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LITIGATION FORECAST 2015

WHAT CORPORATE COUNSEL NEED TO KNOW FOR THE COMING YEAR

THIRD ANNUAL JURISDICTIONAL ANALYSIS

IN-DEPTH LOOK AT IP LITIGATION

RECOVERY AND VALUE-BASED BILLING

LITIGATION FORECAST 2015

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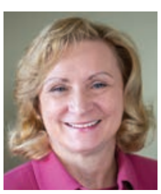

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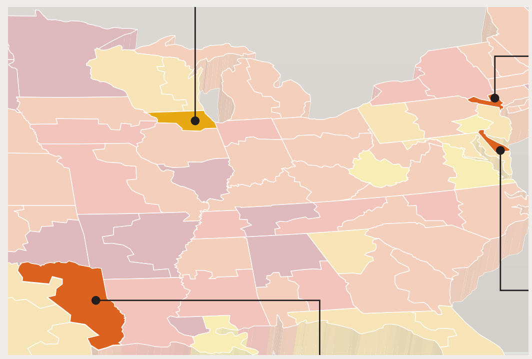

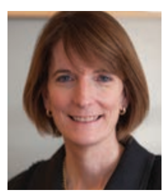

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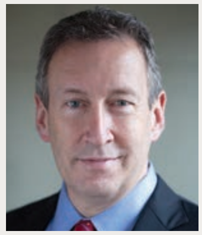
A STRATEGIC APPROACH TO LITIGATION



"Winning" a litigation battle today extends far beyond victory at trial. The stakes companies face when confronted with litigation are much higher and more complex.

Companies must not only successfully navigate the courtroom, but also design litigation strategies that account for business objectives, public reputation, customer relations, stock price, an extremely organized plaintiffs' bar, and increasingly engaged federal, state, and international government enforcers. Failure to anticipate and effectively grapple with all these dimensions threatens to unravel products, plans, and profit margins. And all of this comes amid unprecedented pressures on legal budgets, executive liability, and rising shareholder and consumer activism.

The purpose of our annual *Litigation Forecast* is to help companies look over the horizon at emerging trends in key areas of litigation, particularly in burgeoning and disruptive industries that present both business opportunity and legal risk. In preparing this *Forecast*, we draw on the collective experience of our 300+ litigators and trial lawyers and our litigation work for more than a third of the Fortune 100 companies. That experience led to our being named Washington's "Litigation Department of the Year" for General Civil Litigation by *The National Law Journal/Legal Times*. These articles draw upon what our litigators encounter in federal and state courts every day, and what they see lying ahead.

We also are pleased to introduce our inaugural *Regulatory Forecast* this year, which focuses on government investigative and enforcement activities that are important drivers of litigation. In critical respects, these publications go hand in hand. We hope you find them informative, and we look forward to continuing the conversation.

—Kent Gardiner
Chairman, Crowell & Moring

LITIGATION FORECAST 2015

CROWELL & MORING LLP

CREATOR AND EDITOR Mark Klapow
JURISDICTIONAL ANALYSIS EDITOR Elizabeth Figueira
ASSOCIATE EDITOR Christie Stahlke
MANAGING EDITOR Jessica Nathanson
EXECUTIVE EDITOR Maura Fisher
CONTRIBUTING EDITOR Nicole Quigley

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EDITORIAL DIRECTOR Michael Winkleman
ART DIRECTOR Carole Erger-Fass
WRITER Peter Haapaniemi
CHARTIST Alex Reardon
COPYEDITOR Sue Khodarahmi
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ANTITRUST

UNSETTLED LAW PROVIDES FODDER FOR PRIVATE LITIGATION

Government regulators are expected to continue their active pursuit of cartel behavior and their intense scrutiny of merger activity —and often extensive related private litigation will undoubtedly follow suit.

But the most interesting area to watch may be "rule of reason" antitrust cases addressing issues for which the legal standards remain murky. While the agencies grapple with whether and when to pursue such cases, the private bar may increasingly seize the opportunity to attempt to exploit the evolving legal landscape.

One area that has received increased attention is so-called conditional pricing, such as loyalty or bundled discounts, in which lower pricing is conditioned on the buyer's commitment to purchase more goods or services from the supplier. Because such practices typically lower prices—the very aim of the antitrust laws—they usually do not raise competitive concerns. But in certain circumstances, the apparent discounts can be considered anticompetitive—if, for example, a company uses them to leverage its dominant position in one market to squeeze out competitors and gain a dominant position in another market in order to eventually raise prices.

Exactly when such discounts should be deemed anticompetitive, however, is a question on which the courts have differed. "The law in this area is unsettled, and the standards for judging when such provisions are legitimate and when they are not are muddy at best," says Shari Lahlou, a partner in Crowell & Moring's Antitrust and Litigation groups.

That uncertainty led the DOJ and FTC to hold a joint workshop in mid-2014, inviting a range of academics, economists, and practitioners to discuss potential standards for assessing conditional pricing. Illustrating the complex nature of discerning between legitimate discounts and those that are anticompetitive, the group struggled to reach a consensus. "Unfortunately, it is not always easy to draw the line between pricing practices that injure competition and those that do not," one DOJ official told the group.

With that in mind, agencies may refrain from enforcement actions in all but the most obviously egregious cases. But the private bar may not be so reticent. Rather, the lack of clarity is likely to breed litigation. Struggling firms could increasingly turn to conditional pricing practices as a way to gain a market advantage. "I think the plaintiffs' bar will take advantage of the uncertainty in the law, which gives them room to come up with creative theories," says Lahlou. "Once a competitor brings suit, copycat putative class actions often follow, particularly if the competitor case gains traction," she says. "I wouldn't be surprised to see more of that going forward."

While the uncertainty around when conditional pricing will be deemed anticompetitive presents certain risks to plaintiffs, it can also work to their advantage. Because the companies that are targets of such suits face that same uncertainty, says Lahlou, "they may be more inclined to settle on reasonable terms,

KEY CASES

EISAI INC. V. SANOFI-AVENTIS U.S. LLC

A New Jersey federal court dismissed a case brought by pharmaceutical maker Eisai against Sanofi-Aventis, challenging Sanofi's discounts conditioned on customers' commitments to purchasing primarily from Sanofi. The court determined that Eisai did not satisfy the cost-price test and failed to prove the discount program harmed it or impeded customer choices.

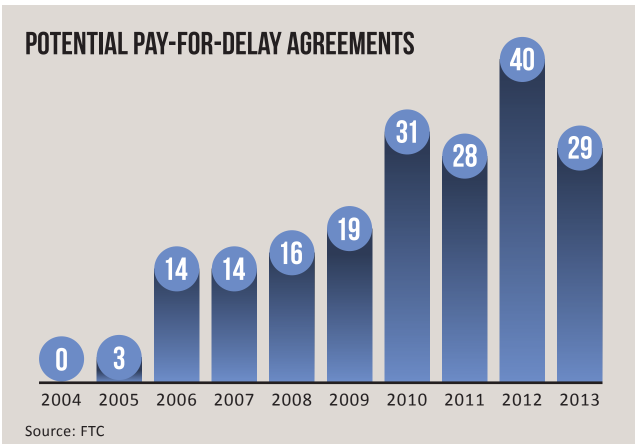
ZF MERITOR LLC V. EATON CORP.

Eaton agreed to pay $500 million to settle a lawsuit that challenged its long-term contracts incorporating loyalty discounts. After a jury found that Eaton's contracts violated the Sherman and Clayton Acts, the Third Circuit departed from other courts, finding that a monopolist's market-share discounts can be anticompetitive even when the products are sold above costs.

IN RE: NEXIUM ANTITRUST LITIGATION

In the first "pay-for-delay" case to go to trial post-*Actavis*, a Massachusetts federal jury found that a settlement between AstraZeneca and Ranbaxy Laboratories regarding Nexium was not anticompetitive. While the jury sided with plaintiffs on certain core issues, it determined that generic entry would not have occurred earlier even without the challenged agreement.

> "I think the plaintiffs' bar will take advantage of the uncertainty in the law, which gives them room to come up with creative theories." *—Shari Lahlou*



The number of patent-case agreements between brand-name and generic drug companies that the FTC identifies as potential pay-for-delay arrangements fluctuates. But overall, it has increased significantly over the past decade—and in 2013, such agreements involved 21 branded pharmaceutical products with combined annual U.S. sales of approximately $4.3 billion.

rather than invest in litigating with the risk of treble damages and attorneys' fees that goes along with the antitrust laws."

DIFFERING VIEWS OF PAY-FOR-DELAY

Another area in which the legal landscape remains largely undefined is the ongoing battle between regulators and pharmaceutical purchasers on the one hand, and branded and generic drugmakers on the other. Known as "pay-for-delay," these cases challenge certain settlements struck between branded and generic drugmakers to resolve patent litigation over the drug in question. The theory is that a settlement involving a payment by the branded company to the generic is a device to delay the generic's entry, thereby depriving the market of a lower-priced option and harming competition.

Although the Supreme Court's 2013 *Actavis* ruling resolved many of the debates brewing in the lower courts, it left unanswered several questions about the appropriate standards for judging when such settlements are anticompetitive. One of the important questions that remains is what constitutes a "payment," leaving open the possibility that different terms of value, apart from straight monetary compensation, could be considered anticompetitive. That question is particularly relevant in light of the increased scrutiny on these settlements, and the fact that many settlements are being structured around more complicated terms. The lower courts are currently sorting through how to handle the question, with differing results. And the Third Circuit, the first appellate court to consider the question, recently heard oral argument in a suit against GlaxoSmithKline challenging its agreement with generic producer Teva not to launch its own authorized generic to compete with Teva's product for a period of time.

As with conditional pricing, uncertainty about reverse payments opens the door to private litigation. "In addition to the regulatory enforcement efforts we've seen, the plaintiffs' bar has been active," says Lahlou, "and is likely to continue to seize opportunities to pursue claims as the courts grapple with the question of what the Supreme Court meant in *Actavis*."

EVOLVING CLASS CERTIFICATION STANDARDS

While it used to be that classes were routinely certified in antitrust cases, the evolution of class standards, heavily influenced by Supreme Court cases over the past few years, has started to change that.

Often, courts are examining class issues later in the proceedings and holding plaintiffs to a higher standard of proof, particularly when it comes to supporting economic evidence, and class has been denied or vacated in several prominent cases. For example, a California judge denied classes of direct and indirect purchasers in an action alleging price fixing regarding optical disk drives*, finding plaintiffs' economists' reports insufficient to establish a viable methodology for proving class-wide impact. In another case, the D.C. Circuit vacated the district court's grant of certification and remanded in a rail freight-related case*, finding the standard the court applied to the expert analysis too lax. The new standards are hardly the death knell for antitrust class actions, and classes continue to be certified. But they have put real meaning into the class battle, and their impact will unfold as the courts shape their contours in the context of specific cases.

* *Crowell & Moring representation*

CLASS ACTIONS

CLASS ACTION PLAINTIFFS STRETCH THE CONCEPT OF "INJURY"

A long-held tenet of federal law is that in order for a civil suit to proceed, the plaintiff has to have suffered some type of injury that the law recognizes.

But in class actions, plaintiffs have been eroding that principle for some time with "no injury" suits, which seek damages even though the plaintiffs have not suffered what courts traditionally consider a legally recognizable injury. Some courts have tried to reverse that trend, while others have let it continue. With no clear rule, class action plaintiffs keep pushing the envelope.

Recent years have seen a proliferation of no-injury class actions. For example, plaintiffs have filed numerous class action suits under the Telephone Consumer Protection Act (TCPA), which protects consumers from unwanted telemarketing. Under that statute, "if a company has called a consumer who doesn't want to be contacted, that's potentially enough to give rise to liability for the company," says Tracy Roman, a partner in Crowell & Moring's Litigation Group. "In a TCPA class action, the class typically includes consumers who did not suffer any injury in the traditional sense, such as people who didn't even answer the telemarketing call."

Another class action approach relies on a "defect as injury" theory. In those cases, plaintiffs who buy a product with an alleged defect but who never experience the alleged defect themselves still sue, arguing that the defect makes the product worth less than what plaintiffs paid for it. In one example, companies have been sued for allegedly moldy washing machines, even though a sizable portion of class members never experienced any problem. Despite that fact, both the Sixth Circuit and Seventh Circuit have said that these cases can go forward.

Data breaches, such as those recently reported by Target and The Home Depot, are likely to be the subject of more class actions going forward. "Usually within a day or two of a breach occurring, a class action is filed, often followed by dozens more," says Roman. In these cases, class members typically claim that even in the absence of any fraudulent charges on their credit or debit cards, the fear of future misuse of their credit or debit cards or personal information provides sufficient injury to sue.

TCPA CLASS ACTIONS CROSS INDUSTRIES

INDUSTRY/COMPANY	CLASS ACTION
SOCIAL MEDIA/ TWITTER	Nunes v. Twitter Inc., No. 14-02843 (N.D. Cal.)
SPORTS/LA LAKERS	Emanuel v. The Los Angeles Lakers Inc., No. 2:12-cv-09936 (C.D. Cal.)
PHARMACIES/CVS PHARMACY	Lowe v. CVS Pharmacy Inc., No. 1:14-cv-3687 (N.D. Ill.)
TRAVEL & LEISURE/ COSMOPOLITAN HOTELS & RESORTS	Kazerouni v. Cosmopolitan Hotels & Resorts Inc., No. 8:14-cv-00616 (C.D. Cal.)

Class action plaintiffs have been particularly active in pursuing TCPA and telemarketing-related suits—and they are targeting a wide variety of industries.

"Usually within a day or two of a breach occurring, a class action is filed, often followed by dozens more."

—Tracy Roman

In 2013, when the Supreme Court weighed in on the injury issue in *Clapper v. Amnesty Int'l USA*, it looked like this trend might begin to ebb. In that case (which was not a class action), "the Court said that injury has to be immediate and impending—not just something that might possibly happen someday," says Roman. In the same term, the Supreme Court ruled in *Comcast Corp. v. Behrend* that a class cannot be certified unless damages can be measured on a class-wide basis.

Building on the *Clapper* and *Comcast* decisions, some courts have dismissed no-injury class action suits or denied class certification on the grounds that plaintiffs have not been injured and therefore lack standing. Other courts, however, have allowed such cases to proceed. The absence of a bright-line rule has created a confusing landscape that encourages the continued proliferation of no-injury class actions.

What's more, says Roman, in 2014, "the Supreme Court turned down the chance to put a nail in the coffin of no-injury class actions when it declined to review several high-profile Court of Appeals rulings allowing such cases to proceed past threshold motions or affirming class certification." One such case—*First National Bank of Wahoo v. Charvat*—involved a federal statute requiring that ATMs have two notices explaining fees charged for transactions. The defendant banks' ATMs had only one. The class plaintiff—an employee at a plaintiffs' law firm who was fully aware of the transaction fees—voluntarily incurred the fees when he used the ATMs and then brought a class action. The Eighth Circuit found that the plaintiff had suffered an "informational injury" because he did not receive the statutorily prescribed notice. The Supreme Court declined to review the decision.

The current term offers the Supreme Court another opportunity to provide clarity. The Court has agreed to hear *Spokeo, Inc. v. Robins*, a class action in which the plaintiff alleges violation of the Fair Credit Reporting Act by data aggregator Spokeo. The Ninth Circuit ruled that the plaintiff had sufficiently alleged an injury-in-fact, rejecting Spokeo's argument that the plaintiff must show tangible harm and not just fear that a prospective employer may rely on allegedly inaccurate data provided by Spokeo. A decision reversing the appellate court's ruling with clearly articulated reasoning could curtail the "no-injury" class-action trend. If the Supreme Court affirms or issues a narrow decision, however, "conflicting decisions are likely to keep coming out of trial and appellate courts on whether these types of no-injury cases can proceed beyond the pleading stage and are appropriate for class certification," says Roman. "And we can expect to see the plaintiffs' bar continue to file them."

UNSETTLING CASES

This past year saw the continuation of the trend of courts giving greater scrutiny to class action settlements—and their willingness to reject class settlements because of the settlement's failure to adequately compensate class members or excessive attorneys' fees. Among the more notable of these: a district court's rejection of a $324.5 million settlement in a case alleging anti-employee poaching agreements by Google, Apple, Intel, and Adobe—a ruling based on the court's unfavorable comparison of the settlement's value with a prior settlement involving other companies hit with the same allegations.

Even more dramatic was the Seventh Circuit's rejection of a settlement involving Pella windows. Here, conflict of interest was a key issue. Among other problems, one of the class representatives was the father-in-law of the lead class counsel. Calling the settlement "scandalous" and saying that "class counsel sold out the class," the Seventh Circuit rejected the $90 million settlement and $11 million in attorneys' fees—and sent the case back to the lower court, where it is proceeding with new class counsel and class representatives.

KEY CASE

DART CHEROKEE BASIN OPERATING CO., LLC V. OWENS

In December, the Supreme Court ruled that a defendant removing a class action to federal court under the Class Action Fairness Act (CAFA) need not provide evidence in its removal notice that the amount in controversy exceeds $5 million. The Court held that removing defendants, like plaintiffs bringing a class action in federal court under CAFA, need only plausibly allege that plaintiffs' damages meet CAFA's jurisdictional threshold. In so doing, the Court reaffirmed CAFA's goal of making it easier to remove certain class actions to federal courts and the Court's reluctance to put up barriers to removal under CAFA.

ENVIRONMENTAL

EPA RULEMAKING RESHAPES THE LANDSCAPE

Over the past year, the EPA has been formulating groundbreaking new rules regulating greenhouse gas (GHG) emissions from the power sector. The Obama administration wants these rules finalized by June. And that will no doubt trigger a flood of litigation, as a range of parties go to court over the new rules.

One of these rules—the New Source Performance Standards—establishes GHG emission limits for new fossil fuel-fired electric generating units (EGUs). As proposed, the rule would require all newly constructed fossil fuel-fired EGUs to meet emission rates achievable by natural gas combined-cycle technology, or 1,100 lb CO_2/MWh—levels that are much lower than what coal-fired EGUs can reasonably achieve. “The agency has proposed emissions standards that new coal plants can’t meet, since such limits are based on the use of carbon capture and sequestration technology that have not been adequately demonstrated on this scale,” says Chet M. Thompson, co-chair of Crowell & Moring’s Environment & Natural Resources Group and former deputy general counsel of the EPA. This rule will effectively guarantee that no new coal-fired facilities will be built in the near future, and that new generation will be dominated by natural gas and renewables. Eventually, this will have a major impact on the power industry, as coal currently represents nearly half of U.S. electricity generation.

A second rule—EPA’s Clean Power Plan—regulates GHG emission rates from the *existing* fleet of fossil fuel-fired EGUs. The rule would do this by establishing state-specific emission rates that each state would have to achieve by 2030. The rates reflect emission reductions that EPA believes are achievable by implementing four “building blocks”: heat rate improvements from existing coal units; increasing the dispatch of natural gas units to 70 percent; increasing renewable energy generation; and implementation of energy-efficiency measures (i.e., electricity demand reduction). This grid-wide approach is unprecedented, and according to EPA would reduce GHG emissions from the electricity sector by 30 percent. This rule would have a transformative effect for the nation’s generation capacity and mix and on the electricity grid, as it moves generation away from coal-fired units to gas and renewables. According to EPA’s own analysis, the rule would result in the retiring of about 50 GW of capacity, which when added to the 50 GW that is expected to retire in response to other EPA rulemakings, reflects nearly one-third of existing coal-fired generating capacity. Others believe that impact will be far worse.

These EPA rules will undoubtedly be challenged in the U.S. Court of Appeals for the D.C. Circuit. They will most likely work their way up to the Supreme Court, simply because the stakes are high and the changes will be felt by many. “The fault lines are pretty clear,” says Thompson, adding that the natural gas and renewables industries like the rules, as do environmental groups, although many activists want even stricter standards. On the other hand, many states worry about the cost and complexity of complying with the rules. For utilities, the shift away from coal could lead to hundreds of millions

KEY CASES

Two recent Supreme Court cases offer different views on how much deference courts should give to EPA. These cases will likely play a critical role in judicial review of EPA’s greenhouse gas regulations. One case, EME, seemingly would support EPA’s authority to regulate the electricity sector broadly, while the other, UARG, suggests the contrary.

EPA V. EME HOMER CITY GENERATION, L.P.

The Court said that EPA’s expertise should be given deference in dealing with technical statutory obligations—in this case, the calculation of downwind air pollution.

UTILITY AIR REGULATORY GROUP V. EPA

The EPA interpreted the law to greatly expand the types of air pollutants it could regulate. The Court precluded deferential review, saying that it was up to Congress to decide what power EPA has—which could lead to a limiting of EPA’s powers.

"The agency has proposed emissions standards that new coal plants can't meet, since such limits are based on the use of carbon capture and sequestration technology that have not been adequately demonstrated on this scale." *—Chet Thompson*

of dollars in stranded generating assets that can no longer be used. "For the coal industry, this is another major blow—one they intend to fight as an unlawful exercise of EPA's Clean Air Act (CAA) authority," he says.

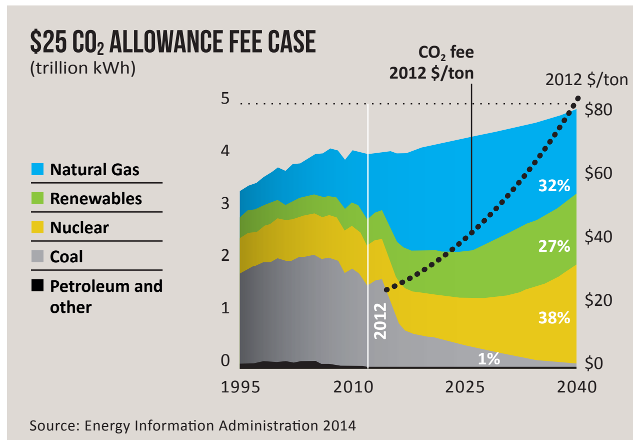
Beyond the immediate effects on EGUs, the rules are expected to lead to rising energy prices—a deep concern for manufacturing companies. And they are likely to serve as a template for addressing GHG emissions in other industries. "This is a first step that shows how EPA is thinking about regulating the next sector," says Thompson. "So it's an issue that everyone needs to watch."

Another Clean Air Act case worth watching next year is *White Stallion Energy Center LLC v. EPA*, a case involving EPA's Mercury and Air Toxics Standards (MATS) rule. MATS established emission limits for mercury and other hazardous air pollutants for coal-fired power plants. The Supreme Court granted *certiorari* on the question of whether EPA unreasonably refused to consider costs in establishing the emission standards under Clean Air Act Section 112. A decision by the Supreme Court that EPA must consider cost would have implications not only for the MATS rule but also other CAA and environmental provisions that are silent on cost.

BROADENING EPA'S REACH

Meanwhile, EPA is also rethinking aspects of the Clean Water Act, with new rules expected to be published on the same timeline as the emissions rules in June 2015. Under the act, EPA has jurisdiction over "the waters of the United States." However, the regulatory definition of that term has lacked clarity for decades, and EPA now has proposed adopting the broadest definition it has ever attempted in a regulation. "The agency is saying that it includes not only navigable waters, but all tributaries of navigable waters, any waters contiguous to navigable waters, and those with a nexus to navigable water," says Thompson. "That can include even dry ditches in the West that only have water a few days out of the year." As a result, farmers, power companies, construction companies, and others may need to get a Clean Water Act permit to make any changes in or near such ditches.

"You have the U.S. government asserting that it has more control over more areas—and anytime you do that, it's controversial," says Thompson. And here again, he says, the controversy is going to be played out in the federal courts and ultimately the Supreme Court.



Today, coal is used to create more than one-third of the electricity in the U.S. Assuming that fairly strict emissions standards are put in place, coal's share of the energy mix could dwindle to virtually zero by 2040, with nuclear and renewable sources making up much of the difference.

ENERGY PROJECTS: RUNNING THE GAUNTLET

Today, large energy projects are virtually certain to encounter opposing litigation from two directions—citizen suits and EPA enforcement. That trend is growing. "With citizen suits, all the major environmental statutes, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act, allow potentially affected parties to challenge the development and permitting of new facilities," says Crowell & Moring's Chet Thompson. "Environmental groups are using those tools to block or slow down pipeline, mining, and even wind and solar projects."

For its part, EPA has been working with a smaller budget—but enforcement efforts are going to be significant in 2015 as the agency emphasizes high-impact cases. "We envision targeted enforcement with the agency focusing on fewer but larger cases," Thompson says. In addition, the *BP Deepwater Horizon* case is now resolved, freeing up agency resources; these will likely be focused on areas such as refineries and coal-fired power plants, EPA's flare initiative, and the continuation of New Source Review cases under the Clean Air Act.

GOVERNMENT CONTRACTS

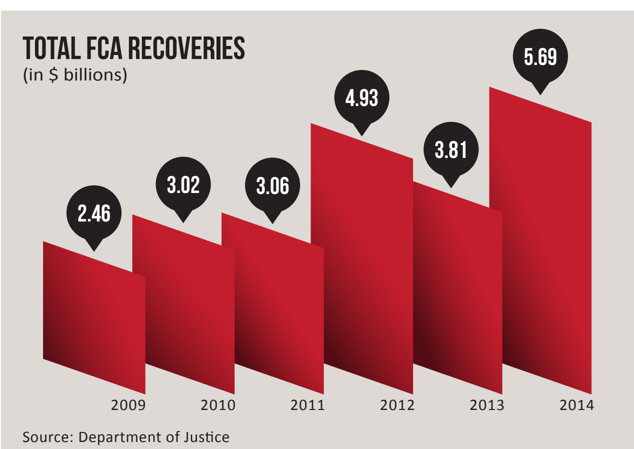
EXECUTIVE ORDERS WEAVE LABOR POLICY INTO CONTRACTS

Contracting with the government has always been a complicated business—and in 2014, the challenges and risks for contractors only increased.

As federal agencies continue to operate with tight budgets, contractors continue to be willing to engage in bid protests to hold on to business. This has led not only to a renewed focus on General Accounting Office (GAO) litigation, but also to increased follow-up litigation in the Court of Federal Claims. “Before, if a contractor got an adverse ruling from the GAO, they would tend to let it go. But now they’re more willing to pursue an appeal,” says Gail Zirkelbach, a partner in Crowell & Moring’s Government Contracts Group.

Meanwhile, whistleblowers and the government continue to be very actively pursuing False Claims Act (FCA) cases. Last September, the Department of Justice (DOJ) upped the ante considerably, announcing that all FCA whistleblower complaints would be automatically reviewed by the department’s Criminal Division to see if a parallel criminal investigation was warranted.

Notably, 2014 also saw the White House issue a number of executive orders focused on labor and employment requirements for government contractors. One of these raised the minimum wage for contractor employees. Another expanded



The past three years have seen the three largest annual settlement and judgment amounts recovered under the False Claims Act, with 2014 setting the record. Total recoveries since 2009 are well over $22 billion, which represents more than half the funds recovered in the past 28 years.

QUESTIONING PRIVILEGE

Attorney-client privilege is a basic tenet in law, but it was called into question by a 2014 court decision.

In March, a district court issued a discovery order in *U.S. ex rel. Barko v. KBR* that said that a contractor’s internal investigations into FCA-related allegations were performed to comply with regulatory responsibilities and not for the purpose of legal advice. Therefore, the internal documents that were part of the investigation—even when they were prepared by in-house counsel—were not subject to attorney-client privilege. “That ruling surprised a lot of people,” says Crowell & Moring’s Gail Zirkelbach. Indeed, shortly after, the D.C. Circuit Court issued a *writ of mandamus* and vacated the lower court’s order.

Nevertheless, says Zirkelbach, the district court’s order highlights the importance of carefully structuring and pursuing internal investigations to keep attorney-client privilege intact. In addition, she says, companies may want to keep an eye on broader potential implications of the order. “If one court is willing to erode the idea of privilege,” she says, “there’s a good chance that others could do the same thing in the future.”

"If you don't disclose a labor violation, is that going to be seen as a contractual breach, or as making a false claim under FCA because of some sort of implied certification attributed to the contractor?" —*Gail Zirkelbach*

existing prohibitions on discriminatory hiring practices to include the categories of sexual orientation and gender identity. Yet another requires contractors to provide the Department of Labor with an "equal pay report" on the race, ethnicity, sex, earnings, and total hours worked for each employee—information that the department will use to analyze potential pay discrimination by government contractors.

The most substantial and far-reaching of these executive orders, titled "Fair Play and Safe Workplace," was signed last July. Under this order, companies bidding on federal contracts have to disclose any state or federal violations of labor-related laws and regulations they have incurred over the previous three years. Contractors must check their compliance with more than a dozen applicable laws, from the Fair Labor Standards Act to the Family Medical Leave Act—shifting much of the burden of identifying labor-law violations to the contractors. Even after a contract is awarded, contractors will still need to self-report any violations—including those of its subcontractors—with updates every six months.

The order also requires contractors to give employees detailed information about their paychecks to help them understand how they were paid, and it limits contractors' ability to have pre-dispute arbitration clauses in their agreements with employees. "That's good for employee rights, but it's probably going to mean more employee litigation against contractors," says Zirkelbach.

For contractors, complying with this range of requirements will typically require the enhancement of their HR processes and more record-keeping and reporting—adding to the already significant amount of effort they put into compliance. The result, potentially, will be pushback by contractors in court. "We may see challenges about whether these kinds of requirements are appropriate for an executive order," says Zirkelbach.

As executive orders are converted into laws and regulations, there will be a greater risk of litigation from enforcement actions and compliance problems—which could be significant. Contractors failing to accurately report labor violations could have their contracts terminated or even be proposed for suspension or debarment from doing business with the government. Beyond that, says Zirkelbach, "if you don't disclose a labor violation, is that going to be seen as a contractual breach, or as making a false claim under the FCA because of some sort of implied certification attributed to the contractor?"

In a closely related trend, contractors are seeing a growing emphasis on the part of the government on enforcing secondary contract clauses—those relating to factors such as being a small business or having an affirmative action program, as opposed to executing work and delivering products or services. "There are more cases now where a contractor has had funds withheld or has not been awarded a contract under some of these socioeconomic clauses," says Zirkelbach. Similarly, the government is increasingly scrutinizing compliance with a growing range of cybersecurity requirements in contracts.

Zirkelbach says these actions are part of a larger trend toward using contractors not only to get work done but also to advance government policies. "A lot of these secondary requirements are not new, although there is more emphasis on making sure contractors are compliant with them," she says. And as the government continues to enforce these clauses, contractors will continue to file protests and pursue litigation.

KEY CASES

COMPUTER SCIENCES CORP.; HP ENTERPRISE SERVICES LLC; HARRIS IT SERVICES CORP.; BOOZ ALLEN HAMILTON

GAO sustained four protests confirming the protestors' allegations that the Air Force's technical, performance confidence, and cost/price evaluations in the Network-Centric Solutions-2 procurement all contained significant errors. GAO determined that the agency failed to conduct a reasonable cost-realism analysis, and recommended that the Air Force reevaluate the 20 technically acceptable bids.

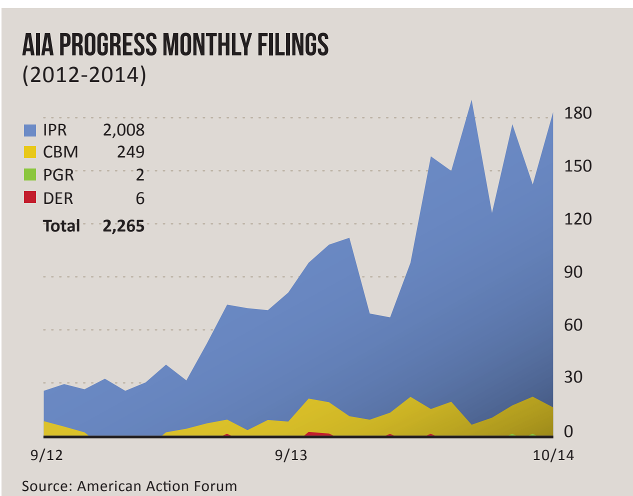
U.S. EX REL. BUNK V. BIRKART GLOBALISTICS

The U.S. District Court for the E.D. of Virginia held that the "traditional rule," and not the more relaxed "substantial continuity" test, governs whether a successor in interest can be held responsible for damages and penalties assessed under the False Claims Act against its predecessor (although acknowledging that the courts are split over which test applies).

INTELLECTUAL PROPERTY

THE USPTO BECOMES A MAJOR VENUE FOR PATENT CASES

A new rocket docket is surfacing for America's patent disputes, but it isn't in the traditional courts—it's at the Patent Office.



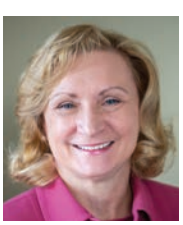
The USPTO launched its new post-grant proceedings in 2012, and since then, a large—and somewhat surprising—number of parties have taken their cases to the Patent Office.

In September 2012, the U.S. Patent and Trademark Office (USPTO) began accepting petitions for its new post-grant review proceedings—most notably, the *inter partes review* (IPR)—created by the America Invents Act (AIA) as a channel for reconsidering the patentability of issued patents. Over the past year, these reviews have proven to be increasingly popular, and the IPR's adoption "has exceeded the expectations of the Patent Office and the user community," says Terry Rea, a partner in Crowell & Moring's Intellectual Property Group and former deputy director of the USPTO.

The IPR is a litigation-like process in which patent holders and challengers present their cases to the Patent Office's Patent Trials and Appeals Board (PTAB). The IPR offers lower costs compared to full-blown litigation, along with speed—by law, the trial phase is to be completed within one year of a petition's being granted. "That approach appeals to many parties because traditional courts can easily take double or triple that length of the time, if not more," Rea says. In just over two years, the number of IPR petitions filed topped 2,000, and more than 250 petitions for reviews of covered business methods—another new post-grant proceeding—were filed with the PTAB. That growth continues; throughout much of 2014, new monthly filings were often in the 100 to 180 range. Initially, says Rea, petitions focused primarily on electrical/computer-related patents. But recently, filings from other areas—especially bio/pharma—have been increasing.

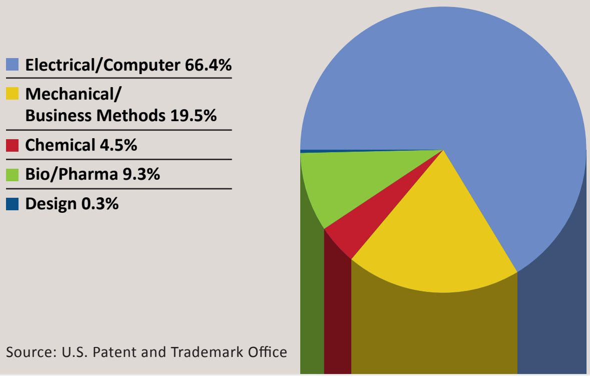
All in all, these figures far outpace the USPTO's early estimates that the board would be handling about 420 post-grant proceedings a year. In its relatively short existence, the PTAB has become the third-most commonly used venue for patent challenges, behind only the Eastern District of Texas and the District of Delaware.

Today, the PTAB is reaching a point where it has built up a body of rulings that provides a sense of how the board views several key issues in its hearings. For example, says Rea, "we see that there is very limited discovery in these IPR cases." Thus, the broad "fishing expeditions" for information that



"In IPR proceedings, discovery is highly efficient, very targeted. You have to know what information is there and what you want before you ask for it." *—Terry Rea*

AIA PETITION TECHNOLOGY BREAKDOWN



Bio/pharma cases acccount for a growing number of USPTO post-grant proceedings, but the lion's share of the workload still stems from high-tech electrical/computer cases.

might occur in district court are generally not allowed by the PTAB. "In IPR proceedings, discovery is highly efficient, very targeted," she says. "You have to know what information is there and what you want before you ask for it."

This past year has also underscored the PTAB's tendency to limit the ability of patent owners to amend patents during its proceedings in order to adjust to new information. On paper, the board's statements say that such amendments are allowed. But in practice, doing so appears to be difficult. By late 2014, the board had allowed only one amendment: that was in *International Flavors & Fragrances v. U.S. Department of Agriculture*, a case in which the patent owner was the U.S. government and the motion to amend was unopposed. Overall, says Rea, "if you're a patent owner, you will want to look at any potential amendments early on, and perhaps bring the new information you have to the Patent Office through the patent reexamination and reissue processes—rather than going through the IPR process."

LEARNING FROM EXPERIENCE

It's important to remember that these AIA post-grant proceedings are still relatively new. "As the Patent Office has gained experience with these new proceedings, it has realized that certain modifications in the rules may benefit the Patent Office and the user community," says Rea.

With that in mind, the USPTO has recently been soliciting public input on how the IPR process might be improved. Among the issues being considered: changing the standard for claim construction to make PTAB and court proceedings more consistent; what type of evidence can be used to demonstrate non-obviousness of a patent; how to handle multiple proceedings of a case occurring in different parts of the USPTO; and the possibility of allowing additional discovery. "This is not a static situation," says Rea. "In the coming year, we will likely see some changes in the way these post-grant proceedings are handled."

BRINGING HARMONY TO PARALLEL PROCEEDINGS

About 80 percent of the patent cases being heard at the USPTO are also involved in concurrent litigation in district court, estimates Crowell & Moring's Terry Rea. And with the growing use of the office's AIA post-grant reviews, the interplay between those venues is becoming more important.

The Patent Office and the courts have different approaches to dealing with patent issues, which leads to inconsistency and redundant work." The district court may be looking at prior art in a case while the Patent Office is looking at the very same thing," says Rea. "It would make sense to have one or the other do that review."

To address such issues, the Sedona Conference research and educational institution is developing a set of guidelines for these parallel proceedings. "The group is defining best practices for the district courts, the PTAB, and practitioners to help make these different proceedings more efficient," says Rea, who is part of the team working on the initiative. The guidelines are expected to be published in the coming year.

KEY CASES

GARMIN V. CUOZZO SPEED TECHNOLOGIES

This case provided insight into the scope of discovery in *inter partes review* proceedings. If the parties cannot agree on the availability or scope of additional discovery, the PTAB will allow it only upon a showing that "such additional discovery is in the interests of justice." That standard has been rigorously enforced by the PTAB, and additional discovery is rarely granted.

IDLE FREE SYSTEMS V. BERGSTROM

This case described the process for successfully amending claims before the PTAB. The patent owner's motion to amend claims on the ground that the patent owner had not proven the patentability of the claims over the prior art was denied.

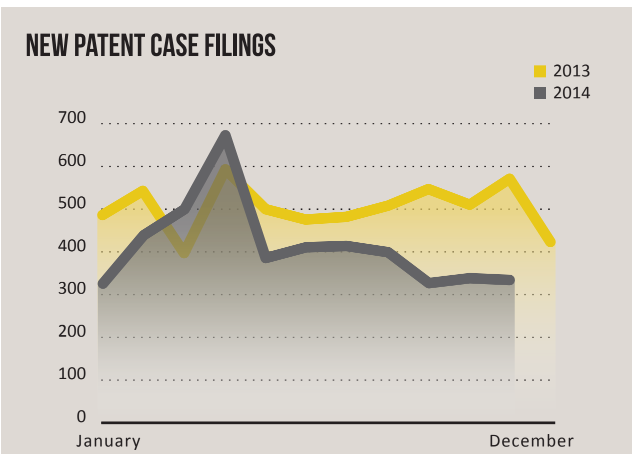
SAP AMERICA V. VERSATA

This case involved the first covered business method review. The PTAB used a broad definition of a business method patent and determined that the patent at issue met that test and could undergo an analysis as a covered business method patent by the PTAB.

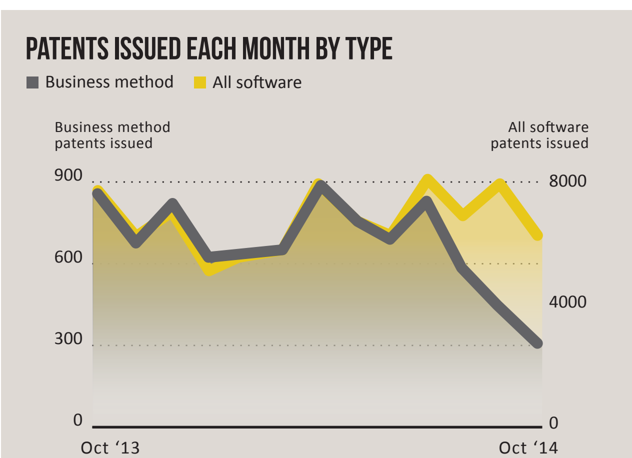
IP: PATENTS

FEE SHIFTING BECOMES A REALITY—AND A RISK—IN LITIGATION

The U.S. Supreme Court has opened the door to increased fee shifting, causing patent holders and accused infringers to rethink litigation strategies.



Source: Lex Machina



Source: James Bessen, *The Atlantic*, Dec. 1, 2014. Data: U.S. Patent and Trademark Office

Month-to-month new patent case filings (top) showed a downward trend in 2014—a change driven by recent Supreme Court activity and, perhaps, the increased potential for fee shifting. The Court's *Alice* ruling presumably contributed to the decline in the issuance of business method patents in the second half of 2014 (bottom).

U.S. patent law has long given federal courts the statutory authority to make the losing party pay the prevailing party's attorney fees when the case is found to be "exceptional." But historically, instances of such fee shifting have been rare because courts have relied on a very strict formula to determine whether a case is exceptional. "A case had to be both objectively baseless and subjectively brought in bad faith in order to be considered exceptional," says Jeffrey Sanok, a partner in Crowell & Moring's Intellectual Property Group. "That's a difficult standard to meet." As a result, operating companies defending patents against suits by patent assertion entities (PAEs) "have never really thought they had much of a chance of getting attorneys' fees," he says. And for the PAEs, there was little risk involved in filing suit.

In 2014, two Supreme Court cases changed all that. The first—*Octane Fitness v. Icon Health & Fitness*—lowered the bar for determining if a case was exceptional. "The Supreme Court said that the rigid rule the Federal Circuit was using was too restrictive and too limiting—that the term 'exceptional' in the statute should have its ordinary and common meaning," says Sanok. "A case is exceptional if it simply stands out from others with respect to the substantive strength of the party's position."

The second case—*Highmark v. Allcare Health Management System*—looked at the appeals process for exceptionality and fee-shifting decisions. Traditionally, the Federal Circuit reviewed district court objectiveness findings *de novo*, without taking into account the court's reasoning. This gave the Federal Circuit a great deal of leeway to overturn cases. In *Highmark*, however, the Supreme Court said that *de novo* reviews were not appropriate in these cases, and that increased deference should be given to district court decisions.

Together, says Sanok, "these cases make it more likely that district courts will award attorneys' fees, and less likely that those decisions will be overturned on appeal. We are already seeing district court judges doing so, particularly against PAEs—and we expect that trend to continue."

LONG-TERM EFFECTS

These cases will have ongoing repercussions. For one thing, says Sanok, "the new standard should change the PAE calculus in bringing suits on questionable patents in the first place. If they don't take the right steps to show that they have a meritorious case, there's a good chance that they'll have an attorneys' fee award against them—and that can often be in the millions of dollars." In addition, the past years have seen a great deal of congressional activity focusing on fee shifting to address perceived abuses by PAEs. Now, says Sanok, "these

"These cases make it more likely that district courts will award attorneys' fees, and less likely that those decisions will be overturned on appeal. We are already seeing district court judges doing so, particularly against PAEs." *—Jeffrey Sanok*

decisions may quell that push for a legislative solution."

The greater possibility for fee shifting will also bring some fundamental changes in litigation strategies. For example, in cases lacking substantial merit, defendants will be more likely to file motions to dismiss or for judgment on the pleadings at an early stage, in addition to early summary judgment motions. "If you don't file early, it may be perceived as an acknowledgment that the case doesn't stand out among others, and therefore is not exceptional. Filing such motions early on can keep the door open to fee shifting," says Sanok. "I believe that's something we're going to see more often, particularly in PAE cases." In addition, accused infringers with strong defenses may start sharing their information with patent owners early on, even before answering a complaint or taking any discovery. The goal: cut the litigation short by pressuring the patent owner to think long and hard about its future investment in the case, considering that a potential fee award may be in its future.

Finally, notes Sanok, it's not just PAEs that have to think twice in this new fee-shifting environment. Operating companies must also carefully verify the merits of their cases, and any hint of harassment in the use of patent litigation against a competitor runs a greater risk of an attorney fee award. The Supreme Court ruling applies equally to defendants, as well, which means courts will likely be granting more fee awards to plaintiffs when frivolous defenses are asserted or even in the absence of evidence to support a willfulness finding. "Sometimes, the old tactic for defendants was to delay and drag out the litigation, particularly when a smaller company would challenge a bigger competitor," says Sanok. "Like PAEs, then, defendants that don't have a strong case on the merits will want to be careful."

KEY CASE

NAUTILUS, INC. V. BIOSIG INSTRUMENTS

The Supreme Court made it easier to prove a patent claim is indefinite by introducing a stricter "reasonable certainty" standard, holding that "a patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, fail to inform, with reasonable certainty, those of skill in the art about the scope of the invention." This decision provides defendants with a stronger arrow with which to shoot down vague patent claims.

BUSINESS METHODS CALLED INTO QUESTION

Last year's Supreme Court decision in *Alice Corp. v. CLS Bank* altered the view of business method patents, and it is already having an impact on patent litigation.

The case involved a computerized method for reducing risk in financial transactions—and the Court ruled that the method was not patentable, because abstract ideas cannot be patented. In essence, the Court said that simply taking an abstract idea and putting it into effect with a computer is not enough to warrant a patent.

"*Alice* broadened the definition of an 'abstract idea,' and that has created some confusion and called into question not only a broad range of business method patents but also a host of other software patents that use computers to more efficiently perform useful tasks," says Crowell & Moring's Jeffrey Sanok. In response, the U.S. Patent and Trademark Office is reviewing its pending applications in order to make *Alice* rejections, even withdrawing cases already approved for issuance. And, many district courts have already invalidated patents based on *Alice*—some based on motions to dismiss filed right after the complaint.

"One result is that the value of business method patents has dropped," says Sanok. "That in turn is driving a decrease in lawsuits from patent assertion entities, many of which favored business method and software patents to attack a wide swath of industries. With *Alice*, their investment risk just went up." And, he adds, "Given the absence of clear guidelines from the Supreme Court as to what does or does not qualify as a patent-ineligible 'abstract idea,' we can expect this to be a hotly contested issue in many litigations."

IP: TRADEMARKS

DEALING WITH THE COMPLICATIONS OF GLOBALIZATION

As more and more businesses move into global markets, they are finding new opportunities for growth. But many are also finding themselves contending with trademark issues that can wind up in court.

One of those issues is trade dress, which essentially refers to the appearance of a product, packaging, or building that is associated with a brand. With the growing importance of IP in general, "we're seeing more trade dress cases in litigation," says Lora Moffatt, a partner in Crowell & Moring's Intellectual Property Group. Recent cases have involved everything from the shape of tequila bottles to the use of dot patterns on bed mats. And the money at stake can be significant: in mid-2014, for example, a circuit court upheld a $1.75 million damages award to Innovation Ventures—maker of the 5-Hour Energy drink—after a jury found that a similar energy drink from NG2 Distributing had violated the company's trade dress.

However, the protection of trade dress is largely a U.S. concept. As a result, companies from other countries that move into this market are often caught off guard. "They're not always familiar with the protection of trade dress, and they have a hard time understanding exactly what is a trade dress and when is it protectable," says Moffatt. "So there's a trend of more of these companies ending up in litigation over it. And when that happens, their reaction is usually surprise that this is something that they can be sued for."

It doesn't help that U.S. courts themselves still struggle to bring consistency to the way they deal with trade dress. "Different circuit courts use different tests to determine whether trade dress is protectable or not," says Moffatt. For example, one court will consider whether the trade dress is primarily an identifier of the source of the product, while another will include the question of whether the trade dress creates a commercial impression distinct from accompanying words in its assessment. "It's a very fuzzy area across the courts, so it's one where forum shopping continues to be very important," she says.

TROLLING FOR TRADEMARKS

While companies coming to the United States contend with trade dress issues, U.S. companies moving overseas are running into challenges of their own in the form of trademark trolls. "We see more cases where a U.S. company announces that it is taking its brand into a new market—often China or South Korea," says Moffatt. "Local companies there will immediately file for that trademark in the country, and then block that company's trademark registrations or market similar products with the trademark. So you get into a contest where a brand owner doesn't own its trademark in that jurisdiction."

The options in these situations are typically limited. The company can go to court, which can be difficult in, for example, China. It can rebrand its products for the new market. Or it can pay the troll to regain control of the trademark.

In mid-2014, electric-car maker Tesla reached a settlement with a Chinese business that had registered the Tesla name in that country to regain ownership of the name, but the financial terms of the deal were not released. That's not uncommon, says Moffatt: "These cases are often settled quietly, because companies don't want to highlight the fact that they might not own their trademark in another country."

In general, says Moffatt, "trying to recover the ownership of the mark for the brand owner in these situations is quite challenging. So you really need to button up your trademark filings in those new jurisdictions—and do it early, before you publicly announce your planned entry into that market."

"[Companies in other countries are] not always familiar with… trade dress, and have a hard time understanding exactly what is a trade dress and when is it protectable." *—Lora Moffatt*

IP: COPYRIGHT

TRANSFORMING FAIR USE

The Copyright Act sets out four factors for determining if the use of copyrighted material without authorization is permissible as a "fair use." These four factors, however, are very general and have proven difficult for judges to apply. In 1990, Judge Pierre Leval, in a seminal article in the *Harvard Law Review*, suggested that the key to determining whether a specific use of a copyrighted work was a "fair use" depends on whether the work was "transformed" by the secondary use. This "transformative use" test essentially looks at whether the use of copyrighted material creates something new, and, if it does, it is not infringing.

The transformative use test was widely adopted by courts with the advent of the Internet as they struggled to apply existing copyright laws to the new medium. As a result, transformative use virtually displaced the four statutory factors resulting in an expansion of the fair use doctrine in the context of the Internet. And, this is very worrisome to copyright owners.

A pair of cases brought in New York demonstrate this. In 2004, Google launched a project to digitize all books held by certain university libraries and to make them available through the Internet. The Authors Guild, a professional society representing 9,000 authors, brought suit against Google and the libraries. In *Authors Guild v. Hathitrust*, the Second Circuit ruled that this wholesale copying was a fair use and held that by making the books text searchable, they were transformed. The district court in *Authors Guild v. Google* reached a similar result.

Now, some courts are taking the transformative use test even further. "We are seeing it expanded beyond the Internet and applied in cases involving traditional media," says Terence Ross, a partner at Crowell & Moring concentrating on civil lawsuits, especially those involving intellectual property, media, and technology. A key case in this regard was 2013's *Cariou v. Prince,* in which an "appropriation artist" altered photographs taken by Cariou. In one image, for example, Prince added a hand-drawn guitar and glasses to a photo of a Rastafarian in Jamaica. The Second Circuit said the altered images were fair use because they were transformative—a ruling that some observers found surprising and suggested that courts were dramatically expanding the transformative use test.

Recently, however, there has been some pushback. In September 2014, the Seventh Circuit rejected the transformative use test in a case involving the use of a politician's image on a T-shirt. A lower court had ruled that the use of the image was a fair use and not copyright infringement because the copyrighted photograph had been transformed when transferred onto the T-shirt. Although the Seventh Circuit agreed that the fair use defense applies, it reached this conclusion by applying the four statutory factors—not the transformative use test.

The Seventh Circuit went out of its way to criticize the Second Circuit's *Cariou* decision. "We are skeptical of *Cariou*'s approach," the court wrote, because focusing on whether something is transformative essentially replaces the four-factor test and endangers the copyright owner's ability to prevent material from being used in derivative works.

"The Seventh Circuit basically said, 'Let's get back to first principles and use the four factors Congress actually set out in the statute,'" says Ross. Courts outside the Seventh Circuit, however, continue to be enamored of the transformative use test. As a result, Ross cautions that copyright owners need to carefully consider where they bring suit in order to avoid an expansive fair use defense. "For the time being, if I anticipate a fair use defense, I would avoid bringing a copyright infringement suit in the Second Circuit," he says.

"If I anticipate a fair use defense, I would avoid bringing a copyright infringement suit in the Second Circuit."

—Terence Ross

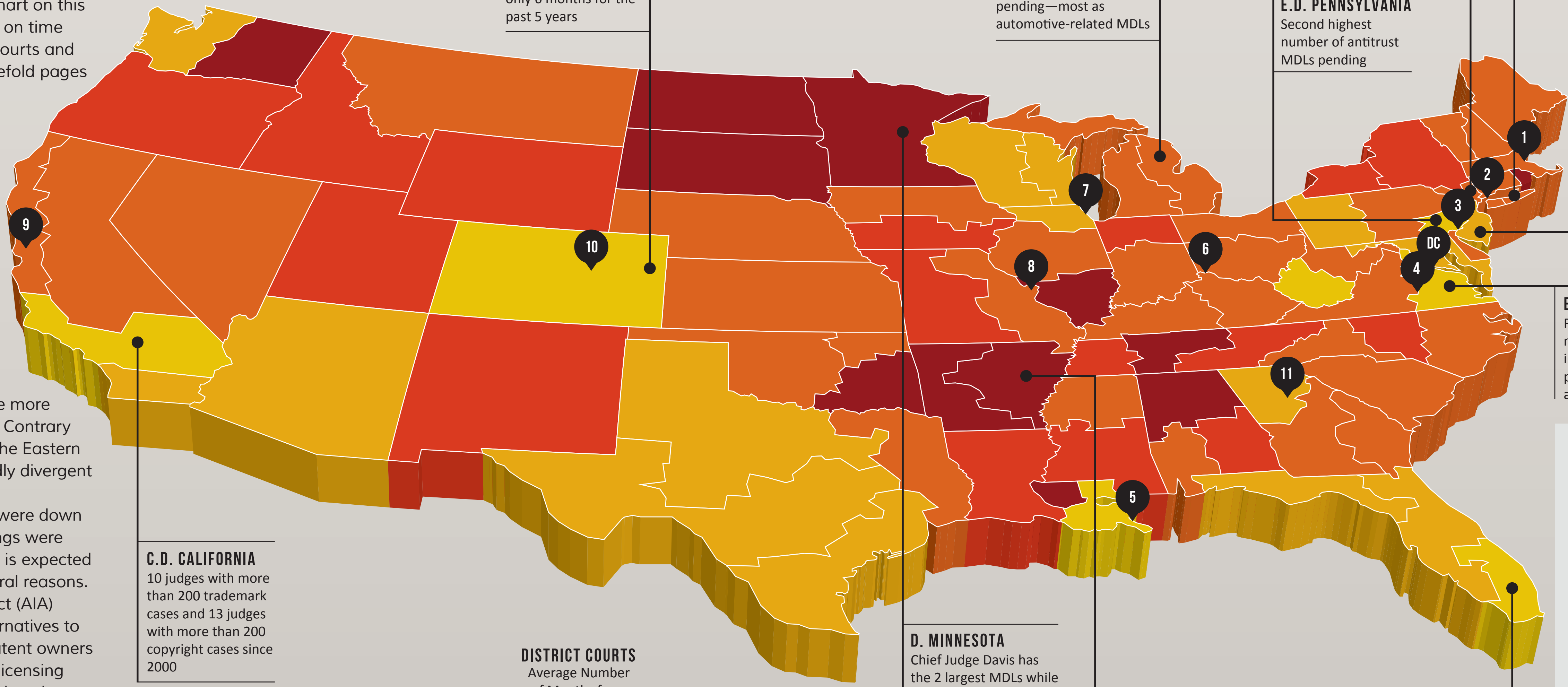
JURISDICTIONAL ANALYSIS

TIME TO TRIAL, FAVORABLE COURTS, AND OTHER LITIGATION TRENDS

Understanding jurisdictional data trends can help shape complex litigation strategy. As in prior years, the map and chart on this page focus on time to resolution in U.S. District Courts and Courts of Appeals. In the gatefold pages that follow, we have focused on specific metrics in patent cases in six key districts. Some notable trends:

- The difference in time to resolution between the fastest (E.D. Pennsylvania) and the slowest courts (E.D. Arkansas) is measured in years.
- While the vast majority of IP cases still settle before trial, certain districts and judges have records that are more favorable to patent holders. Contrary to popular belief, results in the Eastern District of Texas are not wildly divergent from other districts.
- In 2014, patent case filings were down 19 percent and antitrust filings were down 23 percent. This trend is expected to continue in 2015 for several reasons. First, the America Invents Act (AIA) provides administrative alternatives to patent litigation. Second, patent owners are relying on pre-litigation licensing strategies, and there are likely to be legislative and rule changes in 2015 aimed at reducing the pressure on the economy from non-practicing entities. Finally, developments in antitrust case law may make class certification in antitrust actions more challenging.

—Keith Harrison,
partner, Crowell & Moring

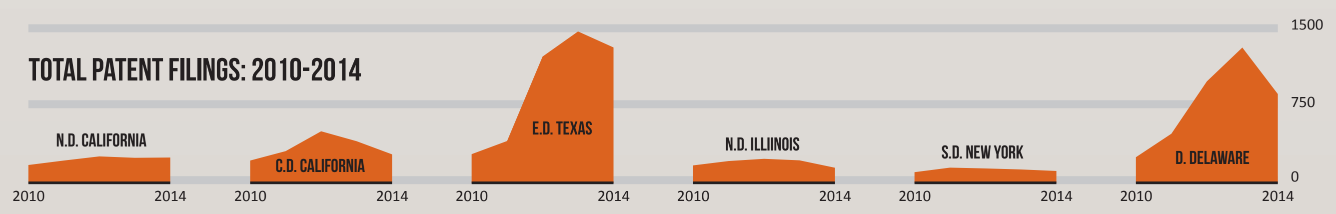


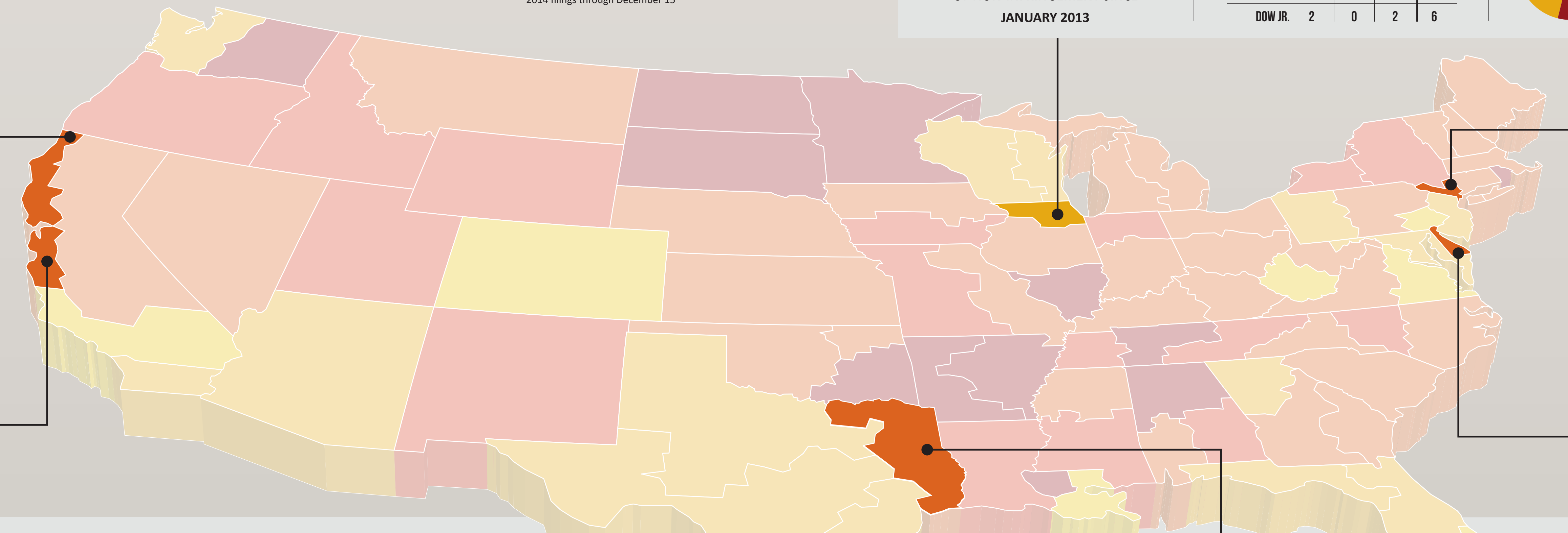
UNITED STATES COURTS OF APPEALS

CIRCUIT	NOTICE OF APPEAL TO DISPOSITION	REVERSAL RECORD
1ST	11.5	3 OF 4
2ND	10.6	2 OF 5
3RD	5.8	2 OF 2
4TH	5.1	1 OF 2
5TH	8.9	6 OF 7
6TH	9.3	9 OF 11
7TH	7.0	1 OF 4
8TH	5.6	2 OF 2
9TH	12.8	11 OF 12
10TH	8.3	2 OF 4
11TH	7.1	2 OF 3
DC	12.6	2 OF 4
FED.	10.6	5 OF 6

PATENT TRIALS AND JUDGMENTS

KEY TRENDS IN SIX DISTRICTS





N.D. CALIFORNIA

Judge Koh handled the well-publicized

APPLE V. SAMSUNG

case with its record-breaking jury verdict

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
WILKEN	3	1	13	20
ILLSTON	1	1	22	19
ALSUP	2	4	7	15
HAMILTON	1	1	3	14

RANKS **4TH** FOR LARGEST NUMBER OF FILINGS OVER PAST 5 YEARS

JUDGES ILLSTON AND HAMILTON

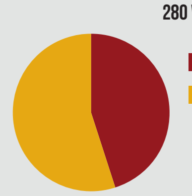
had the largest number of open cases

Claim construction hearings occur in

15%

of terminated cases (average 439 days)

PATENT CASE OUTCOMES
2448 CASES
280 WINS *



Average

274 DAYS

to termination

JUDGE WILKEN

has had the most trials since January 2013

N.D. ILLINOIS

SINCE JANUARY 2000, ONLY

49 CASES

INCLUDED A CLAIM CONSTRUCTION HEARING

47

CONSENT JUDGMENTS INVOLVING A JUDICIAL FINDING OF NON-INFRINGEMENT SINCE JANUARY 2013

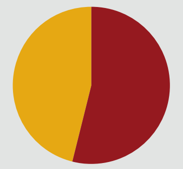
ONLY **38** TRIALS SINCE JANUARY 2000

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
LEINENWEBER	3	0	1	28
DARRAH	1	1	9	14
KENDALL	0	0	6	8
DOW JR.	2	0	2	6

TIME TO TERMINATION FOR PATENTS:

223 DAYS

PATENT CASE OUTCOMES
2275 CASES
283 WINS *



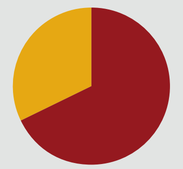
S.D. NEW YORK

Judge Stein generates the

MOST MERITS

opinions

PATENT CASE OUTCOMES
1709 CASES
315 WINS *



Judge Forrest has granted summary judgment for alleged infringers in

14 CASES IN 6 ACTIONS

over just 3 years

Judges Griesa and Cote have the

LARGEST

number of open patent cases

7%

OF CASES SINCE JANUARY 2000 INCLUDED A CLAIM CONSTRUCTION HEARING (AVERAGE 489 DAYS)

Slower than most jurisdictions, with average time to termination:

282 DAYS

with 75% terminated in 2 years

NOTABLE DAMAGE AWARDS

$2.6 m
Cognex Corp., et al. v. Microscan Sys. Inc., et al.
Compensatory lump sum
(Jury trial—Judge Rakoff)

$1.33 m
Adrea, LLC v. Barnes & Noble Inc., et al.
Compensatory lump sum
(Jury trial—Judge Rakoff)

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
KOELTL	1	0	4	20
STEIN	1	3	0	19
RAKOFF	2	0	7	18
MCMAHON	1	0	4	16

C.D. CALIFORNIA

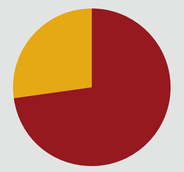
AVERAGE TIME TO TERMINATION:

224 DAYS

FOR PATENTS WITH 75% TERMINATED IN

426 DAYS

PATENT CASE OUTCOMES
4047 CASES
714 WINS *



JUDGE WRIGHT II

HAS GRANTED THE LARGEST NUMBER OF SUMMARY JUDGMENT MOTIONS IN DISTRICT SINCE JANUARY 2013

HIGHEST JURY AWARD

to Alfred E. Mann Foundation for Scientific Research:

$131 M

for reasonable royalties concerning patents for cochlear implants

10%

OF CASES IN THE DISTRICT ARE RESOLVED WITH CONSENT JUDGMENTS IN FAVOR OF THE PATENT HOLDER; MORE THAN

50%

OF THOSE INVOLVED A FINDING OF NO INVALIDITY BY THE COURT

LARGEST NUMBER OF OPEN CASES: JUDGES

GUILFORD AND WU

Judge Pfaelzer maintains an active patent docket even after

37 YEARS

on the bench

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
CARTER	2	1	9	16
SELNA	3	1	15	11
WU	0	0	6	7
KRONSTADT	1	2	1	3

E.D. TEXAS

2014 PATENT DAMAGES

HIGHEST DAMAGES THROUGH DECEMBER 15, 2014

$85 m
Simple Air Inc. v. Google Inc.
Compensatory lump sum (Jury trial—Judge Gilstrap)

$43 m
Pact XPP Technologies, AG v. Xilinx Inc., et al.
Enhanced damages (Handled by Magistrate Payne)

$23.6 m
Mobile Telecommunications Technologies LLC v. Apple Inc.
Reasonable royalties (Jury trial—Judge Gilstrap)

$18.8 m
EON Corp. v. Silver Spring Networks. Compensatory lump sum (Jury trial—Judge Davis)

$16.2 m
Commonwealth Scientific and Industrial Research Org. v. Cisco Systems Inc.
Reasonable royalties (Bench trial and judgment as a matter of law—Judge Davis)

SLIGHTLY FASTER THAN D. DELAWARE TO TERMINATION (236), BUT

MUCH HIGHER VOLUME

LARGE NUMBER OF INTERDISTRICT TRANSFERS, NOT SURPRISING GIVEN NUMBER OF FILINGS

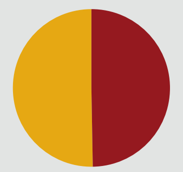
JUDGE DAVIS:

28 TRIALS SINCE 2000

SLIGHTLY OVER 2 YEARS TO TRIAL

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
R. CLARK	10	3	3	12
DAVIS	15	9	20	12
SCHNEIDER SR.	9	2	3	10
GILSTRAP	11	5	3	2

PATENT CASE OUTCOMES
5231 CASES
237 WINS *



JUDGE GILSTRAP: 28 TRIALS SINCE TAKING THE BENCH THREE YEARS AGO

JUDGE GILSTRAP ALSO HAD THE

LARGEST NUMBER OF MERITS DECISIONS

IN 2013, SECOND ONLY TO JUDGE ANDREWS IN DELAWARE. ALMOST

50%

OF HIS MERITS WERE RESOLVED AT TRIAL

D. DELAWARE

70%

OF CASES WHERE THE PATENT HOLDER WINS ON CONSENT JUDGMENT INVOLVE A FINDING OF

NO INVALIDITY

JUDGE	PATENT HOLDER WIN TRIAL	ALLEGED INFRINGER WIN TRIAL	ALLEGED INFRINGER WIN SUMMARY JUDGMENT	YEARS ON BENCH
ROBINSON	25	21	17	22
SLEET	12	10	1	16
STARK	8	3	10	4
ANDREWS	5	6	6	2

9%

of cases involve a claim construction hearing, about a year and a half after filing

JUDGE ROBINSON GRANTS SUMMARY JUDGMENT MOTIONS

MORE

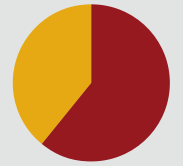
THAN OTHER ACTIVE JUDGES, EVEN GRANTING PATENT HOLDERS SUMMARY JUDGMENT ON 3 OCCASIONS

FILINGS

DOUBLED

EACH YEAR BETWEEN 2010-2012 WITH A HIGH OF 1336 PATENT CASES IN 2013

PATENT CASE OUTCOMES
4107 CASES
326 WINS *



57%

OF CASES HAVE ENDED WITHIN A YEAR SINCE JANUARY 2000

ONLY **4** JUDGES WITH A PATENT DOCKET, BUT SECOND ONLY TO E.D. TEXAS IN NUMBER OF FILINGS

ALTHOUGH NOT KNOWN FOR HUGE DAMAGES AWARDS,

NOTABLE DAMAGE AWARDS

SINCE 2000

$466 m
Masimo Corp. v. Philips Elecs. N.A. Corp., et al.
Compensatory lump sum
(Jury trial—Judge Stark)

$388 m
Edwards Lifestyle AG et al. v. Corevalve Inc., et al. Lost profits award
(Jury trial—Judge Sleet)(08-cv-00091)

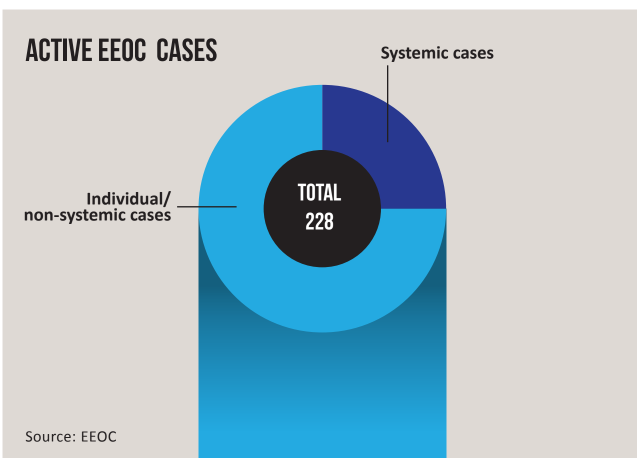
*Covers cases filed on or after January 1, 2000, and terminated through December 15, 2014.
** A patent holder "win" is a decision that (1) the patent is infringed, (2) the patent is not invalid, (3) the patent is not unenforceable, and/or (4) a permanent injunction against infringement should issue. An alleged infringer "win" is a decision that (1) the patent is not infringed, (2) the patent is invalid, and/or (3) the patent is unenforceable.

Source: Lex Machina

LABOR AND EMPLOYMENT

EEOC LITIGATION TARGETS GARDEN-VARIETY EMPLOYMENT PRACTICES

Companies are seeing more aggressive litigation from both the government and plaintiffs, often targeting employment practices that employers have historically embraced as sound business practice.



The EEOC's number of active systemic cases has been growing, and in FY 2014 accounted for 25 percent of the EEOC's active cases—the highest percentage since the commission started tracking systemic cases in 2006, and a reflection of its stated focus on systemic enforcement.

The Equal Employment Opportunity Commission (EEOC) is at the center of much of this activity as the agency continues to file enforcement actions against employers as a means of advancing its aggressive strategic enforcement plan. The agency's litigation tactics have ranged from attacking employer background check policies as discriminatory to asserting that standard severance agreements interfere with employees' Title VII rights.

While the EEOC's litigation push has been aggressive, it has frequently been unsuccessful. In recent years, "courts around the country have taken the EEOC to task in well-publicized decisions for what has been described by various sources as overreaching litigation practices," says Ellen Dwyer, managing partner of Crowell & Moring and a member of the firm's Labor & Employment Group. This has resulted in the dismissal of several cases on procedural grounds without resolution of key issues, and has left employers without the guidance they need to run their businesses. Dwyer says that "companies have less certainty now than they have had in many decades about whether many of their standard employment practices are acceptable or pose potential legal risks."

Despite these high-profile losses, the EEOC appears undeterred. In 2014, for example, the EEOC lost two significant cases challenging the use of criminal and credit background checks in the hiring process on the theory that they had a disparate impact on minority applicants. In both cases—one against Kaplan Higher Education and the other against the Freeman event planning company—the court found that the agency lacked the statistical evidence to substantiate its claims. Undeterred, the agency launched new cases asserting identical claims against BMW and Dollar General in 2014, a move that drew significant criticism from employer advocacy groups and Capitol Hill.

Similarly, in *EEOC v. CVS Caremark*, the Agency challenged as overbroad garden-variety severance agreement terms, including nondisclosure provisions, a release of

"Companies have less certainty than they have had in decades about whether many of their standard employment practices are acceptable or pose potential legal risks." *—Ellen Dwyer* claims, and a covenant not to sue. The EEOC alleged that such restrictions interfered with employees' Title VII rights and limited the ability of employees to cooperate with EEOC investigations. In October, a federal judge dismissed the case without deciding whether the underlying provisions were enforceable. The court based its dismissal instead on the EEOC's failure to engage in conciliation efforts with the employer before filing suit. This ruling is significant, because the Supreme Court is scheduled to decide in 2015 whether the agency's duty to conciliate is subject to judicial review in *EEOC v. Mach Mining*.

The EEOC's continued aggressive stance, combined with its lack of litigation success, generates substantial uncertainty for business. "Companies are anxiously awaiting resolution and guidance on important topics that impact workplace policies and decision making, but they are not getting it," says Dwyer.

UNPAID INTERNS MAKE THEIR CASE

On the wage and hour front, the latest wave of litigation involves claims by unpaid interns for back wages. The interns—who have performed services for the benefit of their employers—allege that they should have been paid at least minimum wage, together with appropriate overtime wages.

This litigation trend began with the highly publicized lawsuit against Fox Searchlight Pictures in 2011, which was brought by interns who had worked on the set of the *Black Swan* film. The interns won their case on the merits, including unpaid wages, overtime, and liquidated damages. Since then, a host of "unpaid interns" lawsuits have been filed against high-visibility companies, including Condé Nast, the Los Angeles Clippers, Oscar de la Renta, and Universal Music Group. NBC Universal recently agreed to pay $6.4 million to nearly 9,000 interns who had worked on the production of *Saturday Night Live*.

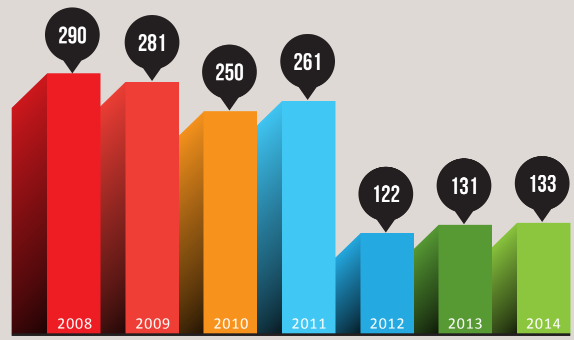
The NBC Universal settlement confirms that the potential exposure in these cases is significant. Plaintiffs often bring these cases on a class action basis, and they typically seek back wages for the full duration of the statute of limitations, as well as liquidated damages and attorneys' fees. "The stakes are high for employers with substantial intern populations," according to Dwyer.

Moreover, these cases can be difficult to defend on the merits. The U.S. Department of Labor long ago established a six-factor test to determine whether an intern is due compensation, and that test establishes a very high bar. Simply tying the intern program to earning college credit is not in itself enough to avoid the obligation to pay interns for the services they provide. Employers may be required to pay interns at least the minimum wage if the employer obtains a benefit from the interns' efforts, or if it would otherwise need to hire employees to perform the work performed by the interns.

To date, many of these lawsuits have challenged employers in high-profile industries, where internships are in high demand as the principal way of getting a foot in the door—and where employers have a long history of offering unpaid internships. But soon, says Dwyer, "these suits may expand to reach any employer that offers unpaid internships."

In this environment, companies are well advised to assess whether their internships comply with wage-hour regulations and, perhaps, consider compensating interns at minimum-wage level to avoid litigation and liability risk.

MERITS SUITS FILED BY EEOC



Source: EEOC

The number of merits lawsuits filed by the EEOC has been declining for several years, as the EEOC has focused less on numerous small suits, and more on larger, broader-impact cases.

KEY CASES

EEOC V. FLAMBEAU, INC.; EEOC V. ORION ENERGY SYSTEMS; EEOC V. HONEYWELL

The EEOC's continuing attack on long-standing employment practices includes these lawsuits filed against these companies alleging that their wellness programs violate the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The EEOC contends that these employers' programs require employees to submit involuntarily to medical tests in order to avoid a monetary penalty. These lawsuits are problematic to many employers that have long used financial incentives to entice employees to participate in employee wellness programs. Employers are waiting to see what, if any, guidance these cases will provide on this issue.

TORTS

PLAINTIFFS LOOK TO FOOD LABELING AND EVOLVING TECHNOLOGY FOR NEW OPPORTUNITIES

On one front, companies face expanding food litigation, while on another, technology is beginning to reshape defamation and product liability.

The filing of lawsuits challenging manufacturers for mislabeling food products has become "an especially hot area in the last year," says Clifford J. Zatz, a Crowell & Moring partner and chair of the firm's Product Liability & Torts Group. From the plaintiffs' perspective, food manufacturers have deep pockets, it is relatively easy to create claims, and the number of possible targets is virtually limitless. Many of the same plaintiffs' lawyers who focused on tobacco, asbestos, and securities litigation have now turned their attention to the food and beverage industry. The number of deceptive-labeling cases filed against food manufacturers or retailers continues to rise at an alarming pace.

Federal regulations do not clearly define some food-label terms. "As a result, a manufacturer's labeling can be accurate and comply with regulations, but still run afoul of various state consumer-protection laws, based on the idea that the labels are misleading," Zatz says. For example, with products containing no trans fats that are labeled as such, plaintiffs have complained that the term "no trans fats" is misleading because it implies that the food is healthy. "Because of the uncertainty about some labeling terms," he says, "virtually any food product description that's qualitative is potentially subject to a lawsuit."

Much of the recent food litigation has been focused on products labeled as "natural." Because there is no legal definition of the term, these foods might have artificial flavoring, preservatives, or genetically modified organisms (GMOs) in them. Defendants in these cases have often argued that such terminology is an issue for the U.S. Food and Drug Administration (FDA) to resolve, under the doctrine of primary jurisdiction, prompting several courts to ask FDA to weigh in on the definition of "natural." But in early 2014, the agency said that it would not do so—effectively undercutting the primary jurisdiction argument.

On the other hand, FDA's decision last year to seek additional input on its prior recommendation against using the term "evaporated cane juice" on food labels has prompted some courts to halt pending litigation claiming the term is deceptive.

"As food labeling cases continue to be filed," says Zatz, "it's likely that a threshold battle line for each new type of claim is going to be whether it is an issue that FDA is willing to address." While FDA has not clearly defined when it will weigh in on labeling issues, defendants are more likely to get the agency's interest when the issues involve public health, rather than generalized claims about product quality.

KEY CASES

POM WONDERFUL LLC V. COCA-COLA CO.

The U.S. Supreme Court unanimously ruled that POM Wonderful could sue Coca-Cola under the Lanham Act for alleged deceptive marketing of Coca-Cola's Pomegranate Blueberry juice blend. The Court said that even when product labeling complies with FDA regulatory requirements, it could still mislead consumers. This case, in combination with the recent *Lexmark Int'l, Inc. v. Static Control Components* Supreme Court decision, may portend an expansion of Lanham Act claims between competitors for alleged false or misleading statements.

U.S. HOTEL AND RESORT MANAGEMENT, INC. V. ONITY, INC.*

A federal court in Minnesota dismissed, for lack of standing, a purported nationwide class action alleging that computerized hotel locks were vulnerable to hacking and were therefore defective and in breach of warranty.

** Crowell & Moring representation*

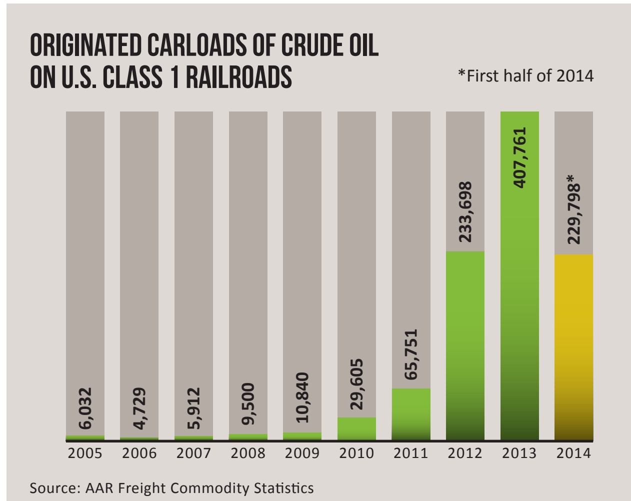
"Because of the uncertainty about some labeling terms, virtually any food product description that's qualitative is potentially subject to a lawsuit." *—Clifford Zatz*

DEFAMATION AND PRODUCT LIABILITY: BREAKING NEW GROUND

In another key development, computer technology is beginning to have an impact on torts such as defamation and product liability. A recent case—*Kuwait & Gulf Link Transport v. Doe**—raised the issue of anonymous defamation by email. Here, the Defense Logistics Agency received pseudonymous letters by email that falsely claimed that a contractor had violated federal sanctions on doing business with Iranian entities. The emails were traced to a competitor of the contractor, who refused to name the individual author, citing his First Amendment right to anonymous speech. A Pennsylvania court ruled that the emails were commercial speech, not subject to such protection, and ordered identification of the author. But the appeals court disagreed, remanding the case to the lower court to balance the author's free speech rights with the plaintiff's right to sue the defamer.

In another case, *Yelp v. Hadeed Carpet Cleaning, Inc.*, a carpet cleaning company subpoenaed the social-networking website Yelp seeking information about seven people who wrote critical online reviews of the company's service. The company alleged that the reviewers had falsely held themselves out as its customers and that their reviews were therefore defamatory. When Yelp refused to comply with the subpoena, it was held in contempt. The Court of Appeals of Virginia affirmed the trial court's decision. The Virginia Supreme Court heard oral argument on October 27, 2014. "Courts in several states across the country are being required to balance the First Amendment right to speak anonymously online and the plaintiff's right to confront his defamer," says Zatz. "The Internet and social media are making anonymous defamation ubiquitous, and litigation over this clash of rights will continue."

Meanwhile, cybersecurity is beginning to intersect with product liability. "The issue here is hacking of computer-based products—not to steal data, but to take control of the product or compromise its function," says Zatz. Products ranging from medical devices to security systems to home appliances to automobiles now contain computer software—and can be hacked by cybercriminals. "The plaintiffs' theory is that hackability equals liability," he says. "They contend that if a product can be hacked into, it is defective or in breach of warranty. If this theory succeeds, the scope of potential product liability is enormous." This issue is just emerging, but it is increasingly likely to become a subject of tort litigation in the near future.



Oil drilling and production have increased dramatically in the U.S. in just a few years, and the industry has turned to railroads to ship oil from the fields to terminals and refineries.

SORTING OUT OIL-BY-RAIL

With the boom in U.S. oil production, the volume of oil carried by rail has increased forty-fold in recent years. Several high-profile derailments have caused oil spills, fires, and explosions—including one in Canada that resulted in 47 fatalities.

Tort liability for such accidents remains to be clarified. "When a train derails, catastrophic injury and mass tort cases may follow," says Crowell & Moring's Clifford J. Zatz. "But who is liable? Were the rail cars defective? Did the railway operate them negligently? Does strict liability apply?" Potential plaintiffs include individuals living near derailment sites, environmental groups, municipalities, and perhaps even early responders. Liability may lie with oil producers and shippers, railroads, and railcar manufacturers. Says Zatz: "Everybody is scrambling to figure it all out."

The U.S. Department of Transportation has proposed new rules for oil-by-rail that are likely to go into effect in 2015. These focus on rail car design, speed limits, enhanced braking, risk assessment of rail routes, and so on. But as the oil boom continues, the courts will no doubt be working through oil-by-rail issues for some time to come.

WHITE COLLAR

THE GOVERNMENT EXPANDS ITS PUSH AGAINST COMPANIES AND INDIVIDUALS

The U.S. government has made it clear—through its words and its actions—that it is making white-collar crime enforcement a priority, and over the past year, it continued to make good on that promise.

The result is more aggressive and comprehensive enforcement of fraud, coupled with incentives for self-disclosure and cooperation and for having effective corporate compliance programs.

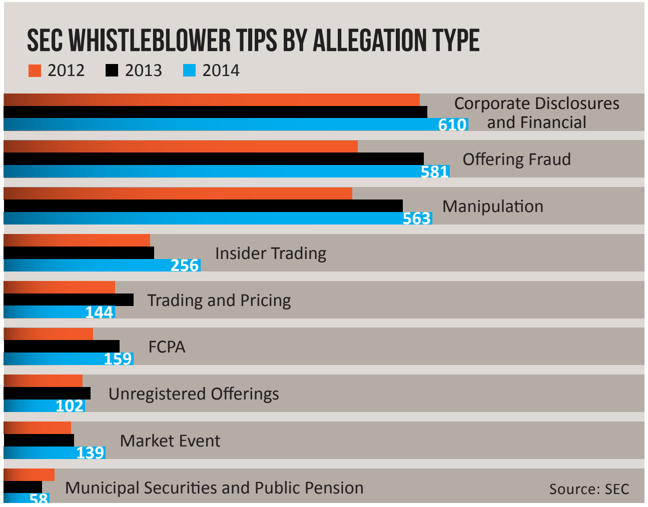
By all accounts, the government's enforcement units have heeded Attorney General Eric Holder's 2012 memorandum that stressed the importance of parallel investigations and called for the Department of Justice (DOJ) to coordinate civil, criminal, and administrative cases from beginning to end. "The government is looking at all possible remedies when it comes to white-collar investigations, and it has in place guidance that encourages the different departments to share information and work together to the extent that they legally can," says Andy Liu, a partner in Crowell & Moring's White Collar & Regulatory Enforcement Group. The government's efforts appear to be successful, with the DOJ collecting more than $24 million in civil and criminal enforcement actions in FY2014, more than triple the amount it collected in FY2013.

This emphasis on parallel investigations spans numerous industries and enforcement areas. For example, the government is now pursuing government contractors under both the civil False Claims Act (FCA) and the criminal False Claims Act. In the area of financial fraud, there have been cases where the government has obtained substantial civil settlements, but nevertheless made it clear that it intends to keep pursuing criminal charges.

Increasingly, such financial fraud cases are being pursued under a U.S. statute passed during the savings and loan crisis era—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which allows civil-side lawyers in government investigations to access grand jury material and subpoena documents, and which sets a relatively low bar for establishing financial fraud liability.

Meanwhile, the government continues to pursue executives and other individuals, as well as their companies. "We've seen an increased focus on individual prosecutions in the antitrust area and in Foreign Corrupt Practices Act (FCPA)

" The government is looking at all possible remedies...and it has in place guidance that encourages the different departments to share information and work together to the extent that they legally can." *—Andy Liu*



The Dodd-Frank whistleblower program continues to receive a growing number of tips across categories. In FY2014, the SEC issued awards to nine individuals—including a $30 million award.

enforcement—even where the companies have resolved the civil matter," says Liu. He notes that in announcing financial fraud settlements, the DOJ "made a point of highlighting that the settlements did not absolve the bank or its employees from criminal prosecution."

ENCOURAGING PREVENTION

The government is not only stepping up investigations of fraudulent activity, it's also taking a harder look at what companies are doing to prevent white-collar crime. "The government has aggressively pursued cases where companies have fallen short with their compliance programs," says Liu. In particular, he notes, officials are pursuing companies for failure to maintain effective anti-money laundering programs—especially financial institutions, where there is a heightened concern about money being used to finance terrorism.

On the other hand, when a company has a sound compliance program in place, the government seems less likely to prosecute if a problem arises—although it may still go after individuals whom it believes created the problem. And the government is more likely to "reward" companies that proactively uncover and call attention to compliance problems.

That approach was evident in recent FCPA cases involving Morgan Stanley and Ralph Lauren.* In the first matter, in which a managing director pled guilty for evading Morgan Stanley's internal controls in order to bribe a Chinese public official, the government noted that the firm was not prosecuted in part because of its robust internal compliance program. In the Ralph Lauren matter, the company self-reported the bribery of foreign officials in its Argentine subsidiary—activity uncovered by Ralph Lauren's compliance program—and worked closely with the SEC to investigate. As a result, the SEC entered a non-prosecution agreement (NPA) with Ralph Lauren—the agency's first-ever FCPA-related NPA.

WHAT YOU DON'T KNOW CAN HURT YOU

The government's scrutiny of corporate compliance programs is increasing—and in some cases, it can lead to problems even when there is no allegation of criminal intent. In January 2014, two executives of the Jensen Farms agricultural company were sentenced to probation, community service, and fines, essentially for failing to have in place the proper systems for cleaning melons—an error that led to a number of deaths from listeria. "Even though the executives had no idea that there was a problem with the cantaloupes they'd sold, they were prosecuted," says Crowell & Moring's Andy Liu.

This case was prosecuted under the FDA's Park doctrine, which says individuals can be charged with misdemeanors for food safety violations at their companies, even if they don't know about those violations. That concept may be moving into other industries, Liu says, "because the DOJ has said it would like to see the Park doctrine expanded beyond the food-safety area."

KEY CASES

U.S. V. NEWMAN

The defendants, former hedge fund managers, were convicted of trading on inside information. Both were several levels removed from the corporate insider tippers, but the government argued that they were criminally liable because, "as sophisticated traders, they must have known that information was disclosed by insiders in breach of a fiduciary duty." The Second Circuit reversed, holding that the government must prove the corporate insider was entrusted with a fiduciary duty; the corporate insider breached his fiduciary duty by disclosing confidential information in exchange for a personal benefit; the tippee knew the tipper's information was confidential and divulged for personal benefit; and the tippee used that information to trade in a security or tip another individual for personal benefit.

U.S. V. BARKO

The district court ordered the defendants to turn over internal investigation documents, holding that they were not privileged because the investigation was not undertaken pursuant to "regulatory law" and "corporate policy," and the investigation was done to serve business needs, not to provide legal advice. The D.C. Circuit reversed, holding that the "but-for" test was improper and that the materials are privileged so long as obtaining or providing legal advice is "one of the significant purposes of the communication."

* *Crowell & Moring representation*

INTERNATIONAL DISPUTE RESOLUTION

AN APPEALING MIDDLE ROAD BETWEEN ARBITRATION AND LITIGATION?

In international dispute resolution, innovations continue to bring fundamental change—and, for ill or good, introduce elements of litigation to the world of international arbitration.

The first of these key changes addresses what has long been a cornerstone objective of arbitration: to be fast and cost-efficient, largely because arbitrators' decisions are final. But that approach doesn't satisfy everyone. "Some companies are hesitant to agree to arbitration because they wouldn't have an opportunity to appeal, like they would have in court," says Ian A. Laird, co-chair of Crowell & Moring's International Dispute Resolution Group. "Now, that's no longer the case."

"For some, [the new appeals process] may temper some of the hesitation they've had about arbitration, because now an arbitral tribunal's decision doesn't necessarily have to be final."

—Ian Laird

New procedures adopted in late 2013 by the International Centre for Dispute Resolution (ICDR)—the international arm of the American Arbitration Association—now provide an appeals process for international arbitrations. Parties can appeal an arbitral award based on errors of law or determinations of fact. However, the process is limited. Appeals are optional, and both parties must agree to them before arbitration begins. In addition, arguments need to be submitted in writing; there is no oral hearing. Overall, the process is designed to be completed in just three months.

The new appeals process has been in place for a relatively short time, and it's still too early to say how frequently parties will take advantage of this option. However, says Laird, "for some, it may temper some of the hesitation they've had about arbitration, because now an arbitral tribunal's decision doesn't necessarily have to be final."

OPENING THE DOOR TO TRANSPARENCY

A second key development affects the investor-state arbitration used to sort out disputes between individuals and nations. There has been much debate as to whether these proceedings should be private and confidential, like commercial arbitrations. In 2014, this led to new United Nations Commission for International Trade Law (UNCITRAL) rules that call for open hearings. The rules allow the free publication of submitted documents, submissions, and awards, and they let non-disputing third parties submit amicus briefs in investor-state arbitration—much like the rules in U.S. courts. The feeling, says Laird, "is that having a more transparent process is important to the legitimacy of these proceedings."

The question, Laird adds, is how widespread this kind of approach will become. "This is certainly a topic of discussion at other institutions, such as the World Bank's ICSID and the Stockholm Chamber of Commerce," he says. "So the interest in transparency is on the ascendancy. It's on the general agendum, and the changing rules that we see in state-investor arbitration may be putting pressure on commercial arbitration, which has tended to strongly favor privacy and confidentiality, to adopt more transparent processes."

NEW ETHICS GUIDELINES

In 2004, the International Bar Association published standard ethical guidelines for arbitrators working with international disputes. These were revised in 2014. However, guidelines for counsel involved in those disputes have been lacking—largely because the diverse nature of international arbitration, which works across a variety of jurisdictions and legal regimes, has made it difficult to come up with such consistent standards.

That is beginning to change. Over the past year, the London Court of International Arbitration included counsel ethics guidelines in its latest rule revision. And the International Bar Association published its *Guidelines on Party Representation in International Arbitration* in 2013. "The lack of more uniform international ethical guidance is often perceived as one of the most serious deficiencies in the field," says Laird. "These initiatives are filling a void in international arbitration."

TAX

THE IRS ADJUSTS TO BUDGET AND BUSINESS REALITIES

The year 2014 was a tough one for the IRS. Congressional scrutiny of the Tax Exempt/Government Entities Division damaged the IRS's reputation in Washington and diverted agency resources. Even after three straight years of budget cutbacks, Congress will be in no mood to increase the IRS's funding in 2015. Not surprisingly, the IRS is focusing on doing more with less. For the largest taxpayers, the strains on IRS resources will result in smoother audits for some and more difficult audits for others.

In line with the mandate to do more with less, the IRS has expanded its Compliance Assurance Process (CAP). Under CAP, taxpayers and the IRS cooperate in a real-time audit of material transactions and issues with the goal of agreeing to the tax treatment before the return is filed.

For taxpayers that are not in CAP, things may be very different. Here, the IRS is adopting inflexible procedures that shift the burden of speeding up audits to the taxpayer. Thus, the IRS took steps in early 2014 to revise the way it handles discovery during the audit. Previously, information document requests (IDRs) involved a relatively informal process. But the IRS, noting that some taxpayers took a year or more to answer IDRs, decided to make the process more rigorous for everyone. Now, if a company does not respond to an IDR within 15 days, the IRS audit team begins a series of escalations that culminate in an administrative summons, enforceable by a court. "This used to be a fairly flexible process—but not anymore," says David Blair, a partner in Crowell & Moring's Tax Group and former trial attorney for the U.S. Department of Justice's Tax Division. Under this procedure, "the IRS has essentially said it's going to go to court if you don't answer the IDR in a timely fashion," he says. "We'll probably see an increase in summons enforcement litigation in the coming months."

On the international front, for years the IRS (and foreign tax authorities) has aggressively attacked transfer-pricing arrangements within multinationals, and it is not backing down. With a dedicated Transfer Pricing Practice, "the IRS is challenging transfer pricing by multinationals, especially those involving intellectual property," says Blair, who is editor of the Practising Law Institute's *Transfer Pricing Answer Book*. In an action that is sure to attract attention from taxpayers with significant transfer-pricing issues, the IRS hired a private-sector litigation firm to help develop one of its largest transfer-pricing cases.

Transfer pricing is an increasingly high-profile issue, with news reports covering the IRS's pursuit of U.S. multinationals that are household names. "You don't often see tax issues making the front page," says Blair. "We're seeing a departure from the purely technical analysis of the tax liability, to more of a hot political topic discussed in Congress. Companies need to manage not only the IRS and litigation but also their reputation and brand interests. People are paying attention to this issue."

SCRUTINIZING THE ENERGY BOOM

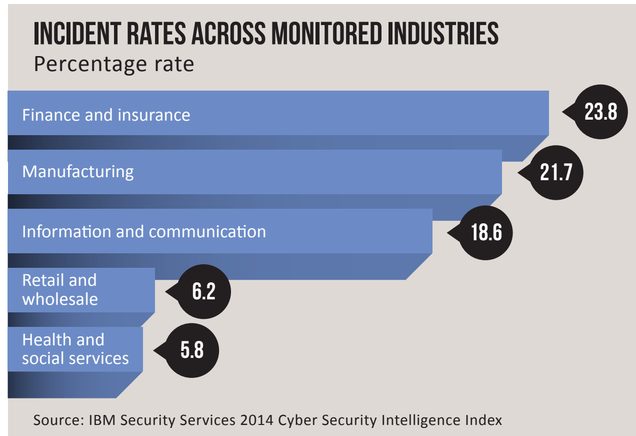
In the oil and gas industry, the IRS traditionally focused on U.S. companies' international business, looking at issues such as foreign tax credits. But with the boom in domestic oil and gas production over the past few years, domestic revenues of energy companies have grown dramatically—and the IRS is interested.

"Over the years, Congress enacted a number of provisions to incentivize the industry to invest in domestic oil and gas production, which can be very expensive," says Crowell & Moring's David Blair. "With increasing domestic production, those incentives are starting to hit the IRS's radar screen, and the agency has adopted some odd positions that would unduly restrict these incentives. The dollars at stake are very large, so we're seeing controversy arising around energy-industry credits—some of which will probably end up in court."

"The IRS has essentially said it's going to go to court if you don't answer the IDR in a timely fashion. We'll probably see an increase in summons enforcement litigation in the coming months." *—David Blair*

PRIVACY AND CYBERSECURITY

GROWING CYBERSECURITY CHALLENGES FUEL LITIGATION RISK



These targeted industries—which provide high potential payoff for criminals—account for about three-quarters of cyber incidents.

Corporate data breaches have become all too common—and they are driving new legal action in several quarters.

The past year has seen large breaches at organizations ranging from The Home Depot and Sony to Goodwill and the Archdiocese of Seattle. Such problems are not going away any time soon. Cybercriminals and nation-states are clearly focused on such attacks, and "companies have a disadvantage in that it's really hard to protect these large networks," says Evan Wolff, a Crowell & Moring partner, co-chair of the firm's Privacy & Cybersecurity Group, and a former advisor at the Department of Homeland Security.

For plaintiffs pursuing class actions in breach cases, the potential rewards are significant. Larger cyber events can involve the personal information of tens of millions of individuals. And while such cases have often failed to gain traction in courts, there are signs that this is changing—witness the Northern District of California's ruling that plaintiffs had standing to sue Adobe Systems for a 2013 breach, although they could not show that personal information had been misused.

Cyber attacks are opening the door to litigation in other ways, as well—and, says Wolff, "it is inevitable that the results of cyber incidents will end up in the courts. When it's front-page news that there's a security risk in this area, impacted parties are asking, 'Could this have been prevented?'"

On another front, cybersecurity events can have a significant effect on mergers and acquisitions. "If you're buying a company with heavy IP and later find out that the IP has been disclosed through a breach before the transaction, what is the impact?" says Wolff. And it can be very difficult to properly gauge such risks. "In other areas of M&A risk management, there is clear guidance on how to assess risk—but not in the cyber area, where standards are less clear and still evolving," he says.

The ongoing globalization of business also complicates the picture. Multinational companies typically have operations and partners in a variety of locations—including areas known for high levels of cyber risk, such as Russia, China, and Iran. For multinational companies that don't operate more secure "segmented" networks that compartmentalize and protect sensitive data, there is a lot of exposure to aggressive cyber attacks—and to resulting litigation.

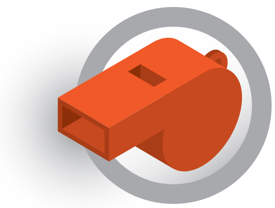
Meanwhile, cybersecurity compliance is becoming increasingly complicated. There is a patchwork of data-breach laws across 47 states, as well as numerous federal laws—and agencies at both levels are developing reporting and disclosure requirements for cyber incidents. "This is a hot topic for everybody from the SEC to the Department of Homeland Security," says Wolff. "Over the next six months to a year, we will see more legislation and rulemaking related to cyber events." As always, increasingly complex regulation will drive more litigation.

In this environment, says Wolff, companies should not only assess security—they should also develop an incident-response plan and run through simulations of how they will deal with a breach. "A cyber event can trigger many complicated legal issues," he says. "This is an area where being prepared can be especially critical to limiting litigation risk."

"It is inevitable that the results of cyber incidents will end up in the courts. When it's front-page news that there's a security risk in this area, impacted parties are asking, 'Could this have been prevented?'" *—Evan Wolff*

FALSE CLAIMS ACT

THE DOJ TAKES A BROAD VIEW OF FCA DAMAGES



The Department of Justice (DOJ) continues to expand the reach of False Claims Act (FCA) liability to situations where the government has neither paid an actual false claim nor suffered any financial loss. Such claims are part of a trend referred to as "indirect" false claims.

Under this approach, contractors may be liable for falsely certifying their compliance with contract terms or regulations, even when their actual claims for payment are not false. "The claim being made by the company may have been a true reflection of the work performed, but the company didn't comply with some applicable regulation," says Mark R. Troy, a partner in Crowell & Moring's Government Contracts Group. "In those situations, both the government and *qui tam* whistleblowers are increasingly asserting damages claims that are not based on the diminished value of a product or service but on compliance."

For example, a government contract for constructing a building might be set aside for small businesses. If a contractor lies about being a small business but finishes the building, the government gets the building and has not been defrauded out of any money. Nevertheless, says Troy, "the DOJ would still go after the entire amount paid on the contract, plus penalties. They're basically ignoring the value of what was provided."

The U.S. District Court for the Central District of California approved that type of approach in the government's case against Westland/Hallmark Meat Co.* There, the government and a whistleblower said the company was abusing cattle in a meat-processing plant, which violated contract terms. The government had received and used the product—beef that was purchased for federal school lunch programs. However, it still asked for damages encompassing all the money it had paid to the company over five years—and trebled under the FCA. The court largely agreed with the government's damages theory and put the burden on the defendant to prove there was no diminished value in the beef that was consumed.

> "In those situations, both the government and *qui tam* whistleblowers are increasingly asserting damages claims that are not based on the diminished value of a product or service but on compliance." —*Mark Troy*

Other courts appear less inclined to award the government windfall damages where there is no proof of financial harm. In February 2014, the D.C. District Court ruled that MWI Corp.* did not owe a $22.5 million treble damages award that had been granted by a jury. The government's claim was based on false claims in paperwork filed by MWI to help a third party get a loan from the U.S. Export-Import Bank that was used to buy MWI irrigation pumps. However, those loans had been repaid by the third party, prompting the court to point out that the government had already been "made completely whole" and "gotten what it paid for."

In another FCA-related trend, the government's claims against the pharmaceutical industry have focused on "off-label" promotion of drugs for legal but non-FDA-approved uses. Such promotion violates FDA regulations but results in no financial loss to the government. Nevertheless, the government has extracted huge settlements from the industry for such conduct.

In a few recent cases, the government has asserted that FCA liability can result from a false estimate in a contract proposal. "A prediction of what a future cost might be is really just a judgment call, not a statement of fact," says Troy. "But recent appellate decisions have made it fair game to bring FCA actions on the basis of 'bad guesses' in a proposal, even in the absence of an actual false claim for payment."

With the varying rulings on what would constitute an indirect false claim, "the courts are not providing much certainty as to what conduct may be actionable," says Troy. "Sometimes they rein in the damages claims and sometimes they don't." That uncertainty—combined with the government's continued aggressive stance and the potentially huge payouts for whistleblowers—will continue to fuel an explosion of FCA cases.

** Crowell & Moring representation*

HEALTH CARE

THE ACA: THE CHANGE CONTINUES

Following the 2014 midterms, some in Congress made it clear that they wanted to roll back the Affordable Care Act (ACA). But, notes Peter Roan, a partner in Crowell & Moring's Health Care Group, "it appears unlikely that Congress will be able to scrap the act wholesale in the next couple years—if for no other reason than the president's ability to veto such action." The evolution of the ACA is hard to predict. But the act has already changed health care—and a variety of litigants are not pleased with those changes.

A key issue is the question of which providers are included in health plans. Insurers have naturally tried to narrow their networks and limit the number of providers they include in an effort to improve quality of service and control costs. But they face obstacles in those attempts—starting with the objections of providers that are not included. "Some hospitals are saying that they are an important facility that has to be in the network, or that they have a right to be in the network," says Roan.

In a high-profile 2013 case, Seattle Children's Hospital was excluded from some plans offered on the state's health benefits exchange. The hospital sued Washington's Office of the Insurance Commissioner, which eventually led to the hospital's inclusion in insurer networks beginning in 2015. Similar suits have since been filed in other states—and we're likely to see more of these, says Roan, as insurers adjust their provider networks to offer more competitively priced plans.

Narrowing provider networks has also spawned class actions in recent months, with class plaintiffs complaining that the information about providers found on exchange websites and even from the insurers themselves is sometimes misleading. "We're seeing a trend of plaintiffs saying, 'I thought Dr. X or hospital Y was in your network based on what was published on websites, but I came to learn after I purchased that plan that my doctor or hospital was not included,'" says Roan.

The ACA may soon drive litigation in other areas. Section 1557 of the act prohibits discrimination on the basis of race, national origin, sex, age, or disability—a provision that would apply to insurers that offer products on insurance exchanges and that receive funds from programs such as Medicare and Medicaid. Regulations defining the scope of this provision have not been issued, but the Department of Health and Human Services' Office of Civil Rights has already begun enforcing the law. Alleged violations of Section 1557 could also spawn litigation arising under that section or under other federal or state laws outlawing such discrimination.

The industry may be seeing lawsuits centered on Medical Loss Ratio (MLR) rules that require insurers to spend 80 to 85 percent of premiums on medical expenses or repay plan purchasers. "There could be questions about whether categories of expenses are truly medical expenses that get applied to the required spend," says Roan. "I can certainly envision plaintiffs' class action attorneys asserting claims for violation of the MLR requirements, as the dollars involved could be significant."

RETHINKING RECOUPED PAYMENTS

Insurers often make payments to providers and later, if a review shows a provider's billing was not appropriate, the insurer recoups the overpayment by reducing future payments for other claims. But recently, some chiropractic groups have sued insurers, arguing that with self-funded employer plans, this practice is subject to the Employee Retirement Income Security Act (ERISA).

A number of courts have held that the plaintiffs have standing as intended beneficiaries of ERISA plan benefits. "Some courts have also said that the plans' actions with payment recoupment were not in substantial compliance with ERISA's notice and appeal requirements," says Crowell & Moring's Peter Roan. "That means providers objecting to recoupments can basically force a hearing on each one. This is calling into question the effectiveness of plan recoupment practices, and the billing-review process in general, for self-funded plans."

"We're seeing a trend of plaintiffs saying, 'I thought Dr. X or hospital Y was in your network based on what was published on websites, but I came to learn after I purchased that plan that my doctor or hospital was not included.'" *—Peter Roan*

INSURANCE

REFOCUSING COURTS ON POLICY LANGUAGE

The question of which insurance policies may respond to particular claims is not always straightforward—and insurers and the courts are looking for new answers to that question.

Many liability policies only provide coverage for bodily injury or property damage that takes place during the policy period. If a person falls in a store and breaks a leg, it is clear when the injury took place. But other situations may be less simple—for example, when there is long-term exposure to allegedly hazardous materials. Injuries from such exposure may occur long after the exposure has ended.

This issue has been addressed by courts for decades. As far back as 1981, in the *Keene* decision, the court held that in asbestos exposure cases, a "continuous trigger" of injury should be applied, meaning that all insurers that provided coverage from the time of first exposure to the time that asbestos-related disease manifested would potentially share the liability. "The court basically decided to maximize the coverage," says Paul Kalish, a partner at Crowell & Moring and co-chair of the firm's Insurance and Reinsurance Practice.

Since then, many courts have applied that "continuous trigger" concept not only to asbestos cases but also to matters involving, among other things, alleged property damage from environmental spills. But now, says Kalish, "we're seeing much more pushback on the issue, with insurers saying that the continuous trigger isn't appropriate." Kalish points to asbestos cases, which today usually focus on cancer claims rather than non-malignant conditions such as asbestosis. The two diseases are different, he says, and "there is a much better understanding today of how cancer develops." As a result, insurers are now frequently asking courts to pin down the timing of injury more closely.

That pushback is starting to extend to non-asbestos cases as well—an approach that was given a boost last year by the Pennsylvania Supreme Court in *Pennsylvania National Mutual Casualty Insurance v. St. John*. There, the court did not apply the continuous trigger concept in a case involving chemicals leaking from pipes that eventually made a herd of cattle ill. Although Pennsylvania courts have used the continuous trigger concept in asbestos cases in the past, in this case the court rejected the idea of automatically falling back on the continuous trigger in every case of continuing environmental property damage. Kalish believes that "we're going to see more and more courts being asked by insurers to follow that kind of thinking and do more of an analysis on these kinds of issues, rather than simply default to the continuous trigger."

INSURERS: MORE PROACTIVE INVOLVEMENT

Insurers are becoming more proactive on another front, as well. Insurers often help defend their policyholders in court, but now, says Kalish, they are more likely to weigh in on other cases involving issues of underlying liability. "You see more insurers filing amicus briefs in cases where they are not otherwise involved," he says. For example, in a recent environmental contamination case, the company sought review by the U.S. Supreme Court, "and a group of insurers not related to the case filed briefs in support of the company's request for review." Similar types of briefs have been filed over the past few years in numerous state supreme courts.

This broader interest is also evident in the wake of *In re: Garlock Sealing Technologies*. Garlock had been sued for alleged asbestos exposure stemming from the use of its products, and ultimately sought bankruptcy protection. A North Carolina bankruptcy court estimating Garlock's potential liability concluded that the record was "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The court eventually ordered the unsealing of the case records in late 2014, but only after the insurers and other companies pushed for that relief. "Insurers are heavily involved in the litigation environment in this country," Kalish says, "and with these kinds of actions, they are trying to do what they can to make sure the system works properly."

"We're going to see more and more courts being asked by insurers to...do more of an analysis on these kinds of issues, rather than simply default to the continuous trigger." *—Paul Kalish*

ENERGY

JURISDICTIONAL DECISIONS COMPLICATE THE EVOLUTION OF THE ENERGY INFRASTRUCTURE

The electric industry is working to meet increasing demands for a diverse, resilient, and clean supply of electricity.

As pressure mounts to deploy new technologies that provide for more local supply and control in the event of disruptive events—such as hurricanes—it is not yet known how these will be coordinated and priced as part of the larger grid infrastructure and markets. A few years ago, the notion of needing a dynamic relationship between the distribution grid and the high-voltage grid was not on anyone's mind. Now, with visions for an integrated distribution and high-voltage grid, recent court rulings have sent contradictory signals and are creating uncertainty at a time when businesses need regulatory and legal predictability—and the legal battles are far from over.

On one hand, courts have indicated that the federal government cannot be the architect of the integrated framework between the distribution and high-voltage grids. For example, a recent court ruling curtailed the federal government's attempt to encourage the development of an important distribution-level resource known as demand response. Demand-response technology lets customer load communicate with the grid and respond to price signals. This makes it possible to reduce the demand on the system rather than produce more electricity from generation sources. Demand response is an important part of the portfolio of options for managing the grid and reducing emissions. With that in mind, the Federal Energy Regulatory Commission (FERC) established a pricing mechanism for demand-response products bidding into organized energy markets throughout the country.

"However, the federal courts have said no to that approach," says Nancy Saracino, a partner in Crowell & Moring's Energy Group and former vice president and general counsel for the California Independent System Operator Corp. and supervisor in the California Department of Justice's Energy Task Force. In *Electric Power Supply Assoc. v. FERC*, the D.C. Circuit said that the FERC demand-response incentive was essentially a pricing mechanism for distribution and retail operations—making it a matter for state, rather than federal, oversight. This has raised significant questions

"A lot of people in the industry are wondering how important decisions driving the architecture of the grid of tomorrow will get made in the face of jurisdictional disputes."

—Nancy Saracino

about the development of demand response as a meaningful product in organized markets, which will ultimately be resolved by the Supreme Court.

While courts are limiting federal involvement in the push for new products, they are also acting to limit state action. States are trying to ensure that they have the generating capacity to meet anticipated needs and reliability concerns and to address the retirement of aging power plants. However, where state-driven incentives for new generation have the effect of superseding pricing mechanisms established through federally approved rules for the wholesale energy markets, the state incentive is preempted.

Together, these rulings draw distinct boundaries between state and federal authority, yet leave unanswered the question of who decides where the framework involves the integration of retail and distribution resources and resources priced on the wholesale market. The ability to take advantage of new technologies requires the ability to work across those boundaries. Both sides of the equation need to be involved to create practical approaches to pricing, reliability, and sustainability. "These dueling jurisdictional arguments impede the ability of the states and the federal government to pursue policies and market rules for an integrated grid," says Saracino. As a result, she adds, "a lot of people in the industry are wondering how important decisions driving the architecture of the grid of tomorrow will get made in the face of jurisdictional disputes."

As federal regulators look to the energy industry to contribute to greenhouse gas emission targets, the picture gets even more complicated. "The jurisdictional issues alone will limit the flexibility for states to comply with EPA's Clean Power Plan and the new rules that the EPA will be promulgating in 2015," says Saracino. That reality is likely to drive continued litigation. "We think that will lead to multiple challenges being filed against any EPA final rule on its Clean Power Plan to regulate CO_2 emissions from existing fossil-fuel power plants," she says. Here, the question of state versus federal jurisdiction will play a key role, as lawsuits look at whether the EPA's rules amount to an unlawful expansion of the agency's authority to regulate CO_2 emissions under the Clean Air Act, because they in effect extend federal oversight into the entire electric grid—including that portion that falls under state control.

Meanwhile, litigation in state courts is not making the industry's efforts to develop and modernize the grid any easier. In California, for example, "lawsuits challenging emissions are an ongoing impediment to new development and improvement," says Saracino. Current litigation includes one Ninth Circuit case addressing the permitting and ongoing operation of a gas-fired plant and another challenging the building of a biomass plant that would rely on renewable fuel sources. "In California and other places, if you have any type of plant that is going to create any emissions at all, you're likely to trigger some sort of legal action," she says.

Because of the dilemmas these issues create, "the litigation that is moving on two tracks—the federal and state jurisdiction questions—is likely to wind its way up to the Supreme Court in 2015," says Saracino. How the Court rules will shape the industry's ability to adapt, and ultimately, the evolution of electric power in the United States.

WHAT CONSTITUTES MANIPULATION?

Electricity market rules must provide generators a certain degree of operational flexibility to meet physical limitations as well as contractual commitments. But within this flexibility lies the ability to exploit market rules. "While generators need to operate to capture revenue from the markets, the organized markets and the Office of Enforcement at the Federal Energy Regulatory Commission are watching carefully for potentially exploitative behavior," says Crowell & Moring's Nancy Saracino.

The problem is that the line between right and wrong is not always clear. "FERC may find that there's market manipulation, even if there isn't an explicit rule that bars the activity in question," she says. "So FERC has been criticized for being too aggressive, as well as for failing to provide notice as to what behaviors will be deemed manipulative." On the other hand, she notes, "maintaining the integrity of our electricity markets is critical to protecting ratepayer interests and to the long-term health of these markets."

The question over FERC's enforcement actions has led some energy-market participants to test FERC's actions in federal court. Enforcement cases involve complicated technical questions and have not historically been tried in courts. But with the often high penalties involved in market-manipulation matters, "these questions are now going before trial courts, which have to consider these complex markets and decide whether the conduct is manipulation or not," Saracino says. "This brings a new dynamic to FERC's enforcement regime."

RECOVERY

LEGAL DEPARTMENTS JOIN IN THE SEARCH FOR REVENUE

Companies today operate under intense cost pressures, and those pressures are being felt by the legal department. As a result, a number of legal departments are broadening their role to include revenue-producing activities. They are working not just to defend cases, but to recover money owed to the company through legal action.

"It used to be that recovery was left to the business side, but in a tighter economic environment there is pressure for in-house counsel to think about recovery options," says Crowell & Moring partner Daniel Sasse. Some legal departments are taking steps to sharpen their focus on recovery. This usually means designating individuals or teams to specialize in recovery, and to track recovery metrics, coordinate efforts with outside counsel, and look for areas where they might recover funds.

Health care: With changes in health care laws, many companies have taken a more active role in managing and funding their health care plans. Recovery efforts may target overspending due to medical manufacturers' inflated pricing through anticompetitive behavior, or higher medical expenses due to defective medical devices or fraudulent billing.

Trade: It's not unusual to find that importers and manufacturers are paying unnecessary duties on imported merchandise, either directly or as part of their cost of procured materials. Here, recoveries generally take the form of refunds for past overpayments, or future duty and penalty avoidance.

The pressure on legal departments to show that they are adding value to the business is not going to abate any time soon. As a result, says Sasse, "we expect to see more legal departments putting more resources into this and institutionalizing their recovery activities."

"It used to be that recovery was left to the business side, but in a tighter economic environment there is pressure for in-house counsel to think about recovery options." *—Daniel Sasse*

These initiatives can be well worth the effort. Recovered amounts vary widely. But, says Sasse, "often there are tens of millions of dollars, or even hundreds of millions, at stake." As companies embrace recovery programs, he adds, "legal departments, which have traditionally been charged with reducing cost and liability, are now seen as profit centers."

Much of the recovery activity to date has been in the intellectual property and antitrust arenas. With IP, recovery is often focused on violations of licensing agreements or infringement of patents. With antitrust, recovery opportunities often stem from cases where government agencies have found illegal cartel behavior, which prompts civil class action litigation. As purchasers of price-fixed products, corporations are often members of these classes and thus have significant claims.

There are several potential "growth areas" that are likely to see more of these in-house recovery efforts. These include:

Supplier contracts: More legal departments are reviewing contractual agreements with vendors, licensors, or even business partners that have failed. Often, these reviews can turn up significant opportunities for recovery.

LEVELING THE GLOBAL FIELD

When U.S. companies are victims of price fixing from foreign suppliers, it may not be clear whether courts have jurisdiction over these claims. Under the standard adopted by the Third and Ninth Circuits, when foreign defendants dealing with U.S companies establish a single price governing all sales of their components—whether delivered in the U.S. or to subsidiaries abroad for importation—such conduct involves import commerce and courts have jurisdiction. By contrast, a panel of the Seventh Circuit has recently held that unless the foreign defendant physically ships the product into the U.S., the conduct does not involve import commerce and courts do not have jurisdiction (*en banc* review is pending). This developing circuit split is important for all companies that have a global supply chain.

VALUE-BASED BILLING

THE SECRET TO SUCCESSFUL VALUE-BASED BILLING

Industry data suggests that only 20 percent of large law firm revenue is currently derived from alternative fees—increasingly called value-based billing (VBB) arrangements. The question is, *why?* Why does VBB only account for a fraction of total legal spend when its model is so promising?

The fact is that general counsel at some Fortune 500 companies are openly skeptical of VBB. The convergence of new pricing approaches and a fiercely competitive market means that plenty of mistakes have been made with such deals. "Some firms have jumped into value-based billing without changing the way they operate and without doing the initial hard work with clients to ensure both sides benefit. Successful VBB requires an investment of time and planning between the law firm and client," says Matt Laws, senior director of practice management at Crowell & Moring, who is responsible for pricing strategy. Indeed, some approaches have led to VBB arrangements that fail to deliver on their promise, which has given rise to a lack of confidence on the part of many firms and legal departments. "To improve VBB effectiveness, law firms have to be prepared to invest in changing processes, people, and technology," he says.

Doing more than just talking the VBB talk requires firms to build internal resources and capabilities that will help them accurately predict and manage costs and risk. Laws says firms must capture and analyze historic data in an effort to understand what it truly costs the firm to provide various services, and what it should cost. At the same time, firms need to build a sophisticated pricing function, armed with powerful modeling software—much like a company would have to support a product line. And most important, they need to invest in project management training for their attorneys and change the way they deliver the service to maximize efficiency without sacrificing results. That in turn requires investment in tools like matter-management systems that can monitor cases as they progress and provide concise, dashboard-based reporting. "Without these sorts of capabilities," says Laws, "you're just guessing at pricing and conducting business the same old way—and we've seen that that won't work for anybody in the long run."

In-house legal departments testing the VBB waters should be informed consumers and are often bringing their own pricing expertise to the table. "Many companies are hiring senior-level pricing experts who are a part of the legal department," says Laws. These executives can work with the business to understand the company's legal goals and work with their law firms to come up with the right VBB agreements, even for high-stakes, complex litigation.

Laws also recommends that in-house counsel take time to understand the internal processes and philosophies that law firms are using to arrive at their pricing proposals by asking some probing questions right from the start. "How do they go about arriving at a price?" he says. "Do they simply estimate the standard value of time and round it up to present it as a flat fee? What incentives are there for associates to be efficient, rather than to bill lots of hours? How do they decide whether to make an investment?" They should also ask whether their law firms have historical data on how much it costs to write a brief, take a deposition, and perform other tasks, he adds.

"These agreements allow law firms to provide greater budget certainty and risk-sharing in an area where that has rarely been possible," says Laws. "But what the past few years have shown is that thoughtful deals crafted by outside counsel for legal departments can revolutionize relationships, build trust, and control costs while delivering value to the business."

Crowell & Moring partner Kathryn Kirmayer also contributed to this article.

"Without these sorts of capabilities, you're just guessing at pricing and conducting business the same old way—and we've seen that that won't work for anybody in the long run."

—Matt Laws

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FOR MORE INFORMATION CONTACT:

Mark Klapow
mklapow@crowell.com
Phone: 202.624.2975
1001 Pennsylvania Avenue NW
Washington, D.C. 20004-2595

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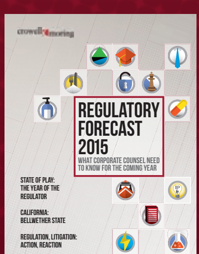

HOW TO THRIVE IN AN AGE OF REGULATION

If any business is booming these days, it is the business of government regulation. To help you understand the impact regulation is having—and the threats it is posing—Crowell & Moring has produced *Regulatory Forecast*, a companion to its *Litigation Forecast*. To access an electronic version, go to www.crowell.com/RegulatoryForecast.

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