigate a patent case in district court. The discovery burden and potential disruption to a company's business operations are also much lower in IPR proceedings. On the other hand, district court might still be the venue of choice for large cases. A major downside of IPRs is the estoppels effect: once the board issues its decision, the party challenging the patent is estopped from raising any invalidity ground, which it raised or reasonably could have raised, in district court or before the ITC.

The IPR process is still relatively new. But based on early observations, "it has the potential to be a faster and cheaper way to challenge validity, and it gives you a chance to stay litigation," says Koide. "So it's an alternative to keep in mind."

JURISDICTIONAL ANALYSIS



Time to case disposition analysis shows which courts are the real "rocket dockets"

W.D. WISCONSIN

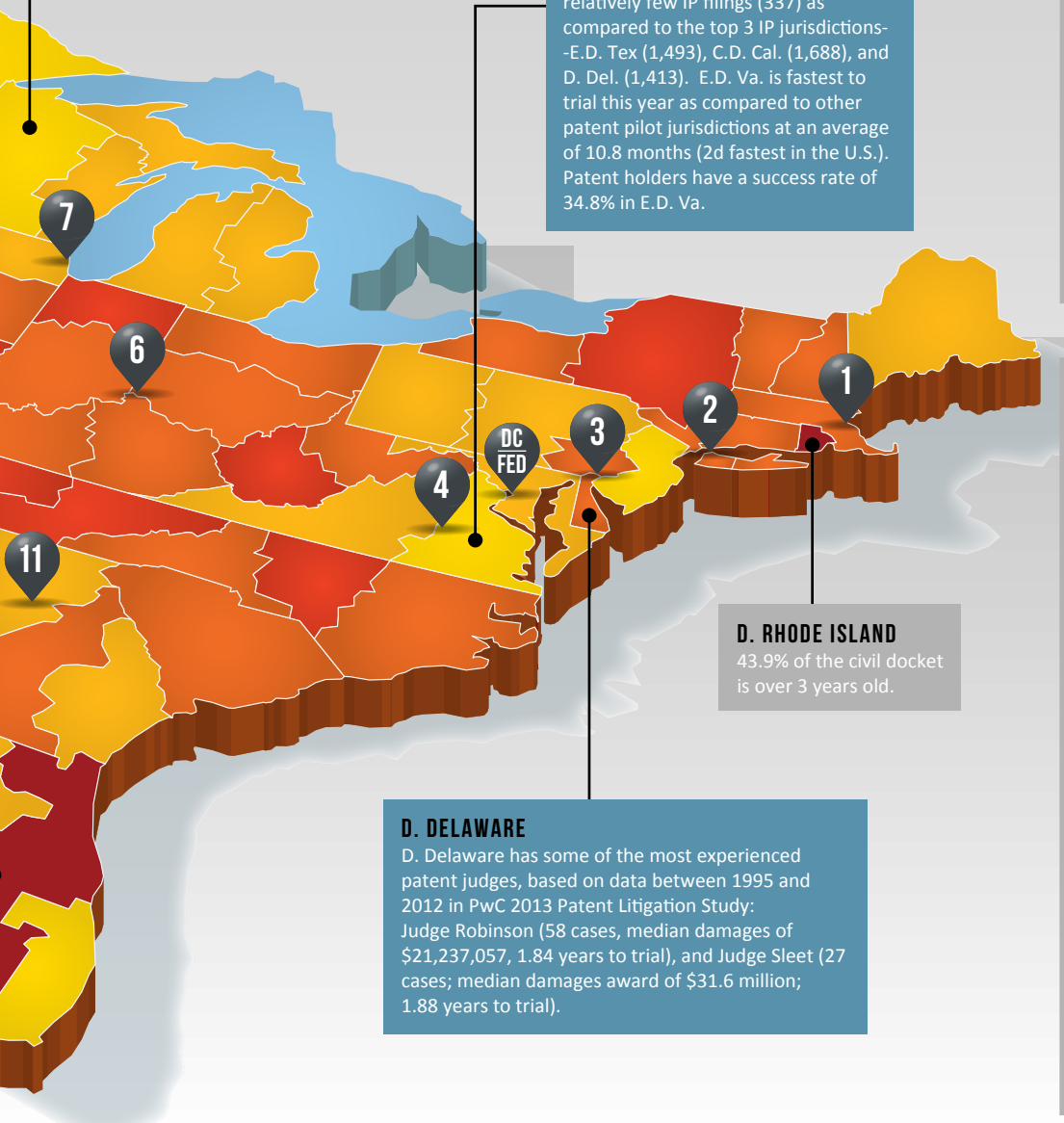
Though not in the patent pilot program, this district is increasingly becoming a favorite of non-practicing entities based on speed to trial for patent cases (from 1995 to 2012, median of 1.07 years, according to PwC 2013 Patent Litigation Study).

Congress's Patent Pilot Program (July 2011) was designed to develop expertise in patent cases in certain jurisdictions.

Key time to case disposition indicators

E.D. VIRGINIA

Despite being known as a rocket docket and designated as a patent pilot jurisdiction, E.D. Virginia has relatively few IP filings (337) as compared to the top 3 IP jurisdictions--E.D. Tex (1,493), C.D. Cal. (1,688), and D. Del. (1,413). E.D. Va. is fastest to trial this year as compared to other patent pilot jurisdictions at an average of 10.8 months (2d fastest in the U.S.). Patent holders have a success rate of 34.8% in E.D. Va.



D. RHODE ISLAND

43.9% of the civil docket is over 3 years old.

D. DELAWARE

D. Delaware has some of the most experienced patent judges, based on data between 1995 and 2012 in PwC 2013 Patent Litigation Study: Judge Robinson (58 cases, median damages of $21,237,057, 1.84 years to trial), and Judge Sleet (27 cases; median damages award of $31.6 million; 1.88 years to trial).

EFFECT OF BUDGET CUTS/SEQUESTRATION/ CONGRESSIONAL GRIDLOCK ON THE COURTS

Courts and cases are slowing down in an atmosphere of sequestration cuts and congressional gridlock.

The average months to resolution for a civil case went from 6.8 last year to 8.5 this year, despite a 4% drop in civil filings. In a September 10, 2013, letter to President Obama, John Bates, secretary of the Judicial Conference of the United States, wrote, "Losses are resulting in the slower processing of civil and bankruptcy cases, which impacts individuals and businesses seeking to resolve disputes in federal courts."

6 DISTRICT COURTS WITH VACANT JUDGESHIPS EXCEEDING 2 YEARS (IN MONTHS) AS OF JUNE 30, 2012:

ARIZ.	39.8
N.D. CAL.	38.0
N.D. ILL.	33.9
E.D. MICH.	31.9
N.D. GEORGIA	28.9
NEVADA	26.6

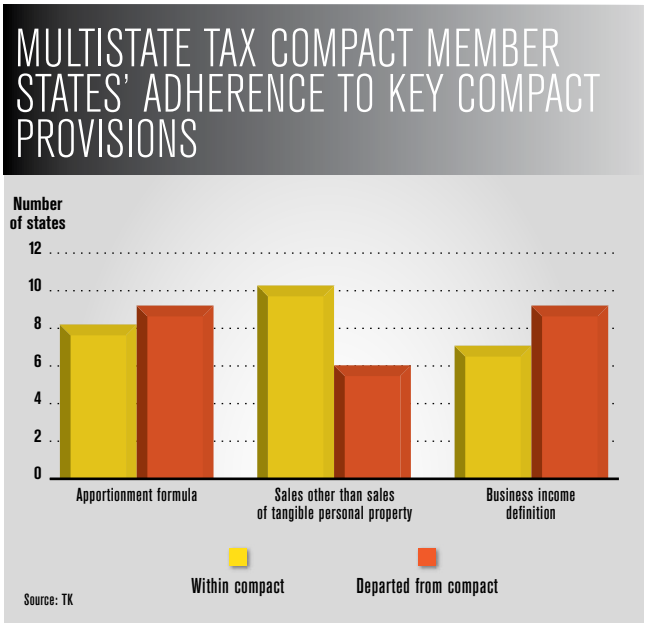
UNITED STATES COURT OF APPEALS

CIRCUIT	NOTICE OF APPEAL TO DISPOSITION	REVERSAL RECORD
1ST	10.8	1 OF 1
2ND	10.8	6 OF 10
3RD	6.9	5 OF 6
4TH	5.0	3 OF 5
5TH	9.2	6 OF 7
6TH	10.8	2 OF 2
7TH	8.2	1 OF 3
8TH	6.1	2 OF 2
9TH	13.8	12 OF 14
10TH	8.3	0 OF 2
11TH	7.7	6 OF 6
DC	11.8	2 OF 3
FED.	10.6	3 OF 5

TAX

NEW TRUCES AND NEW BATTLE LINES

As the long period of widespread creative tax planning draws to a close for corporate America, state and federal governments are still combatively scrutinizing taxpayer positions and aggressively enforcing draconian interpretations of the tax laws.



A number of states have replaced some of the Multistate Tax Compact's provisions with their own rules and formulas. The resulting discrepancies often create opportunities for taxpayers to seek large refunds.

Long the near-exclusive domain of corporate CFOs and tax VPs, state and federal tax controversies are increasingly grabbing the attention of general counsel because of the escalating militancy of government tax officials. "There is a real shift taking place," says Don Griswold, a partner with Crowell & Moring's Tax Group. "As the taxpayer pendulum swings away from creativity toward more conservative positions, the government pendulum continues to swing the other way, reflecting a continuing mistrust of the corporate community."

THE NEW IMBALANCE OF POWER

That shift is playing out in several ways. "Penalties are getting tougher and more fiercely contested," says Griswold. Underscoring that point, the U.S. Supreme Court recently sided with the IRS in a tax-shelter case (*United States v. Woods*) that hit the taxpayer with a 40 percent penalty. At the state level, California's non-economic substance transaction penalty can also be as high as 40 percent if the state finds a taxpayer's action was taken merely to reduce taxes; state supreme courts in New Jersey and North Carolina have upheld heavy penalties for actions that were not barred when they took place. Any efforts to reach settlement of taxpayer disputes will be affected by the heavy weight of such significant penalties.

On another front, the IRS has accelerated its audit processes, partly to avoid allowing the statute of limitations to run out and partly to expand its window into evolving taxpayer strategies. The agency recently announced a new enforcement policy for taxpayers who fail to respond promptly to Information Document Requests during an IRS inquiry. Taxpayers may work with the IRS to set initial response deadlines, but those who miss them will be subject to a new enforcement procedure that may culminate in a summons. "That will lead to more litigation," Griswold says. "These matters previously could be handled exclusively within the company's tax department, but they now require closer collaboration with the legal department."

DRAWING NEW BATTLE LINES

As the pendulum swings, governments and taxpayers alike are working hard to change the tax litigation landscape. For example, many states are applying sales taxes to Internet retailers that do not have a physical presence in the state—the legal threshold for taxation since the Supreme Court's landmark 1992 *Quill* ruling. "States are increasingly attempt-

KEY CASES

NFIB V. SEBELIUS The Supreme Court upheld as a valid exercise of Congress's taxing power the Affordable Care Act's individual mandate, which imposes a "shared responsibility payment" on individuals who do not maintain minimum essential health insurance coverage. The Court found unconstitutional the Act's Medicaid expansion provision, which threatened states with the loss of all federal Medicaid funds if they failed to increase Medicaid coverage as provided by the Act.

U.S. V. HOME CONCRETE & SUPPLY The Supreme Court rejected IRS attempts to hold the statute of limitations open on a large group of taxpayer transactions. Four justices found certain new IRS regulations were not entitled to *Chevron* deference because its previous *Colony* decision had left no room for a contrary statutory interpretation by the IRS. The decision leaves open questions about the IRS's ability to overturn a prior judicial interpretation by regulation.

U.S. V. WOODS The Supreme Court ruled that a taxpayer was subject to a significant penalty for overstating his basis in a partnership found to be a "sham." The Court also rejected reliance on use of the Joint Committee on Taxation's "Blue Book," long considered an authoritative source of legislative history.

ing end-runs around U.S. constitutional nexus protections with these laws," says Griswold. Unable to persuade Congress to expand state taxing authority, the states hope to prompt the Supreme Court to revisit the issue. The question has led to litigation in a number of states, but the Supreme Court has so far refused to oblige, deciding in December not to review New York's "click-through" nexus law, despite taxpayers' confidence that it violates the federal Constitution.

For its part, the IRS is increasingly developing regulations based on previous litigating positions. "When they lose a case, they are basically building their litigating position from that case into the rules," says Griswold. "There are now a number of cases out there testing 'fighting regulations' that adopt IRS litigating positions…even those it has lost!" For example, in the midst of transfer-pricing litigation it would ultimately lose in the Ninth Circuit, the IRS rewrote the regulations. In court, the agency lost its argument that the Xilinx technology company must share stock-option costs in a joint venture with an overseas company, but its litigating position lives on in the new regulation, which is now being tested in a case involving Altera Healthcare.

Meanwhile, taxpayers are pushing back in an evolving area of multistate taxation: apportionment, the process of dividing a company's nationwide income among the states in which it operates. Upwards of 20 states agreed many years ago to enter a rare multistate tax compact that allows taxpayers to choose between the compact's apportionment rules and each state's different rules. Several states, however, now tell taxpayers they have no choice: they must apply the state's formula when that produces a higher tax bill. The resulting litigation has now worked its way to the high courts of California and Michigan in *Gillette* and *IBM*. California found the issue troubling enough to drop out of the compact, and a number of states are expected to follow. "This a real watershed issue," says Griswold, "and it's going to be explosive for the next five years—or longer."

RESTRAINT—UP TO A POINT

Despite its aggressive approach to enforcing its interpretation of the tax laws, the IRS has announced the continuation of its "policy of restraint" when it comes to confidentiality of the legal work product that taxpayers generate during the development of their tax positions. However, in those instances where the IRS does want that information, "the issue is being hotly contested," says Crowell & Moring's Don Griswold.

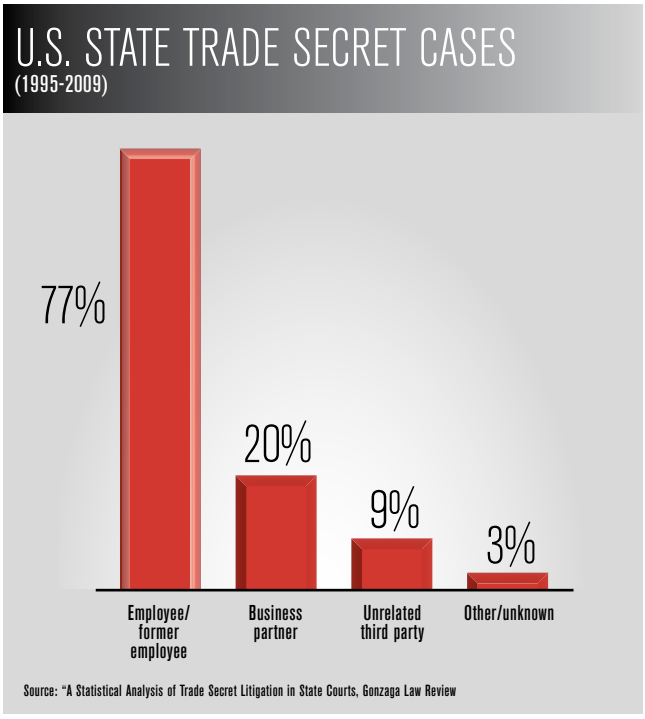
The First Circuit ruled a few years ago that the work-product privilege did not apply to the tax accrual workpapers of Textron, a ruling that caused many to wonder if work-product protections were to be severely limited. However, the U.S. Supreme Court declined to hear that case, and the issue continues to reverberate in courtrooms.

On the state side, restraint has been harder to come by. Some states are so aggressive that they hire third-party contractors to audit taxpayers on a contingent-fee basis. In the 2012 *Microsoft* decision, a D.C. administrative law judge invalidated a transfer-pricing assessment based on the contractor's flawed analysis of the company's transactions. While New Jersey has ceased this controversial practice, and "top revenue officials in some states have assured us [in interviews published in our monthly Bloomberg BNA column, *Crowell's Conversations*] that they will not take up the practice, other states continue to push the limits," says Griswold. "Expect due process challenges in the next several years."

TRADE SECRETS

POTENTIAL NEW LAWS—AND NEW RISKS

Trade secret theft has become a high-profile issue for the U.S. government, and the last year has seen a flurry of trade secret-related legislation being proposed in Congress. Some of these bills focus on modifying causes of action.



Trade secrets theft often involves insiders with access to key data, a threat that is particularly difficult to counter due to mobile technologies that make it easy to capture company information.

For example, the Private Right of Action Against Theft of Trade Secrets Act of 2013 would allow anyone who suffers injury as a result of a violation of the Economic Espionage Act to seek damages, adding a civil cause of action to the existing criminal law. "That would give companies a new arrow in the quiver in the fight against trade secret theft," says Mark Romeo, a partner in Crowell & Moring's Litigation and Labor & Employment groups.

Another proposed bill—Aaron's Law Act of 2013—attempts to resolve a split in the circuit courts over the interpretation the Computer Fraud and Abuse Act's prohibition of unauthorized access to computers. Several courts have interpreted "unauthorized access" broadly to mean a violation of company policies, while others have taken a narrower view that says it means circumventing a physical or electronic barrier. Aaron's Law would write that view into the statutes.

Other proposed bills target cyber theft by foreign entities. The Cyber Economic Espionage Accountability Act would create immigration and financial penalties for foreign individuals who engage in cyber espionage. It would require the president to draw up a list of foreign officials and agents who are engaged in cyber espionage, making them ineligible for a U.S. visa and putting them at risk of having their U.S. assets frozen.

The Deter Cyber Theft Act would take a similar approach at a higher level, requiring the director of National Intelligence to compile a list of countries engaged in cyber espionage and the U.S. intellectual property being misappropriated or targeted by foreign entities. The worst offenders would be designated "priority foreign countries." The bill creates a two-tiered system of import restrictions: prohibiting foreign articles containing technology and proprietary information misappropriated from the U.S. from entering the country, and banning articles "purchased or exported" by an entity owned or controlled by a "priority foreign country" if the articles are the same or similar to articles produced using technologies or IP *targeted* in the U.S. by cyber espionage. "It would not be necessary to show that stolen trade secrets are involved, just that the IP has been targeted by cyber espionage," says Romeo.

Finally, the U.S. Attorney's office is increasingly willing to work with U.S. companies to pursue foreign trade thieves, and Congress has weighed in with a proposed bill called SECURE IT [Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology]. "Among other things, this facilitates sharing cyberthreat information and ratchets up penalties for violations of existing trade-secret law under CFAA," says Romeo. "This fits with the idea that government and business should be more collaborative in protecting against trade secret theft by foreign governments or entities."

KEY CASES

STATUTE OF LIMITATIONS DEFENSE LEADS TO SUMMARY JUDGMENT* When a global behemoth filed suit to crush competition being waged by a small startup, the district court in Nevada dismissed the plaintiff's claim that the startup had misappropriated trade secrets by hiring several former employees, concurring that the plaintiff "knew or should have known" of the trade secret misappropriation, yet sat on its heels for more than three years before bringing suit.

CHRISTOU V. BEATPORT DISTRICT COURT OF COLORADO ruled that MySpace friend lists were trade secrets. Although the names could be found in public directories, the court said that the contact information connected to those names had been properly password protected, involved a cost to develop, and included information that was not publicly available.

PHONEDOG V. KRAVITZ A website sued a former employee, saying that he had taken trade secrets when he left the company with a Twitter account that he had maintained for the company when employed there. The Northern District of California court refused to dismiss the case, saying that Twitter accounts and passwords could be trade secrets.

TECHNOLOGY MAKES IT COMPLICATED

While the legislative wheels turn, evolving technology makes the protection of trade secrets more complex. The proliferation of portable data-storing devices "makes it easy to steal information and difficult for companies to prevent that theft," says Romeo. "This will likely create a focus on what constitutes reasonable measures to protect secrets."

The rise of social media is changing the trade-secret landscape, and the law is trying to catch up—often, in court. "There is a trend of costly litigation involving the use of social media accounts for marketing purposes and contesting who owns the account and the information it contains," says Romeo.

Social media is widely used in business, and employees often mix their personal and business activities. That raises a range of issues. For example, are lists of friends and contact information contained on a MySpace account a trade secret of the MySpace user's company? "At least one district court has held these lists can be trade secrets of the employer, because the effort and expense in connecting with potential customers made that information a protectable trade secret," Romeo says.

But not all courts agree. In *Eagle v. Morgan*, the CEO of a company called Edcomm had opened a LinkedIn account and used it to promote the company and build social and professional relationships. After the CEO left, the company cut off her access to the LinkedIn page, but she regained access a few weeks later. In the ensuing litigation, the company said that the CEO had taken its trade secrets—the names and contacts on the LinkedIn page. "The court determined, however, that this wasn't a trade secret because it was readily ascertainable by the business community and publicly known," says Romeo.

With these types of gray-area issues in play, companies need to pay closer attention to up-front prevention through nondisclosure and assignment of rights agreements that take social media into account. And, Romeo adds, "when possible, keep employee and personal social media accounts separate."

TRADE SECRET PREEMPTION: GAINING STEAM

The Uniform Trade Secrets Act provides a cause of action for trade secret theft. But it also creates an often-used way to avoid tort claims related to the UTSA claim, because most courts say that the UTSA provides a statutory remedy in such cases, and that it preempts any tort claims.

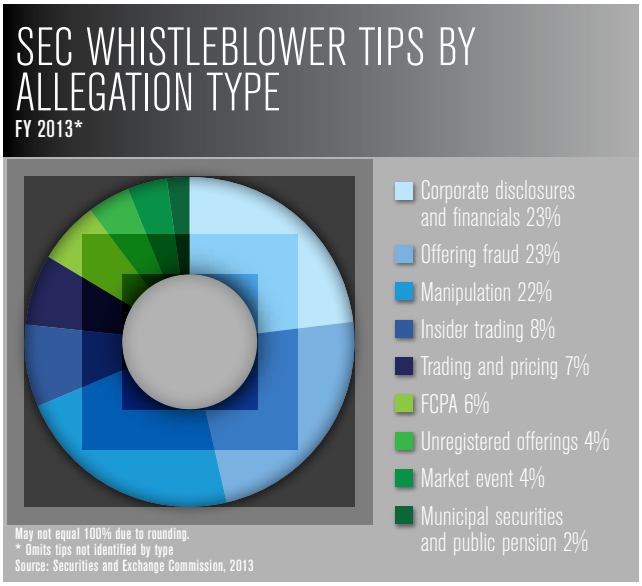
Now, however, there is a question about whether tort claims involving the theft of "confidential" information—that is, important information that falls short of being a trade secret—would be subject to UTSA preemption. "In California and many other states, the answer to that question is 'yes,' although a minority of courts have disagreed, saying that you should be able to proceed with tort litigation in such cases," says Crowell & Moring's Mark Romeo. "But many federal courts have yet to consider the issue, and for those that have, the rulings are not uniform." But in time, he says, "we expect most courts to follow California's lead in finding that the UTSA preempts tort claims based on misappropriation of confidential information."

* *Crowell & Moring representation*

WHITE COLLAR

CHALLENGES FROM INSIDE—AND OVERSEAS

The Dodd-Frank Act authorized the SEC to reward whistleblowers who provide information that leads to successful enforcement actions, and over the past year the SEC has ramped up its activity in this arena. In October, the SEC announced its largest whistleblower payout to date—more than $14 million in an investment fraud case.



With more government enforcement, encouragement by plaintiffs' attorneys, and a growing public awareness of potential rewards, the SEC is receiving a variety of tips from whistleblowers.

Such actions are likely to become increasingly familiar. A significant number of cases have been reported to the SEC since it established its Office of the Whistleblower in 2011. "These take time to work through the system—and many of them are now starting to mature and ripen," says Stephen Byers, a partner in Crowell & Moring's White Collar & Regulatory Enforcement Group. As those cases are resolved, they have a ripple effect, with media reports increasing awareness of the program—and its potentially large awards—among corporate employees. At the same time, says Byers, "we are seeing concerted efforts by the plaintiffs' bar to drum up SEC whistleblower cases, including cold-calling employees at large financial services companies, broker-dealers, and other enterprises that operate in high-risk environments. So momentum for these cases is likely to increase in 2014."

That holds true for whistleblower employer-retaliation cases as well. Traditionally, whistleblowers with such complaints first went through an administrative proceeding, then to court. Now, under Dodd-Frank, they can proceed directly to federal district courts. What's more, the SEC itself can initiate retaliation suits on its own, and the OWB is actively looking at retaliation cases with a view to filing such suits as object lessons. Among other things, the SEC will be scrutinizing employment, severance, and settlement agreements that make it difficult for whistleblowers to report problems. The agency may provide some guidance on this in the coming year or so, says Byers, "and it may go so far as to focus on lawyers who draft such agreements."

A NEW PUSH: ACCOUNTING AND FINANCIAL FRAUD

Accounting and financial fraud has historically been a cyclical enforcement area for the SEC; in 2012, such cases made up only 11 percent of the enforcement actions brought by the agency. But the SEC is making it a priority for 2014, placing particular emphasis on improper recognition of revenue, improper increase of reserves, cross-border financial fraud by foreign issuers publicly traded in the U.S., and the failure of audit committees and auditors to recognize accounting red flags.

As part of this new push, the agency recently formed a Financial Reporting and Audit Task Force—a team of lawyers and accountants that is "dedicated to detecting fraudulent or improper financial reporting," notes the SEC. The team will be helped by a new automated analytical tool known formally as the Accounting Quality Model—and more familiarly as the "financial fraud RoboCop." The AQM can search corporate filings for specific terms and phrases that have been tagged

KEY CASES

UNITED STATES V. AGRAWAL The defendant copied pages of computer code that his employer used for a high-frequency trading program. He intended to provide the code to his future employer, another investment firm, and was arrested on the day he was scheduled to begin his new job. He was convicted of violations of the Economic Espionage Act and the National Stolen Property Act. The Second Circuit affirmed the defendant's convictions under both of these statutes.

UNITED STATES V. JIN The defendant, who had spent a prolonged time in China and sought employment from a Chinese company, returned to the U.S. and downloaded thousands of internal Motorola documents pertaining to its iDEN cellular telecommunications system. She was apprehended at an airport preparing to return to China, and was convicted of criminal trade secrets theft under the Economic Espionage Act. The Second Circuit upheld her conviction on appeal.

as indicators of high-risk activity by companies—things that indicate, for example, a high proportion of transactions structured as "off-balance sheet," or frequent changes in independent auditors. And the AQM will essentially learn and improve over time as it is continually updated with new indicators based on the SEC's experience in the field.

THE FCPA PIPELINE KEEPS GROWING

The Foreign Corrupt Practices Act continues to be an area of ever-increasing activity—and a source of concern for corporations. In a recent survey of general counsel, it ranked seventh in a list of Top 10 concerns. "It was there alongside things like data security and operational risk—and it was the only thing on the list related to a specific statute or enforcement area," says Byers.

Those executives have good reason to worry. "The intensity of government enforcement continues to rise, and the costs of infractions can be enormous," says Byers. "Any company that deals with foreign governments, including especially state-owned enterprises as customers, is at risk." And the Department of Justice and the SEC continue to devote resources to FCPA efforts. In just a few years, the number of full-time FCPA prosecutors in those agencies has gone from a few dozen to about 60, complemented by sizable enforcement staffs. The two agencies reportedly have more than 150 cases under investigation.

This flow of cases has been driven largely by corporations reporting their own violations, typically in the hope of avoiding harsh penalties. But, while the number of self-reported cases is holding fairly steady, they are actually accounting for a smaller percentage of overall cases. That's because there is a growing range of other sources coming into play. For example, as FCPA-like laws are adopted in more countries, agencies in those countries are referring more cases to U.S. officials. In addition, familiar corporate names continue to be named in FCPA cases; in the past year, the list has included Wal-Mart, Stryker, Diebold, and Ralph Lauren*. "With this higher profile, prosecutors and agents nationwide are becoming more attuned to and adept at spotting FCPA issues," says Byers.

TRADE SECRETS THEFT AND CYBERCRIME

Today, the fields of trade secrets theft and cybercrime often intersect, and federal law enforcement is increasingly focused on both. For example, the Department of Justice has a Task Force on Intellectual Property, and the FBI has significantly increased the number of trade secrets theft investigations.

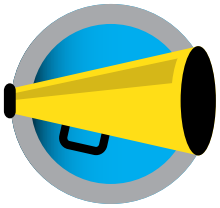
As a result, companies pursuing civil litigation in these areas may find that initiating parallel criminal proceedings is appropriate—proceedings that offer additional tools in areas such as discovery and remediation. Thus, companies may benefit from working with law enforcement to investigate and prosecute these crimes. And it will be important to stay involved.

"Once a criminal investigation is launched, it is not just a matter of sitting back and letting the government do its work," says Crowell & Moring partner Stephen Byers. "The victim company must be proactively engaged in order to protect its interests." Involving law enforcement could help deter such crimes, but companies need to understand the potential risks, such as the lack of control once the criminal process is initiated, unwanted publicity, or adverse impacts on civil litigation.

* *Crowell & Moring representation*

ADVERTISING

FALSE ADVERTISING: INJUNCTION RULES GET TOUGHER, AND THE STAKES GET HIGHER



For some time, there has been a decline in the number of competitor Lanham Act false advertising cases filed.

That may be due in part to the fact that more class action firms are now shifting their focus from product liability to consumer false advertising litigation, which can be simpler and less expensive. Those firms are watching the false advertising arena closely—and companies know it.

"Today, if you file a false advertising claim, you are almost certainly going to get a counter claim," says Christopher Cole, co-chair of Crowell & Moring's Advertising & Product Risk Management Group. "If you lose on that counter claim, you know you're going to get sued in a consumer class action." That is making some companies think twice before getting involved.

Of course, false advertising claims are still going to court. But the rules around a key tool—the injunction—have been changing. Traditionally, plaintiffs in many competitor false advertising cases did not need to prove harm to get an injunction. It was assumed that false advertising, by its nature, caused some competitive harm. But some courts have recently been applying the standard articulated in *eBay v. MercExchange*, a patent case, to false advertising cases, holding that plaintiffs need to prove specific harm in order to get an injunction. And, in advertising, proving specific harm from an advertisement can be tricky and may require surveying consumers to see if the advertising in question has affected their purchases.

Not all courts are applying *eBay* in this manner, however. In a survey of false advertising cases, Cole found that "it seems that the Southern District of New York is a better place to go for injunctions than anywhere else. So this view of injunctions is not universal, but it's starting to take hold."

Because injunctions, particularly preliminary injunctions, are harder to get, Cole also points out that those false advertising cases that are filed are more likely to go the distance to trial. In the past, there was a tendency to settle these cases after the injunction ruling was determined one way or another. "Now, we're seeing a greater percentage of these cases go to trial," he says. "They're becoming more involved and resulting in more long-term litigation."

One reason, Cole says, is that companies often see a favorable court ruling as a comprehensive way to stop ad campaigns running in multiple channels, from TV to print, the Web, and radio. Another reason: the size of the awards that can be involved. In a recent false advertising case, *Retractable Technologies v. Becton Dickinson & Co.*, a Texas jury awarded the plaintiff $113 million in damages—one of the largest false advertising awards ever. "So we're seeing much higher stakes involved," he says, "and people are willing to fight for that."

WHO CAN SUE?

In *Lexmark v. Static Control*, the U.S. Supreme Court is considering a case that will determine who has standing to sue for false advertising. Basically, the issue is the degree to which a plaintiff must be in competition with the defendant in order to bring a case under the Lanham Act.

"There has been a split in the circuit courts about this," says Crowell & Moring's Christopher Cole. "The rulings range from saying that you have to be a direct competitor, like Coke and Pepsi, to saying that all you need is a reasonable interest to be protected from false advertising that is likely to affect you. The Court's decision will hopefully resolve that split."

INSURANCE/REINSURANCE

BURGEONING CONCUSSION LAWSUITS—AND CHANGING PRINCIPLES

In the coming years, a great deal of litigation involving both insurers and reinsurers is likely to stem from a single source—concussion-related lawsuits. The first major-scale litigation was filed against the NFL by former players who claimed to have long-term brain damage from injuries sustained while they played in the league. Last August, the NFL announced a $765 million settlement to resolve the claims of some 18,000 retired players (still pending at the end of 2013). Beyond that, there are thousands of pending individual lawsuits, which have been consolidated in a multi-district litigation forum.

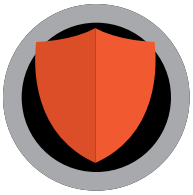
The NFL expects its insurers to fund its defense of these lawsuits, along with any settlements or judgments. From virtually the outset of these lawsuits, there were disputed insurance coverage issues, leading the NFL and its insurers to file competing coverage actions. When those cases are resolved, they are likely to trickle up and cause disputes between the insurers and their reinsurers. "There will undoubtedly be significant litigation over these lawsuits against the NFL, given the magnitude of the potential liability involved," says Jennifer Devery, a partner in Crowell & Moring's Insurance/Reinsurance Group.

The NFL cases are only the tip of the concussion-litigation iceberg. There are 11 putative class action lawsuits pending against the NCAA, some alleging claims on behalf of a broadly defined class consisting of all student-athletes who have ever played any sport at any NCAA member school. Likewise, late in the year, a putative class action lawsuit was filed against the NHL by 10 retired players. Individual lawsuits have been filed against Pop Warner football, school districts and high school coaches, Major League Soccer teams, helmet manufacturers, and others. Concussion studies are being conducted in ice hockey, soccer, and auto racing, which may lead to a host of litigation against sponsoring entities.

Says Devery, "Some are calling concussion-related lawsuits 'the new asbestos,' given the alleged latency of the injuries and the number of potential plaintiffs." As more of these cases emerge, she says, "defendants will naturally turn to their insurers. Litigation will likely continue."

NEW BOUNDARIES FOR FOLLOW-THE-FORTUNES?

The "follow-the-fortunes" doctrine provides a bedrock principle of reinsurance that says reinsurers may not second-guess their insurer's reasonable, good-faith settlement with a policyholder and its determination that risks are covered by the underlying insurance policies. Over the years, however, courts have said that this doctrine would not bind a reinsurer if the insurer was grossly negligent, acted in bad faith, or engaged in fraud or collusion with its policyholder. But the boundaries of what actions rose to such a level were largely undefined.



Last year the New York Court of Appeals issued an opinion in the *USF&G v. Am-Re* case that may lead to future litigation about those boundaries. In that case, USF&G billed its reinsurers for a portion of the almost $1 billion settlement that USF&G paid to its policyholder for asbestos liabilities. Two reinsurers challenged some of USF&G's decisions underlying the billings, arguing that the decisions were made with the bad-faith intention of maximizing USF&G's reinsurance recovery. Both the trial court and the intermediate appellate court said that the follow-the-fortunes doctrine precluded the reinsurers from questioning USF&G's decisions. The Court of Appeals, however, overturned the lower courts' rulings in part and held that the reinsurers were entitled to a trial looking at the facts in order to determine whether USF&G's actions were performed in good faith. In doing so, the Court noted that settlements need to be "objectively reasonable."

"It is quite possible that the Court has opened the door for reinsurers to seek extensive information about the underlying settlements of their insurers to assess whether there was any bad faith," says Devery. However, the ruling does not provide much guidance as to what constitutes "objectively reasonable" decision making by insurers. Says Devery, "This is likely to give rise to further litigation in which courts are called upon to interpret the decision and clarify the reinsurer's ability to challenge the decisions and settlements of the underlying cedent company."

E-DISCOVERY

TAR ENTERS THE MAINSTREAM

Increasingly over the past few years, technology assisted review (TAR) has come into its own as a valuable tool that helps litigants tackle the high cost of e-discovery.

TAR differs from the more traditional e-discovery methods that use search terms to look for key words. Instead, TAR, also referred to as "predictive coding," uses computer analytics to identify the patterns of words and phrases in documents to analyze the content, providing a richer assessment of documents than search terms. This allows attorneys to fine-tune the tool to sharpen its focus on documents relevant to specific topics.

Experience has shown TAR to be versatile and effective. With TAR, "the technology has evolved to a point where you can use several different analytical algorithms at the same time," says Crowell & Moring partner Jeane Thomas, who is co-chair of the firm's E-Discovery & Information Management Group. "So you can simultaneously identify documents that are relevant to, say, the six most important issues in a case, while identifying all documents relevant to a broad discovery demand." In addition, some very good results have been achieved using TAR to assist in identifying privileged documents that would not otherwise be located using search terms.

"We've used TAR in small matters and cases involving terabytes of electronically stored information," Thomas continues. "We've used it in civil litigations, criminal investigations, and in cases involving foreign language documents and highly sophisticated content. It dramatically reduces the number of documents that have to be manually reviewed, and costs are usually less than 50 percent of what they would be with a manual review and significantly less than if we used search terms."

The process is effective as well as efficient. In Crowell

KEY CASES

DASILVA MOORE V. PUBLICIS GROUPE Apparently the first opinion in which a court approved of the use of computer-assisted review to identify relevant electronically stored information. The court noted that, "computer-assisted review works better than most of the alternatives, if not all of the alternatives," and that "the Federal Rules of Civil Procedure do not require perfection."

GLOBAL AEROSPACE INC. V. LANDOW AVIATION, LP The first case in which a court approved a party's use of technology-assisted review over an opposing party's objection. In granting its approval, the court left open the opportunity for plaintiffs to later question "the completeness of the contents of the production or the ongoing use of predictive coding."

IN RE BIOMET M2A MAGNUM HIP IMPLANT PRODS. LIAB. LITIG. Following a growing trend, the court applied the principle of "proportionality" to the discovery process. Plaintiffs asserted that predictive coding is more accurate than keyword searches and should have been applied to the entire universe of 19.5 million documents, thus asking the defendants to "do over" the review and production. The court disagreed, finding that it would cost the defendants millions of dollars to start over with predictive coding, which in the court said would sit "uneasily with the proportionality standard in Rule 26(b)(2)(C)."

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& Moring's experience, TAR's accuracy rate in identifying relevant documents has been as high as 95 percent compared to about 50 percent for a typical manual review. That not only requires less effort and cost, it also reduces the risk of producing documents for discovery that do not need to be produced.

As the technology evolves, so too are the courts' views of TAR, and a growing number have said that its use is acceptable. In one notable case, [*Global Aerospace Inc. v. Landow Aviation, L.P.*] the defendants argued that traditional linear manual review of documents would cost $2 million and locate only 60 percent of the relevant documents. Keyword searching would cost less, but return even fewer relevant documents. But predictive coding, the defendants said, could identify up to 75 percent of potentially relevant documents "at a fraction of the cost and in a fraction of the time." The court approved the use of the technology over the plaintiffs' objection.

Several years ago when the technology was first being used, litigants were concerned that the costs of defending the use of TAR would outweigh the savings, or that courts would reject the technology outright. However, Thomas says, "concerns have largely disappeared." Although most courts are reluctant to weigh in on disputes regarding the methods parties use to identify relevant documents, courts are increasingly likely to encourage litigants to reach agreement on these issues. "Courts are being more diligent about requiring parties to confer on issues related to the discovery process. Because of that, we're seeing parties reaching agreements on the use of TAR, including the processes for validating the results," she says.

TAR may not be right for every case, and keyword searches and manual review can be effective in some circumstances, says Thomas. "You always need to ask what the best approach is for the specific circumstances of each case. But increasingly, the answer is going to be that you should be using TAR."

UNDER CONSIDERATION: NEW RULES FOR DISCOVERY

Following several years of input from the plaintiffs' and defense bars, corporations, government, and judges, the Advisory Committee on Civil Rules published its proposed amendments to the Federal Rules of Civil Procedure last August. Two of the more significant changes are to Rule 37(e), which permits sanctions for failure to preserve discoverable information, and Rule 26(b)(1), which defines the scope of discovery.

The Rule 37(e) change would prohibit sanctions for failure to preserve discoverable information unless the court finds that the failure was "willful or in bad faith" and causes "substantial prejudice." It aims to address a growing concern about the burden and costs of "over-preservation" and litigation relating to spoliation claims, which are driven in part by the lack of consistent sanctions standards across federal courts.

"The proposed rule includes a somewhat controversial stop-gap provision permitting sanctions even when there is a failure to show willfulness or bad faith and substantial prejudice, if the loss of evidence 'irreparably deprives' a party of the ability to defend or prosecute its claims—an exception that some fear could swallow the rule," says Crowell & Moring's Jeane Thomas. She adds that another focus of criticism is the proposed "willfulness" standard, which some courts have interpreted as any intentional act, such as the routine deletion of a departing employee's email, whether or not done for the purpose of destroying evidence—prompting some to suggest a "willful *and* in bad faith" standard as an alternative.

The Rule 26(b)(1) change would redefine the scope of permissible discovery to be "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.". As Thomas explains, "This is intended to encourage judges and parties to focus on the appropriate amount of discovery given the individual circumstances of each case, rather than the current approach where anything relevant or that is reasonably calculated to lead to the discovery of admissible evidence is deemed fair game."

INDUSTRY WATCH: ENERGY

NEW GENERATION: WHO DECIDES WHAT, WHERE, AND WHEN TO BUILD?

For decades, the division of authority between state and federal regulators in the electric utility industry was reasonably clear. The states had the power to authorize the construction of power plants within their borders, while the federal government generally did not. And the states regulated retail rates, while the Federal Energy Regulatory Commission, for the most part, regulated wholesale rates.

With industry restructuring and the evolution of the wholesale capacity markets overseen by FERC, some wonder whether a century of resource planning by state regulators has been, or might be, replaced by a market-based regime in which price signals alone will drive developers to build new power plants. In reality, says Larry Eisenstat, a partner in Crowell & Moring's Environment, Energy & Resources Group, "nothing new was being built—or if it was, it was a pitifully small amount of capacity compared to what would be needed to replace generating units that were going to be retired."

In response, a number of states required utilities to enter into long-term contracts with power plant developers to incentivize the construction of new generation. That has prompted lawsuits from utilities and existing power generators challenging the states' authority to do so. The problem, they say, is that such initiatives interfere with FERC's regulation of the wholesale markets or intrude on its authority to set wholesale rates. "The question is, do states have the authority to require their jurisdictional utilities to build generation capacity when they see a need, be it for reliability, policy, or other reasons, even if a FERC-overseen capacity marketplace might not be recognizing that need?" says Eisenstat.

Two of these cases, *PPL EnergyPlus v. Hanna** and *PPL EnergyPlus v. Nazarian**—one in New Jersey and one in Maryland—were recently decided by federal district courts, which sided partially with the utilities and existing generators, saying that these activities were unconstitutional. Both cases are being appealed, and they may ultimately make their way to the U.S. Supreme Court. "How they are decided could have broad ramifications," says Eisenstat. If the district court rulings stand, he asks, "will they be used as a sword to strike down other kinds of programs that are similar? For example, will states be prevented from doing things like setting renewable portfolio standards to encourage wind or solar generation, or deciding that older, less environmentally friendly plants should be retired?"

The New Jersey and Maryland decisions addressed other constitutional issues that may have far-reaching implications. In these two lawsuits, along with others around the country, the plaintiffs challenged the states' authority to support the development of generating resources within their borders or within a specified interstate region. Opponents of these efforts argue that such geographic restrictions violate the dormant Commerce Clause because they don't give developers in other states a chance to compete to provide the needed generating capacity. In the New Jersey and Maryland cases, the states prevailed on this point, but the issue is being litigated in other proceedings throughout the country.

Altogether, says Eisenstat, "the outcome of these suits might well lead to the development of new ground rules for how a state may encourage the development of the power generation resources it believes it needs within or near its borders, and whether states are permitted to treat different types of power differently."

CAUGHT IN THE MIDDLE

New and proposed Environmental Protection Agency and state environmental regulations are driving the retirement of some 50,000 megawatts of older coal plants in the coming years—a significant portion of the country's capacity. At the same time, electricity demand is expected to grow in the long run. Both EPA and FERC believe that the market could take care of the resulting shortfall. But the North American Electric Reliability Corp., which oversees grid reliability overall, has raised the alarm that the shortfall in capacity could have a negative impact on the reliable operation of the grid. In essence, some regulators are telling utilities to retire capacity, and at the same time, others are telling them not to in order to ensure reliability.

"Utilities are kind of caught in the middle, and it is unclear which government mandates to follow," says Crowell & Moring's Larry Eisenstat. "The result is likely to be litigation around projects designed to extend the life of existing plants that may not meet new environmental standards, but that are necessary for reliability."

* *Crowell & Moring representation*

INDUSTRY WATCH: FINANCIAL SERVICES

STATE COURTS: THE NEW M&A BATTLEGROUND

With the growth in mergers and acquisition activity over the past few years, there has been commensurate growth in a new "cottage industry" whose practitioners file class actions suits aimed at holding up nearly every deal involving a public company. And the bankers and lawyers who put together these deals now have to expect this all but certain hurdle to deal execution.

Today, smaller plaintiffs' class action firms that once focused on securities litigation in federal courts are regularly filing these strike suits in state courts (other than in Delaware) shortly after nearly every public-company merger is announced. They are doing so because federal procedures and standards have made it difficult for smaller firms to get lead counsel appointments in such cases, and the seasoned judges of the Delaware Chancery Court have exhibited increasing skepticism toward M&A strike suits.

"These firms routinely post trolling notices on the Internet within hours or even minutes after an M&A deal is announced," says Edwin Baum, a partner at Crowell & Moring and head of the firm's Commercial Litigation Practice in New York. "They then race to file putative class actions in state courts. In essentially cookie-cutter fashion, they assert state-law breach-of-fiduciary-duty claims, typically claiming that the sale process was deficient, the proxy disclosures are inadequate or misleading, and the agreed share price is inadequate." Thus, it is not uncommon for merging companies to quickly find they are facing multiple suits in several states.

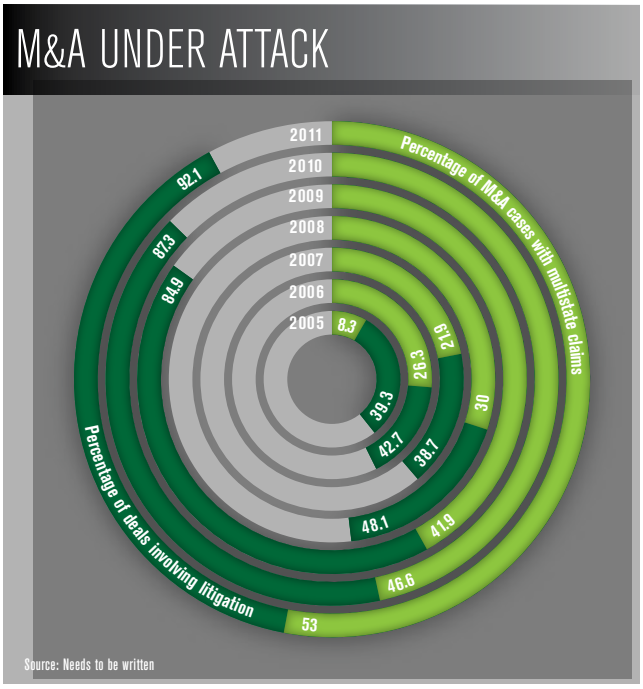
The deal parties typically settle these cases quickly to avoid delaying the closing of their deal—usually with only very minor amendments of the proxy statement. "There is usually no change in the deal price or any cash payments made to the putative shareholder class. There are, of course, stipulated fee awards for the plaintiffs' counsel," says Baum. Overall, he says, "these suits have become a virtual private 'tax' on public-company M&A deals."

RECESSION REVERBERATIONS

In 2008 and 2009, companies that just a few years earlier had been the subjects of highly leveraged acquisitions found themselves buried in debt and facing a tough economy—conditions that in many cases would have pointed to bankruptcy or foreclosure. However, says Baum, "stakeholders of some overleveraged companies pushed through only light forms of restructuring that did not address the fundamental fact that the debt loads were just too large." In essence, he says, "they didn't want to take the hit, so they kicked the can down the road on the chance that things might get better in the not-too-distant future."

For some, the much better times they needed did not materialize quickly enough. Thus, while, on an operating basis their current businesses might be sustainable in downsized forms, a slow, modest recovery has meant that some companies have not been able to grow enough to support their still-outsized debt loads.

In the last year or so, some companies have started to hit the wall, and are now pursuing the type of heavy restructuring they tried to avoid in 2008 and 2009—some consensually and others through foreclosures or bankruptcy filings. Financial services institutions and funds hold much of the debt in question, and will be involved in shaping these second-round restructuring solutions or the filings or litigation that can follow.

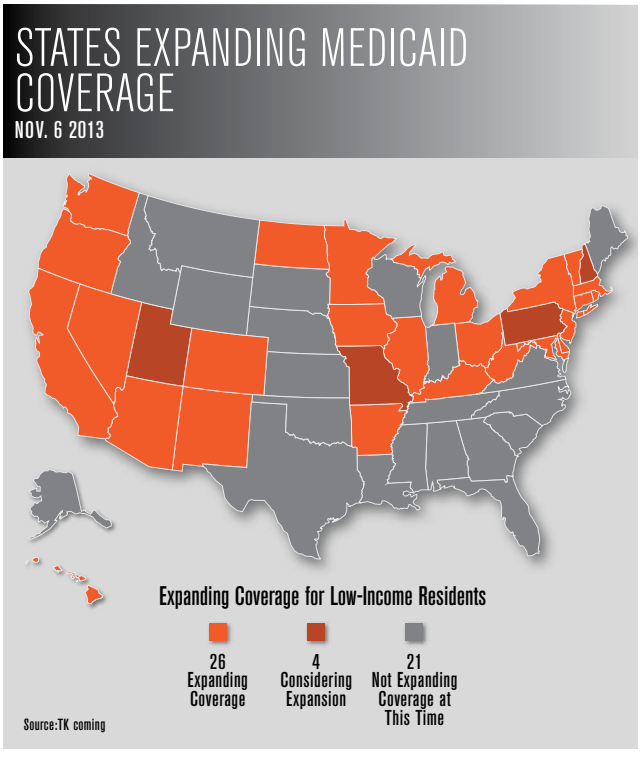


Class-action plaintiffs' firms are quickly attacking newly announced mergers in multiple state courts—a fact that financial services firms need to consider as they put together deals.

INDUSTRY WATCH: HEALTH CARE

LEGISLATION-DRIVEN CHANGE SETS THE STAGE FOR LITIGATION

Perhaps more than ever, government actions are reshaping the health care landscape—and those changes are often translating into increased litigation.



The Affordable Care Act is prompting many states to expand their Medicaid coverage. As states and insurers adapt, a number of key issues are likely to be resolved through litigation.

As one might expect, the Affordable Care Act—known as Obamacare—is an important driver of litigation. Under the act, many states have expanded eligibility for their managed care programs in order to take advantage of increased federal funding and help keep health care costs down. This has presented an appealing opportunity for health plans, and many have, for the first time, moved into the Medicaid managed care business in various states.

In essence, this is new territory for states that are jumping into the Medicaid managed-service space—and the result has sometimes been friction and financial problems. Some plans have been forced to exercise early termination rights arising out of arrangements they made with the states based on disputes about whether the states provided accurate claims data when they bid on the business.

Kentucky's experience is illustrative. The state switched from a traditional fee-for-service Medicaid program to a managed-care program, contracting with three plans to serve Medicaid beneficiaries in the state. Within 18 months, the three plans reported statutory losses totaling more than $410 million; one of the three moved to exercise its right to terminate its contract, and the state fought the move. "The issue of whether they have the right to terminate is up on appeal," says Crowell & Moring partner Christopher Flynn, who co-chairs the firm's Health Care Litigation Team. In the meantime, one plan has sued the state of Kentucky for more than $200 million for its portion of those losses. The case is now working its way through the state's courts.

Flynn says that states need to understand the expanding Medicaid market better and to work with plans to create agreements based on mutual success. Transitioning to managed care, he says, cannot be about political expediency and short-term cost savings, but rather a commitment to ensuring that Medicaid beneficiaries receive the best care possible, delivered effectively and efficiently. Some states understand this proposition while others are learning the hard way. In the meantime, as the Affordable Care Act rolls out and state governments move into new ground, it is likely that such litigation will continue to crop up.

DEFINING THE SHAPE OF PARITY

Another litigation focal point for the health care industry is the Federal Mental Health Parity and Addiction Equity Act of 2008, and a number of similar state laws enacted in its wake. (The final rules for the MHPAEA were released late in 2013.) These laws call for similar insurance coverage for medical treatments and behavioral treatments, such as counseling

KEY CASES

U.S. V. BLUE CROSS BLUE SHIELD OF MICHIGAN The parties agreed that the injunctive relief sought by the plaintiffs was no longer necessary because of Michigan's new laws and the order by the commissioner of the Michigan Office of Financial and Insurance Regulation banning Most Favored Nation clauses, and they jointly asked the court to dismiss the case without prejudice or costs to any party.

IN RE NEURONTIN MARKETING AND SALES PRACTICES The U.S. Court of Appeals for the First Circuit ruled in three cases that Pfizer had hired doctors to write medical articles with misleading information about Neurontin's off-label benefits, despite a lack of scientific evidence to support its marketing claims.

and psychiatric treatments. But it's not always clear what that means in practice. For example, if an insurance plan allows an unlimited number of visits to an orthopedist for a knee injury, does it need to allow unlimited visits to a psychiatrist for the treatment of depression?

"The trick lies in determining what's comparable from the medical health side to the behavioral health side, because in reality they don't always line up neatly. So some in the provider community are using litigation in an attempt to expand the boundaries of the laws," says Flynn. "The plaintiffs' bar has been aggressively testing the limits of mental health benefits coverage in class actions across the country. These cases continue to multiply and show no sign of abating in the near future." In one recent case in the U.S. District Court for the District of Vermont, a plaintiff alleged, *inter alia*, that Fletcher Allen Health Care and the Fletcher Allen Preferred Plus Medical Plan had violated the Mental Health Parity Act because Fletcher Allen's actual practices differed from its written policies regarding the provision of mental health benefits and medical benefits. Specifically, the plaintiff alleged that Fletcher Allen required pre-approval for, conducted concurrent reviews of, and initiated an automatic review process of all routine, out-of-network mental health services but allegedly did not apply those same practices to routine, out-of-network medical services. The district court denied Fletcher Allen's motion to dismiss the Mental Health Parity claim. Subsequently, in November 2013, the parties stipulated to a dismissal of the suit with prejudice.

Some suits challenge the methods used to compare medical and behavioral health services to determine parity. Others often focus on utilization review, the well-accepted industry practice of determining the medical necessity of a treatment. The question is whether these well-accepted practices are appropriate when applied to behavioral treatments. "Some advocacy groups argue that utilization review leads to coverage that is too restrictive for behavioral treatments compared to general medical treatments, and are therefore unlawful," Flynn says. "But utilization review is an accepted part of modern-day health care, and is often mandated by employer groups because it helps ensure that members receive appropriate medical care. So there's a lot at stake here."

LITIGATION RISK ON THE HORIZON

Under Section 1313 of the Affordable Care Act, payments made by, through, or in connection with, an exchange are subject to the False Claims Act if the payments include any federal funds. The law makes clear that compliance with the requirements of the FCA concerning eligibility for a health insurance issuer to participate in an exchange is a material condition of an issuer's entitlement to receive payments. This means, notes Crowell & Moring's Christopher Flynn, that if an insurer makes a false statement in connection with its medical loss ratio, in its justification for any rate increase, risk corridor calculations, or in connection with its satisfaction of requirement for participation in an exchange, it could face FCA or other fraud and abuse liability. This brings a whole new "commercially insured" population into the enforcement arena. Health plans need to be vigilant and ensure that they have adequate protections in place to ensure the accuracy of their premium rate-building processes given the potential impact of the FCA.

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