LITIGATION FORECAST 2016

WHAT CORPORATE COUNSEL NEED TO KNOW FOR THE COMING YEAR

FOURTH ANNUAL JURISDICTIONAL ANALYSIS

CALIFORNIA'S COMPLEX COURT PROGRAM

BUSINESS TURNED ON ITS SIDE

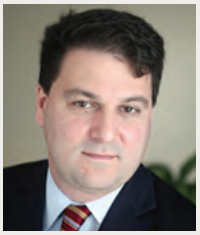
WITH EVERYTHING CHANGED, HOW SHOULD LAWYERS AND BUSINESSES WORK TOGETHER?

crowell moring

LITIGATION FORECAST 2016

COVER STORY

LITIGATION: MORE COMPLEX



Open this book to almost any page and you will find a common theme rising from the litigation trends impacting areas from health care to cybersecurity, from torts to the environment. Litigation in 2016 will be more complex and specialized than ever. Corporations will be entrenched in cases inspired by new regulations promulgated by the outgoing Obama administration, more aggressive federal agencies, zealous activist groups, and quickly advancing technology. The cases that will mean the most to the bottom line will likely emerge from small questions that pack big implications far outside the courtroom. They reflect a plaintiffs' bar that has become expert in industry, a government that is changing the rules as fast as it can publish them, and a marketplace that is demanding the full story on day one.

Crowell & Moring's attorneys work for more than a third of the Fortune 100 companies in litigation alone, across a broad spectrum of industries. We bring vast experience balancing business opportunity and legal risk and a deep bench of litigators and regulatory attorneys with years of government experience who understand where their industries have been and where they're going. It's that experience that we've brought together to identify the critical issues, trends, and developments covered here—as well as in our firm's companion volume, *Regulatory Forecast 2016*.

We hope you'll find both volumes useful, informative, and inspiring. To keep the conversation going, please visit www.crowell.com/forecasts.

—Mark Klapow
Partner, Crowell & Moring
Editor, Litigation Forecast 2016

FOCUS AREAS

FEATURES

SPECIAL COVERAGE

A NEW KIND OF LAWYERING

Speed. Change. Innovation. Disruption. These are the forces that have turned business on its side. Couple that with the rise of Big Data, an increasingly empowered regulatory arena, and the continued impact—and reach of—globalization, and it's clear that corporations are facing a new dynamic with a forever-altered approach to legal risk. As discussed not only in this volume's cover story (p. 4) but throughout this *Forecast*, the problems lawyers must now anticipate are no longer linear or predictable. Executives are looking for rapid answers and real-time solutions. This puts tremendous pressure on lawyers to get past "no" and balance risk while finding opportunity. What's needed, instead, is an informed, strategic partnership between business leaders and lawyers that helps to protect, monetize, and shape both the company and the environment in which that company functions in ways that correspond to the unforgiving realities of today's business world.

And that may be the most important message conveyed in the Crowell & Moring *Litigation Forecast 2016*. As each of the attorneys featured in this volume remind us, the new definition of success might no longer be couched in just winning a case, but in the litigation strategy through which the case is approached, as well as a deep, well-honed understanding of the company's business priorities, as well as the directions in which technology, industries, and the regulatory environment are moving, and how best to strategically—and quickly—anticipate and react in order to achieve objectives. With this in mind, our lawyers are taking a new look at how they can invest in better understanding the clients they serve—and our clients are taking a close look at how best to use our services.

—Kent Gardiner
Chair, Litigation & Trial Department,
Crowell & Moring

LITIGATION FORECAST 2016

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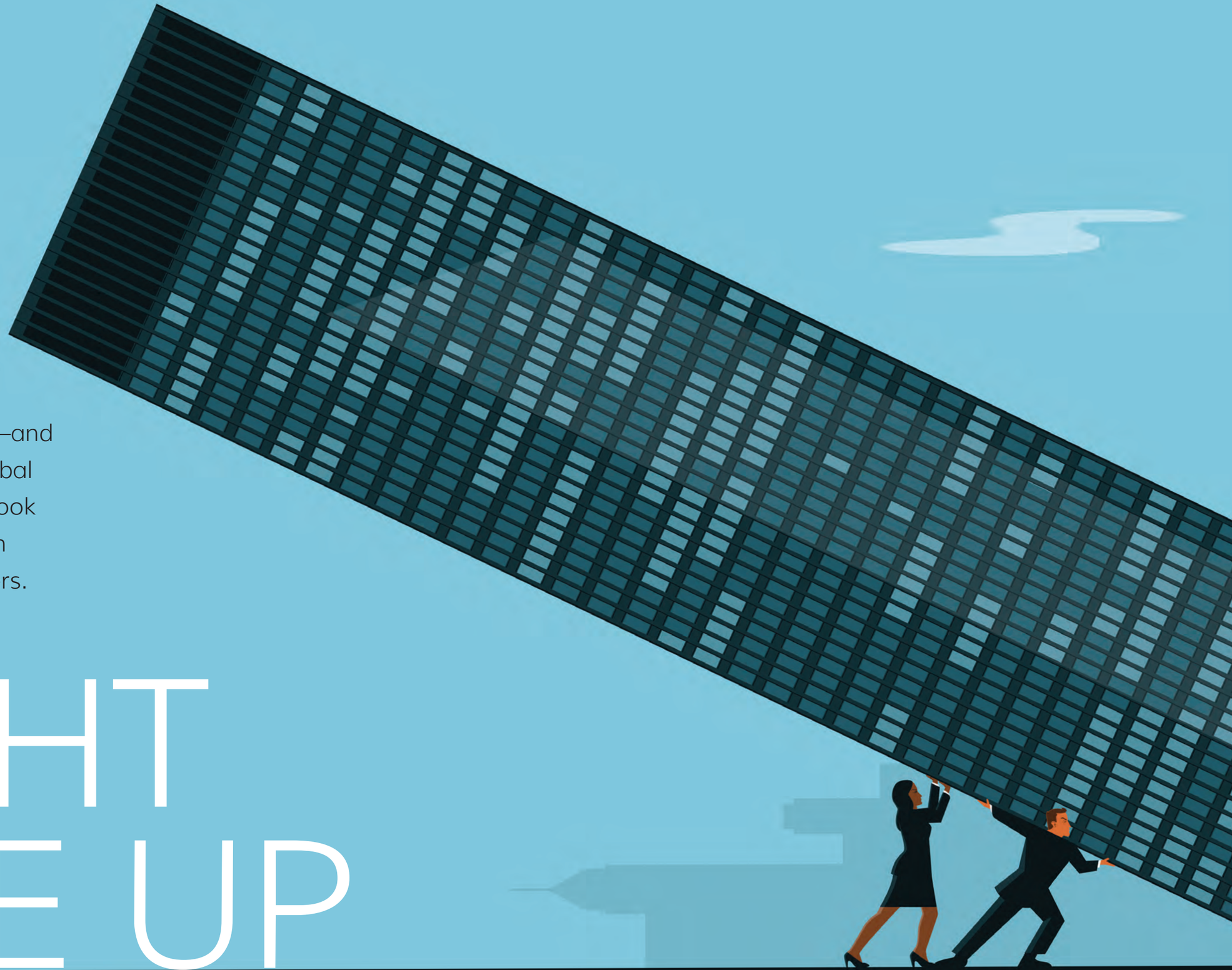
COVER STORY

Disruption and innovation can create rapid business growth—but they can also ignite crises, litigation, and regulatory quagmires that can turn your company sideways. Staying upright—and succeeding—in today's global economy requires a fresh look at the relationship between businesses and their lawyers.

RIGHT SIDE UP



"MOVE FAST AND BREAK THINGS. UNLESS YOU ARE BREAKING STUFF, YOU ARE NOT MOVING FAST ENOUGH."

—Mark Zuckerberg, co-founder, chairman, and chief executive, Facebook

Is a new partnership needed between companies and their legal counsel? In an age of innovation and disruption, executives are working around the clock to devise bold strategies that can propel rapid business gains in a slow-growth economic environment. But the fast-paced drive for change, and the rise of a digital media that exposes every misstep to intense public scrutiny, give adversaries the ability to marshal their forces quickly and effectively—and much more harshly. For lawyers, it means higher stakes and more pressure than ever.

The core of the new dynamic is that legal risk has changed. The problems lawyers must anticipate and mitigate are not as linear, or predictable, as they once were. At the same time, corporate risk profiles now go far beyond new regulations out of Washington or the threat of a civil suit. The rise of Big Data, the reputation economy, and the seemingly unending new avenues of attack that might ambush a company all make for uncertain terrain. It can produce the kind of risk-averse, slow-response lawyering that doesn't get past "no," at a time when executives are looking for rapid answers and the kinds of practical solutions they need to conduct business. The resulting disconnect can mean that counsel are not positioned to help their clients navigate challenges at a time when clients need them the most.

"When it comes to new business strategies, the standard has changed. It's not just enough to produce profits. Nor is it enough to achieve technical compliance with a statute. The strategy also must be able to withstand potential attacks from competitors, plaintiffs' attorneys, regulators, and the public," says Kent Gardiner, chair of Crowell & Moring's Litigation & Trial Department. "Business is moving too quickly for the traditional model of lawyering to keep up. We need a new model of partnership between business and legal. The question of how we design it is critical."

The need to redesign the legal and business relationship is seen in the lessons learned by both newly launched and well-established companies. Thanks to the Internet, Big Data, and a raft of new digital-based businesses, a company with a few employees and a break-out idea can attract huge numbers of customers, and disrupt entire industries, within a matter of months. Established players must react—and react fast—if they are to survive. There's less time than ever to project out the potential legal risks of a business decision before pulling the trigger, says Gardiner.

Meanwhile, companies are enduring greater scrutiny than ever. Investors, regulators, and the public are demanding ever-greater levels of transparency. Thanks to tools like e-discovery and social media—not to mention a rise in malicious hacking—regulators are getting that transparency whether executives like it or not. In an era that gives primacy to a company's brand and "voice"—not just to its product or service—stakeholders are holding companies to a higher standard. And when a company is found lacking, its adversaries can quickly rally their constituents and inflict damage. Add in a rapid and

"None of these challenges can be anticipated or handled well within the traditional scope of a counsel relationship. The world is moving too fast." *—Kent Gardiner*

continuous news cycle, and companies that make errors are often being propelled into a global spotlight before they're able to fashion a response.

At the same time, established players in realms such as financial services and auto manufacturing are facing a different challenge. They're grappling with misbehaving employees who, by deceit or incompetence, have saddled their businesses with outsized litigation problems. In some cases, employees' bad actions are rooted in a corporate culture that emphasizes the importance of winning at all costs. And in these cases, the public is left to wonder where the lawyers were all along.

In many industries, pioneering companies are simultaneously capturing market share even as they are drawing protests, investigations, lawsuits, and even custom-made laws and regulations. "These developments are often the biggest threat to their future growth—as much, or even more, than competition," Gardiner says. "And yet none of these challenges can be anticipated or handled well within the traditional scope of a counsel relationship. The world is moving too fast."

STARTING WITH OUTSIDE COUNSEL

"Outside counsel need to change," Gardiner says. "Lawyers can be their own worst enemy because they think their clients want to avoid all risk. General counsel constantly lament to us that their outside counsel are great at submitting 20-page legal memos identifying every possible legal downside to a business initiative, seeming to limit the company to the option of closing its doors. These clients want to know something fundamentally different: how to construct a legal strategy that *advances* their business objectives. It's a completely different analysis."

Companies increasingly are recoiling at this reactionary advice from their outside counsel, meaning that such counsel are actually not consulted when they should be. "Traditionally, lawyering has been very binary and conservative," says Robert Cusumano, a Crowell & Moring Insurance/Reinsurance Group partner and former general counsel for the international insurance enterprise ACE, Ltd. "Too often, a lawyer has felt that the main part of his or her job was to say no, or to over-warn people about every fantastical risk that could arise. So lawyers have contributed to the reputation they have in some organizations of being obstructionist."

That conservative approach is rooted in traditional legal training as well as in business leaders' traditional expectations. But binary advice won't do in today's more complex, transparent, and innovation-dependent business environment.

One way that counsel can begin countering their conservative reputation is by acknowledging that all business entails risk. Cusumano says lawyers must replace "the red light/green light approach" with advice that looks at business decisions along a spectrum of risk and reward.

More broadly, lawyers must also overcome a reputation for myopia—thinking that their particular assignment (a specific piece of litigation or transactional work) is the only thing that matters. Such outside counsel miss the forest for the trees because they don't recognize that their assignment is simply one small piece of a broader, vital business strategy. And lawyers who focus only on their discrete task may end up suggesting a course of action that causes the company to win a legal battle but lose the war for support in the public opinion arena, in the legislature, and eventually, in the marketplace.

To illustrate, assume you are counsel to what's come to be called a "unicorn"—for example, a high-profile company that allows people to rent rooms in their homes. The company gets some unwanted publicity when tenants start behaving badly. "You could create documents in which the renter is 100 percent responsible, the company has no responsibility, and the homeowner is renting out the room purely at his or her own risk," says Michael Kahn, senior counsel in Crowell & Moring's

CHECKLIST: EMBEDDING LEGAL STRATEGY IN BUSINESS STRATEGY

To prevent both unnecessary external blowups and internal crises, general counsel should consider these moves, according to Robert Cusumano, a partner with Crowell & Moring and former general counsel for ACE, Ltd.:

- Have clearly delineated times where business strategies must be presented to lawyers.
- Ensure a lawyer is present at all board and executive committee meetings (or at a similar level for smaller companies), and the lawyer is confident in "speaking truth to power."
- Make sure every lawyer reports to (and has compensation set by) the legal department, not local business leaders.
- All lawyers should be able to discuss business strategy and present options that go beyond legal maneuvers.
- Any lawyer asked a question that presents an ethical ambiguity should share the case with the entire legal department and allow for debate to help ensure that the right advice is given.

Commercial Litigation Group, who was recently named to the State Bar of California's "Trial Lawyer Hall of Fame." "Many people would sign on for the service anyway. But when the inevitable occurred, if the company took this position out loud, it would not play well."

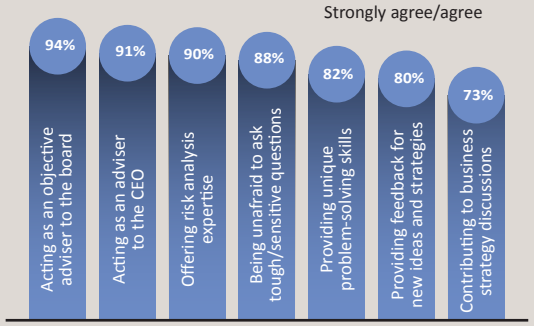
Instead, business leaders are increasingly seeking lawyers who can act as strategic partners, assessing risk but also presenting options and even devising strategies that can help the company retain and build its competitive advantage. "Lawyers who earn that reputation as strategic thinkers will earn their place in the executive suite," says Gardiner. "Those lawyers have the ability to think strategically, and they've also invested the time to delve deep into the particulars of the business."

For Kahn, thinking strategically requires going beyond strictly legal approaches if it can help the client achieve its business goals. For example, he's helped clients seeking to avoid litigation by devising new systems for oversight and external and internal public relations campaigns. He once advised a client dealing with a problematic business partner not to file litigation (even though he was likely to prevail) but instead to pay the business partner to terminate the relationship voluntarily.

ADDING VALUE: LAWYERS AS BUSINESS PARTNERS

Studies show that C-suites and boardrooms most value the role of general counsel because of the strategic and pragmatic perspectives they bring to the table. A survey by NYSE Governance Services, *Corporate Board Member*, and the recruiting firm BarkerGilmore found that board members and CEOs alike believe general counsel strengthen decision making, provide objective advice, and are not afraid to ask tough questions. Key to their job performance is their knowledge of their industry and the financial acumen they've developed, according to a Korn Ferry Institute study.

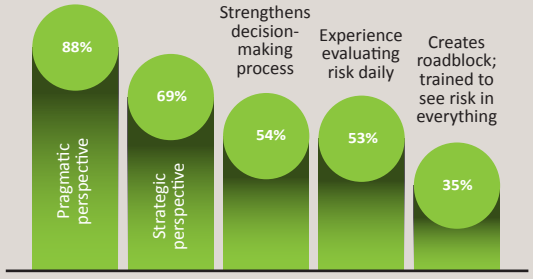
WHERE GCS ADD VALUE TO BOARD MEETINGS



Source: GCs: Adding Value to the C-Suite, NYSE Governance Services, Corporate Board Member, BarkerGilmore, 2015. Based on responses from approximately 5,000 directors, board chairs, and CEOs of publicly traded companies in the NYSE Governance Services database.

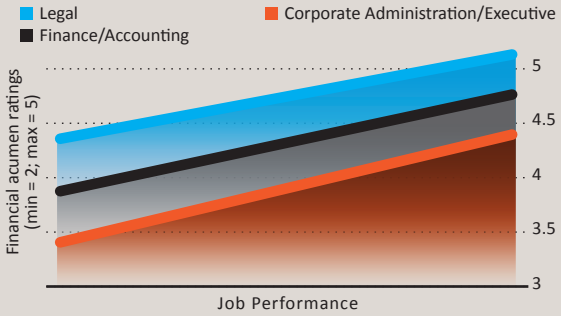
GENERAL COUNSEL ON THE BOARD

Strongly agree/agree



Source: GCs: Adding Value to the C-Suite, NYSE Governance Services, Corporate Board Member, BarkerGilmore, 2015. Based on responses from approximately 5,000 directors, board chairs, and CEOs of publicly traded companies in the NYSE Governance Services database.

INCREASED FINANCIAL ACUMEN ACCELERATES JOB PERFORMANCE FOR LEGAL EXECUTIVES



Source: "More Than 'Just a Lawyer,'" Korn Ferry Institute, 2015. Based on Korn Ferry Institute research.

"Lawyers are a bridge from somewhat closed corporate capitalism to the world outside. They are a bridge to juries, to judges, to regulators, and to the concerned public." —*Robert Cusumano*

For outside counsel, strategic lawyering may require a change in the traditional ways of doing business. "Outside counsel needs to start looking beyond the traditional business model based on piecework and billable hours and instead focus on building lasting relationships with clients," Gardiner says. "And that requires spending a lot of non-billable hours educating themselves about the company, its business, and its business environment." As the relationship deepens, an outside lawyer might even be "seconded" to the company. By working on-site for months at a time, lawyers gain special insights into the business while also acting in a training role.

"Outside counsel have to be willing to invest in their clients and learn without charge, on the firm's nickel," Gardiner says. "When they do this, they can approach clients to advise on where the business is going. They have ideas to contribute at the outset, and they're not asking to be brought on to be educated. They've undertaken the effort to be educated themselves."

With the partnership between firm and client in place, fees can move away from the billable hour and toward long-term, relationship-based, risk-sharing engagements that reward results and efficiency instead of just time served.

"Once lawyers acquire deep, cross-industry knowledge in a legal or policy area," Gardiner says, "they can proactively identify new risks and opportunities and flag them for executives." For example, Gardiner and his colleagues who understand both the railroad and airline industries recently spotted an antitrust risk that had first affected railroads spreading to the airline industry. They were able to proactively inform their airline client of substantial unanticipated risks.

WHAT CAN COMPANIES DO?

It's a tough world out there for sure, with companies caught between aggressive demands for growth, a sophisticated plaintiffs' bar, a continuous media cycle, and the increasing scope of regulators (for more details, see Crowell & Moring's *Regulatory Forecast 2016*). Then there's the recent uptick in mergers and acquisitions, which is putting even more challenges on the in-house counsel's plate.

The changing business environment necessitates a new partnership between companies and their legal counsel, one in which lawyers are more deeply and constructively engaged in corporate decisions.

"Companies need to find the right lawyers, and then they need to trust them and include them," says Gardiner. "The most extreme form of a partnership is when the outside counsel and in-house counsel work directly with the board. It is the most sensitive place with the most acutely personal relationships, and the only way to get there is by developing trust."

Companies that don't yet see their lawyers as strategic partners often marginalize them, engaging in what Cusumano calls "closet lawyering." In this model, the general counsel typically reports to the chief operating officer and is consulted only when a non-lawyer executive decides there is a legal issue. "This approach has proven not just dangerous but deadly," Cusumano says. "That executive may not recognize a legal issue when it comes across his or her desk."

Instead, lawyers should be more deeply embedded in the deliberation process. Depending on the business, companies may want to have a lawyer included in all meetings of the board and its committees, as well as embedded within key operating units, Cusumano says. The perspective of counsel can be valuable for executives in every business function—HR, sales, marketing, finance, product development, and more.

Yet many executives do not understand that the old ways of doing business cannot stand in a new era of increased transparency and scrutiny. "Executives are charging ahead without a full understanding of the risks they face—of the legal, regulatory, or reputational concerns they must confront," says Cusumano. "Either they didn't consult counsel, or counsel isn't thinking strategically."

While it's not feasible for counsel to become involved in every business decision, says Kahn, there are triggers that can help an executive know when to raise a flag. When deciding whether to get counsel involved, he notes, executives should ask: Is the idea new? Is it untested? Is it viable? Could it leave certain parties—especially suppliers and competitors—aggrieved?

When a key business strategy is identified, Gardiner recommends doing a "pressure test." Executives and counsel work through a scenario, "war game" style, in which the strategy results in a legal dispute and ultimately, a trial. "How would we prepare a CEO to act as a witness? How would you prepare the company and the evidentiary record for all that may occur? How do we educate regulators that we've acted responsibly? You want to make sure that you've arrived at a decision in a way that a jury would understand. It needs to pass the fairness test, not just the compliance test, because a jury's approach would be much more emotional. It is a useful proxy for the court of

"If you structure your endeavor in ways that anticipate those challenges, you will be more successful when the inevitable challenges occur." —*Michael Kahn*

public opinion. The media, customers, and even shareholders will not just be asking if the strategy is legal, but if it's *fair*."

When testing strategies, make sure you consider the possibility of success as well as failure, Kahn asserts. "Failure creates liabilities and consequences, but success can also create enormous legal problems. It will draw competitors, investigators, public complaints, and ultimately, antitrust concerns. If you structure your endeavor in ways that anticipate those challenges, you will be more successful when the inevitable challenges occur."

COUNSEL AS COMPASS

When businesses venture into uncharted territory, lawyers can act as an invaluable compass. "I think lawyers are a bridge from somewhat closed corporate capitalism to the world outside," Cusumano says. "They are a bridge to juries, to judges, to regulators, and to the concerned public. Beyond their knowledge of the law, lawyers are trained to sort out conflicting interests and to understand what the other side is saying. "And frankly, many executives don't have that level of empathy; they are too busy competing and too much an advocate for their own side."

A lawyer's capacity to see how any given statement will affect multiple audiences has become more valuable in today's digitized world, says Gardiner. That's because documents like emails and meeting minutes that once were considered private are so easily tweeted to the world—or exposed through e-discovery. "The digitized world is much more of a fishbowl in terms of the decision-making process. The formulation and evolution of ideas will be carefully and skeptically scrutinized.

"Executives don't always understand that when they're communicating with one constituency, such as stock analysts, their comments are also available to the public, regulators, plaintiff lawyers, and others," Gardiner continues. "The risk of collateral damage from an ill-considered statement is substantial."

Even more damaging than an ill-considered statement is

an irresponsible or insular culture. Such a culture has always been dangerous, but it's even more so today, when the public is much more likely to discover it sooner. Companies that trust and include their lawyers are less likely to develop such a culture and to suffer the sort of scandals that have rocked automakers, financial firms, and others in recent years.

"The culture in some corporations can become resistant to criticism and imprudent about risk," says Cusumano. "Sometimes, employees may not even perceive the risks that are emerging all around them. Or, if something is not flatly, obviously illegal, people will press ahead with it. You need to have an internally transparent process about risk, one that is open to people who independently tell you about risk factors, or it is almost inevitable that those risks will become realities."

Companies should consider implementing practices that create the right incentives for executives to consult with counsel at key junctures in the decision-making process, Cusumano says. More crucially, companies need "an internal organization, an

DREAM...RISK...SUCCEED

Innovation is vital to business survival and growth—bringing with it the potential for both action and risk. As a result, it's changing the ways lawyers serve clients. Consider these quotes from key thought leaders:

"Innovation almost always is not successful the first time out." —*Clayton Christensen, professor, Harvard Business School*

"People who don't take risks generally make about two big mistakes a year. People who do take risks generally make about two big mistakes a year." —*Peter Drucker, management consultant, educator, author*

"Risk more than others think is safe. Dream more than others think is practical." —*Howard Schultz, chief executive, Starbucks*

apparatus, and a culture that welcomes critique. If you don't have that, then you have the illusion of lawyer participation, but in reality you're not being told what's being done. You're not at the real meetings where things are being decided."

Today's businesses are grappling with new tools and new platforms that are creating a host of new risks and opportunities. Lawyers who don't keep up will find themselves falling out of those key meetings where big decisions are being made. They'll need in-depth knowledge to identify and mitigate not only existing risk, but also emerging risks and opportunities as the legal, business, and regulatory environments evolve.

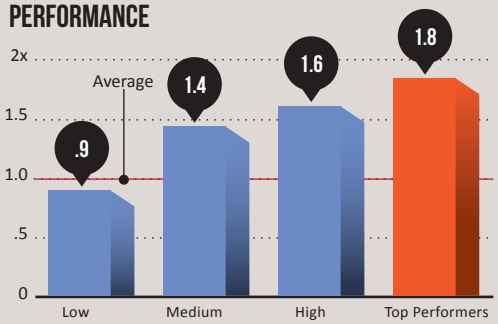
"Some law departments fear they will lose their objectivity if they adopt the businessperson's perspective," Gardiner says. "But there's no reason why good lawyers can't combine an in-depth knowledge of the business and its strategic goals with independence and the ability to speak truth to power.

"Ultimately, counsel should see themselves as more than just calibrators of existing legal risk," he adds. "They are also partners in the protection and monetization of the company's core assets and strategies. So much of the economy is new and untested, and regulations are not written. The best legal departments use internal and external resources to predict where the legal and regulatory environment is going and to think about how to shape it."

BIG DATA DRIVES RESULTS

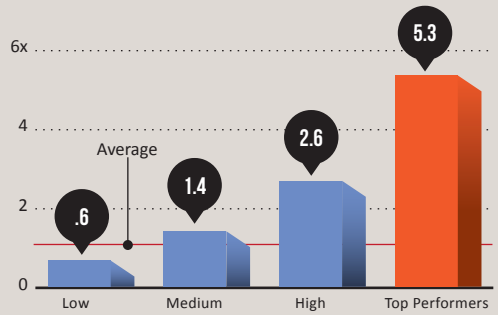
In a study of 400 large companies, those companies that had adopted the most advanced analytics outperformed their competitors by wide margins in terms of financial performance and decision making. With Big Data driving change, it is critical that in-house counsel and their law firms be able to navigate these analytics.

LIKELIHOOD OF TOP-QUARTILE FINANCIAL PERFORMANCE



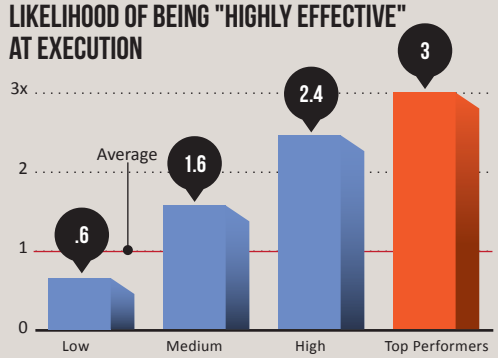
Source: "Big Data: The Organizational Challenge," Travis Pearson and Rasmus Wegener, Bain & Co., 2013

LIKELIHOOD OF MAKING DECISIONS "MUCH FASTER"



Source: "Big Data: The Organizational Challenge," Travis Pearson and Rasmus Wegener, Bain & Co., 2013

LIKELIHOOD OF BEING "HIGHLY EFFECTIVE" AT EXECUTION



Source: "Big Data: The Organizational Challenge," Travis Pearson and Rasmus Wegener, Bain & Co., 2013

JURISDICTIONAL ANALYSIS

TIME TO TRIAL, FAVORABLE COURTS, AND OTHER LITIGATION TRENDS

In today's world of using data to make better decisions, jurisdictional intelligence should play a key role in managing corporate legal dockets. This Jurisdictional Analysis highlights some of the important variables that effective litigation management strategies must take into account. At the federal level, fewer cases than ever are going to trial because more businesses are mitigating the risks and expense of litigation and runaway juries by efficiently managing litigation dockets. Those cases that do go to trial tend to be the high-value ones that are important either from a liability exposure or business strategy perspective. This "new normal" of litigation management requires designing litigation strategies that take into account more than just the merits of a case; they also consider the likely time to trial, disposition rates, and the likelihood of summary judgment, as well as the likelihood of success on appeal. Failure to anticipate and effectively analyze these variables could undermine an otherwise successful strategy. Whether developing national litigation strategies for a broad docket of cases or a strategy for an individual case, increasingly our clients are drawing on these analytics to make better decisions. No doubt, this is a trend we expect will continue. —*Keith Harrison, partner, Crowell & Moring*

N.D. CALIFORNIA
Regained the top spot for most antitrust filings

D. WYOMING
While second only to the rocket docket in civil filing to trial time, this district is one of the slowest for filing to disposition

N.D. OHIO
Civil docket increased 25% in the past two years, prompting significantly longer filing-to-disposition times

E.D. PENNSYLVANIA
Maintained the same civil filing disposition rate while also facing a significant number of judicial vacancies

S.D. NEW YORK
Average time from civil filing to disposition dropped from 38.5 months in 2011 to 8.9 months in 2015

D. DELAWARE
After a several-year surge in IP filings, the district dropped back to 2012 levels in 2015

E.D. VIRGINIA
The rocket docket maintained its position as the district with the fastest filing-to-trial time and with one of the fastest filing-to-disposition rates for civil cases

D. D.C.
Second-longest time from filing to trial for civil cases

C.D. CALIFORNIA
Most civil case filings of any district by a large margin when personal injury and product liability cases are excluded

E.D. TEXAS
This district continues to lead with the highest number of IP cases, with its case load more than doubling since 2012; in the Marshall Division, patent filings continued to rise significantly in 2015

S.D. FLORIDA
While it has the third-fastest civil filing-to-disposition time, time to trial is more than four times longer

DISTRICT COURTS FOR CIVIL CASES
Average number of months from filing to disposition

- 0.0 - 6.0
- 6.1 - 7.9
- 8.0 - 9.9
- 10.0 - 11.9
- 12.0 +

VIRGIN ISLANDS · GUAM · PUERTO RICO · ALASKA · HAWAII

UNITED STATES COURTS OF APPEALS

CIRCUIT	NOTICE OF APPEAL TO DISPOSITION	REVERSAL RECORD
1ST	12.7	0 OF 1
2ND	10.0	1 OF 1
3RD	8.3	3 OF 3
4TH	5.3	3 OF 6
5TH	9.2	6 OF 8
6TH	8.8	4 OF 5
7TH	7.2	3 OF 3
8TH	6.0	7 OF 8
9TH	12.8	10 OF 16
10TH	7.8	3 OF 4
11TH	7.3	5 OF 5
DC	14.0	3 OF 4
FED.	10.0	2 OF 3

TAKING ON THE TOUGH CASES

California's complex court program aims to streamline costly, time-consuming litigation.

For decades, complex lawsuits have been a challenge for state courts and litigants across the nation, often unnecessarily consuming time and money for all involved. These cases can clog court dockets and may create uncertainty for the parties when, for example, different judges handle discovery, motion practice, and ultimately trial. Such cases have been especially common in California—so much so that the state has created courts that focus specifically on handling complex litigation in an efficient and timely manner. This approach has met with success and has provided a model for similar courts in other regions.

California's complex courts are specialized departments within the civil divisions of several of the state's superior courts. The complex court program was established after a state task force was set up in the mid-1990s to consider the creation of separate courts that would focus on business-related issues. "The task force determined that creating those special business courts would not be the best approach," says Nathanial Wood, Commercial Litigation counsel in Crowell & Moring's Los Angeles office. "But its work led it to suggest that the state instead create a broader type of court that could address all types of complex civil litigation." This recommendation led to the launch of a pilot program in 2000 to test the complex court concept. In 2015, the complex courts received permanent funding, and there are now eight of them in operation (see map, p. 15).

The California Rules of Court define the complex case fairly broadly, calling it "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." This breadth sets California apart, as other states generally use these courts primarily to handle commercial disputes. As the rules reflect, multi-party litigation such as class actions or antitrust, securities, construction defect, and mass environmental or toxic tort cases will often qualify as complex. But parties often overlook the fact that the courts have discretion to designate a matter as complex, so even two-party disputes can get assigned to the complex division when counsel can explain to the court at the outset why both the parties and the court would benefit from the

"If you're a plaintiff that thinks that you can adjudicate a significant point by motion, the federal or complex court might be the right choice." —*Gregory Call*

1990
California State Bar establishes Business Court Committee to consider establishing separate business courts

1993
Committee proposes creation of business courts

1994
State Bar Board of Governors passes resolution prohibiting the committee from supporting legislation to create business courts

1996
Judicial Council Business Court Study Task Force is established

1997
Business Court Study Task Force recommendations are released and then Complex Civil Litigation Task Force is created by Chief Justice Ronald M. George

1999
Complex Civil Litigation Task Force releases recommendations

2000
Six courts (San Francisco, Contra Costa, Alameda, Santa Clara, Los Angeles, and Orange County Superior Courts) are designated to initiate the complex court pilot program

2003
Arizona models court after California's program

California makes complex courts permanent

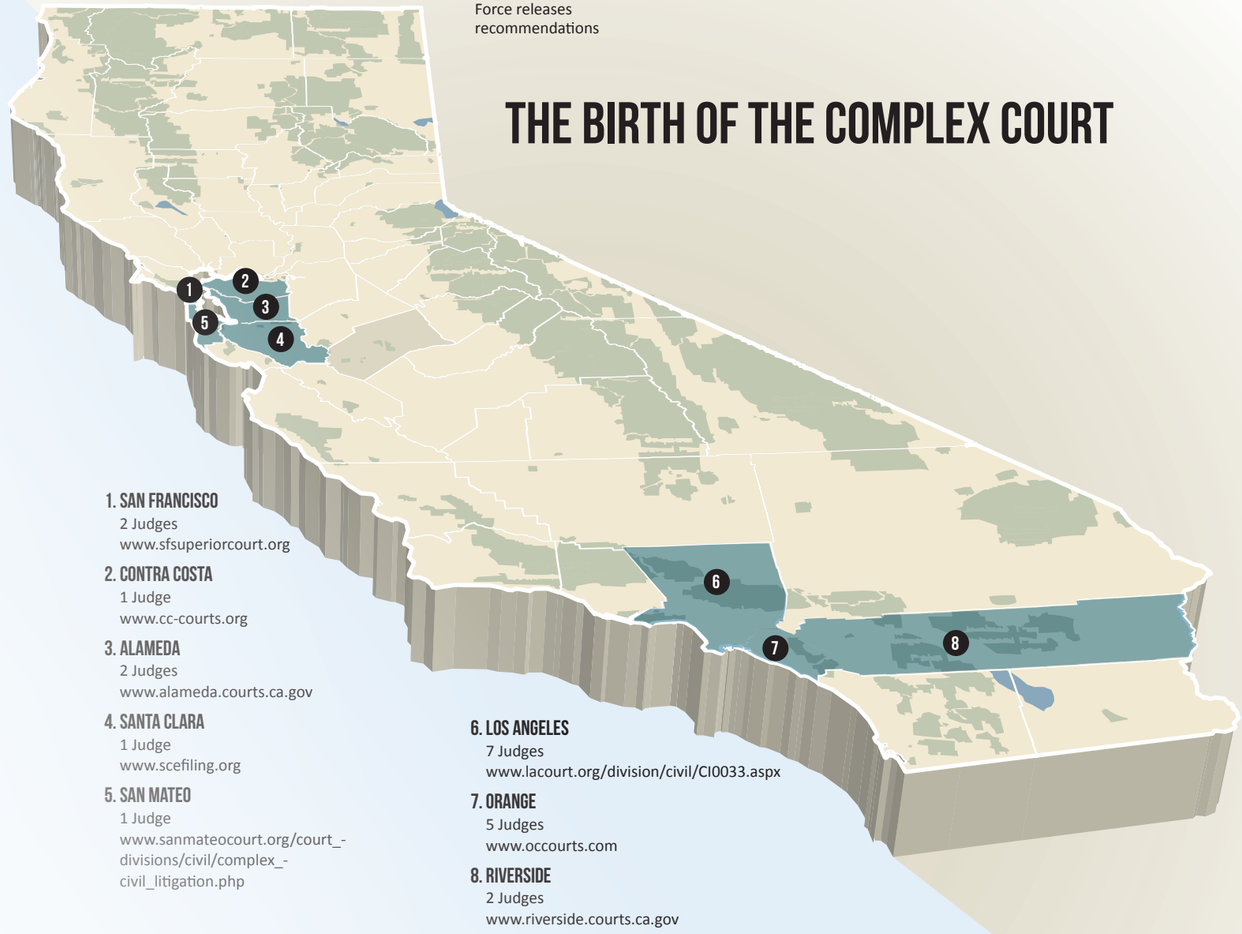
2004
National Center for State Courts releases positive report on California complex court pilot program

2006
San Mateo County Superior Court creates complex division

2015
Riverside County Superior Court creates consolidated complex division

Complex court funding becomes permanent

THE BIRTH OF THE COMPLEX COURT



1. SAN FRANCISCO
2 Judges
www.sfsuperiorcourt.org

2. CONTRA COSTA
1 Judge
www.cc-courts.org

3. ALAMEDA
2 Judges
www.alameda.courts.ca.gov

4. SANTA CLARA
1 Judge
www.scefiling.org

5. SAN MATEO
1 Judge
www.sanmateocourt.org/court_divisions/civil/complex_civil_litigation.php

6. LOS ANGELES
7 Judges
www.lacourt.org/division/civil/CI0033.aspx

7. ORANGE
5 Judges
www.occourts.com

8. RIVERSIDE
2 Judges
www.riverside.courts.ca.gov

Non-complex California state courts generally are less active in supervising discovery. "This can make it easier for parties to get information." —*Van Nguyen*

enhanced case management found in the complex courts.

California's approach is designed to give each court the time and resources needed to focus on complex cases while attempting to resolve these cases as efficiently as possible. Judges in the complex courts typically have reduced caseloads compared to judges in non-complex courts. They are often more experienced and are expected to look for ways to handle cases with greater efficiency. A key element of the program is its use of an individual calendar system, as opposed to the master calendar system used in many other state courts. This means that the complex courts typically have a single judge assigned to a case from beginning to end, from deciding motions to overseeing discovery and ultimately deciding the case.

WHICH COURT IS RIGHT FOR WHOM?

With the complex courts in place, venue decisions become more complicated than the typical state court/federal court distinction when parties are litigating complex matters. Plaintiffs must determine not only whether to file in state or federal court (if there is federal jurisdiction), but also to consider which county to file in—a county with a complex division, with the possibility of being assigned to complex, or a county without a complex division—to avoid it. Defendants, too, have more choices—rather than removing to federal court, which is often the standard play when even shaky grounds for removal are present, defendants must now con-

COMPARISON OF FEDERAL VS. STATE COMPLEX AND NON-COMPLEX

	FEDERAL	STATE NON-COMPLEX	STATE COMPLEX
Pleading Standards	More restrictive	Less restrictive	Less restrictive
Dispositive Motion Procedural Rules	Less restrictive	More restrictive	More restrictive rules, but judges encourage stipulated modifications to the rules
Case Management	Highly judge-dependent	Less case management	Strong case management
Discovery Rules	More restrictive	Less restrictive	Less restrictive rules, but more active management of discovery
Expert Evidence	Strong gatekeeper role	Less developed rules regarding exclusion of experts	Less developed rules, but judges are more likely to entertain challenges
Jury Requirement	Unanimous	Non-unanimous	Non-unanimous

The task force's work on business courts "led it to suggest that the state instead create a broader type of court that could address all types of complex civil litigation." —*Nathanial Wood*

sider whether the benefits of the complex division outweigh the costs of a potentially protracted and expensive remand battle in federal court. In making such decisions, litigants need to examine some fundamental qualities of the three types of courts. These include:

Active and unified case management. An average of 3,700 case filings per judicial position in California state courts (in 2013-14) makes it virtually impossible for judges in non-complex courts to provide substantial amounts of oversight. And many non-complex courts are "master calendar," meaning that different judges handle different parts of the case. In contrast, the complex courts provide for a single judge with resources to supervise the case from start to finish. The parties can expect early, and frequent, in-depth discussions with the court regarding how every aspect of the case will proceed. Federal courts in California fall somewhere between these two extremes and are dependent on the particular judge.

The likelihood of success on a dispositive motion. In California state courts, the rules make it more difficult for defendants to be granted summary judgment. But while the rules are the same for a complex and non-complex state case, with the individual calendar system and emphasis on expedited proceedings and closer judicial oversight, complex court judges will often spend the time to consider early briefing of key legal issues that can streamline the case. "So plaintiffs may face more risk of having their case dismissed through a motion in federal court or one of the complex courts," says Gregory Call, chair of Crowell & Moring's Commercial Litigation Group, head of the firm's San Francisco office, and a 2015 *National Law Journal* Litigation Trailblazer. "On the other hand, if you're a plaintiff that thinks that you can adjudicate a significant point by motion, the federal or complex court might be the right choice."

How easily the parties will be able to get documents and information. Compared to complex and federal courts, non-complex California state courts generally are less active in supervising discovery. "This can make it easier for parties to get information," says Van Nguyen, a Commercial Litigation partner in Crowell & Moring's Orange County office. The complex court, with a single assigned judge and a mandate to streamline the process, is more likely to rein in discovery. And federal courts are now working under new rules that direct judges to consider whether discovery puts an undue burden on the parties. "That's going to really separate the federal and regular state courts because the concept of proportionality is now baked into the federal discovery rules, and that does not exist in the state courts," she says.

The standards governing the admission of expert evidence. California's rules covering limitations to expert testimony and the qualification of experts are not nearly as evolved as federal rules. "So, if you have a damages theory that is not rock solid and requires more causal jumps from an expert, you are more likely to succeed in state court," says Call. In addition, under a state court master calendar system, issues such as the admissibility of experts are not decided until the eve of trial, as opposed to the complex court system where the parties can raise issues regarding admissibility of certain expert testimony earlier, potentially saving time and money.

Time to trial. For plaintiffs hoping to leverage the threat of a trial, having a court set a near-term trial date is key. "That might be the single most important factor for deciding what court you want to be in," says Call. This issue is highly court-dependent. In some California federal courts, a party can be looking at more than two years before trial. In state court, the goal is a 100 percent clearance rate for all civil matters within two years—though the statistics reflect that this goal is not met, and the percentage of matters getting resolved in that two-year window is decreasing. Generally speaking, the complex courts tend to be at the longer end of the spectrum. There, Call says, "the judge is more likely to want to focus efforts not on working toward a trial date, but in attempting to focus and narrow the case through the early adjudication of legal issues or undisputed factual issues."

Understanding these fundamental differences can help litigants determine which type of court is most appropriate for them. However, they also need to pay attention to the basics. Even with these differently structured courts, says Call, "you still need to do your homework. You need to understand the specifics of the courts—the individual judge's approach and the local rules of the court—as you compare the options you have across the different kinds of courts."

ANTITRUST

AGENCIES SHOW A NEW WILLINGNESS TO LITIGATE

Antitrust agencies are bringing more cases—and exacting big penalties.

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) do not always win in antitrust litigation, and the government, of course, has the burden of proof—but that has not stopped them from going to court. "The agencies have been trying more cases—and they're increasingly winning a lot of them," says Jason Murray, a partner in Crowell & Moring's Antitrust Group. "It's happening across industries—no sector is immune."

For example, last year, the DOJ filed suit to prevent Electrolux's $3.3 billion purchase of GE's appliance division, and sued four Michigan hospitals over their agreement not to advertise in each other's territories. In February 2015, the DOJ won a trial in district court after claiming that American Express's rules limiting merchants' promotion of other credit cards were anticompetitive. In September 2015, KYB Corp. agreed to plead guilty and pay a $62 million criminal fine for its role in a price-fixing conspiracy involving shock absorbers that were installed in numerous vehicles sold in the United States.

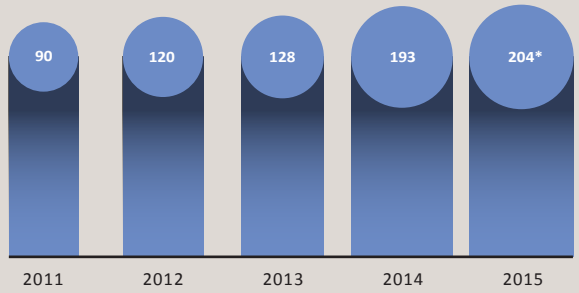
The FTC has also been increasingly active in court. In June 2015, the U.S. District Court for the District of Columbia granted an FTC request for a preliminary injunction blocking the proposed merger of Sysco and US Foods, prompting the companies to abandon the deal. Shortly before that, the Court of Appeals for the 11th Circuit upheld an FTC ruling that McWane, a supplier of iron pipe fittings, had maintained a monopoly by excluding competitors. FTC litigation even found its way to the Supreme Court: In *FTC v. North Carolina State Board of Dental Examiners,* the court ruled that the licensing board—which had been warning non-dentists to stop offering teeth-whitening services—was not protected by state action immunity and was therefore subject to FTC antitrust oversight.

"The fact is that the odds of actually going to court in an antitrust matter are higher than they have been in recent memory," says Murray. "When you're involved in merger reviews or investigations, you always evaluate whether you want to settle, but you need to be prepared to put them to the test in litigation. The agencies are clearly ready to litigate."

The government also is more willing to use disgorgement as a penalty for antitrust violations. Disgorgement has traditionally been an uncommon remedy in antitrust cases, but more recently it has come up in several cases. In early 2015, for example, the DOJ settled a suit with two New York City tour bus operators and their Twin America joint venture for $7.5 million, based on the gains made through anticompetitive behavior that led to price increases for consumers.

The FTC has also made significant use of disgorgement

FTC CASES AND PROCEEDINGS
(2011-2015)



* As of Dec. 15, 2015
Source: FTC Enforcement Cases and Proceedings Database

The FTC has been focusing on anticompetitive activity in recent years, which has led to a growing number of enforcement actions against companies.

"The agencies have been trying more cases—and they're increasingly winning a lot of them. It's happening across industries—no sector is immune." —*Jason Murray*

over the past year. Most notably, it reached a $1.2 billion disgorgement settlement with drug maker Cephalon for entering into a "reverse-payment" agreement in which Cephalon paid generic drug manufacturers to delay the release of a generic version of Cephalon's sleep-disorder treatment. The use of disgorgement represents a change in tactics for the FTC that many observers find troubling—including some at the FTC itself. In a statement on the *Cephalon* case, two FTC commissioners, referring to disgorgement, expressed "continuing concerns about the lack of guidance the commission has provided on the pursuit of this extraordinary remedy in competition cases."

"We're seeing that the agencies are not only more willing to go to court over antitrust issues, they're also willing to use a wider variety of tools from their litigation tool box—even controversial ones—in order to provide what they believe is relief for consumers," says Murray. That risk of litigation is not going to diminish anytime soon, he says. "Some FTC commissioners, and the chief economist at the FTC, have explained that they see the increased emphasis on litigation as an effective response to what they believe are a growing number of obstacles to consumer class action antitrust suits."

ROBINSON-PATMAN RETURNS

Disgorgement may not be the only area where seldom-used antitrust enforcement tactics are returning to the stage. In *Woodman's Food Market, Inc. v. The Clorox Co.*, Woodman's sued Clorox for violating the Robinson-Patman Act. Due to a change in its distribution model, Clorox had stopped selling bulk-size packages to Woodman's, while continuing to sell them to national stores such as Costco. Woodman's claimed that this was price discrimination based on package size, under sections 2(d) and 2(e) of the act. The Wisconsin Federal District Court refused to dismiss the case, and the issue was immediately appealed to the Seventh Circuit.

"There really hasn't been much litigation under Robinson-Patman for the last 10 years or more," says Murray. Moreover, he says, "this is the first time that a federal court has weighed in on this type of claim, and it could end up being one of the few times that the courts have expanded the scope of the act." If Woodman's wins, he adds, it could prompt more private litigation under Robinson-Patman.

THE ONGOING EVOLUTION OF PAY-FOR-DELAY

The U.S. Supreme Court's *Actavis* "pay-for-delay" ruling continues to play out, as state and federal courts try to understand and apply the Court's framework. For example, in the May 2015 *Cipro* ruling, the California Supreme Court said that pharmaceutical companies' pay-for-delay agreements can be considered unreasonable restraints of trade under state law. In addition, it laid out a structured rule-of-reason test with several clear steps for assessing when pay-for-delay settlements are anticompetitive. "It's a fairly detailed set of factors, and it addresses an area that *Actavis* had not addressed," says Crowell & Moring's Jason Murray. The *Cipro* ruling is likely to make it harder to defend pay-for-delay cases in California. In time, other state and federal courts may end up drawing on the California test as well because the structured rule-of-reason assessment provides a defined approach that can be easily replicated by other courts seeking to apply the *Actavis* framework.

Meanwhile, a Third Circuit appeals court ruling looked at the question of non-cash compensation in pay-for-delay agreements—another area left open by *Actavis*. That case—*In re Lamictal Direct Purchaser Antitrust Litigation*—involved an agreement in which Glaxo agreed to allow Teva to sell generic forms of Glaxo's Lamictal product before the patent had expired, and Glaxo agreed not to sell its own generic version of Lamictal. The appeals court said in June 2015 that *Actavis* does apply to such non-cash settlements, explaining that the agreement could be seen as an "unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer," raising the possibility that it was "a payment to eliminate the risk of competition."

Together, says Murray, "these two rulings can be expected to encourage plaintiffs' firms to pursue more of these pay-for-delay cases in both state and federal courts."

CLASS ACTIONS

BATTLING ON THE FRONT END OF LITIGATION

Today, a great deal of litigation is testing the validity of important defense tactics in class actions—and possibly reshaping courtroom strategies.

Over the past few years, many class action defendants have attempted to moot—or "pick off"—plaintiffs by offering to pay the maximum amount the plaintiff could recover. Whether the plaintiff accepts or not, the offer moots the individual claims and the class action—or so the theory goes. "One argument is that under the scheme of Federal Rule of Civil Procedure 68, the claims are mooted if the plaintiff fails to accept an offer of full relief. The other, more fundamental argument is that the plaintiff no longer has standing under Article III of the Constitution to pursue the case," says Steven Allison, a partner in Crowell & Moring's Class Action Group.

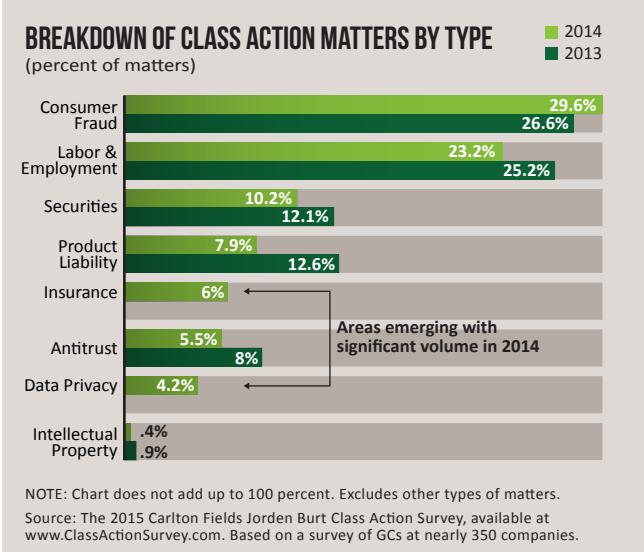
In cases where damages are set by law, the calculation of such offers is fairly straightforward. "If a plaintiff is offered enough to cover that maximum amount, they no longer have standing, because they have been offered everything that they're entitled to and they are not harmed," says Allison. "The plaintiff then arguably cannot serve as a class representative."

While companies that have to defend themselves in class actions find this argument appealing, not all courts see it that way. The Ninth and Eleventh Circuit Courts have ruled that such offers do not moot the class action claim. The Third, Fourth, and Sixth have said that they do. So too had the Seventh Circuit—but it reversed itself in *Chapman v. First Index* in August 2015, when it ruled that an unaccepted offer of judgment does not moot a class claim.

The issue has reached the U.S. Supreme Court in *Campbell-Ewald Co. v. Gomez*. In this case, the plaintiff received an unsolicited recruiting text message from Campbell-Ewald, a marketing company doing work for the U.S. Navy, and filed a putative class action under the Telephone Consumer Protection Act. The company offered a settlement of $1,500 (the maximum damages under the act) plus costs, but the plaintiff did not accept the offer. The trial court ruled in favor of the company, but the Ninth Circuit then reversed the decision, saying that an unaccepted settlement offer does not moot the class action claim.

"If the mooting of class plaintiffs is validated by the Supreme Court, it becomes a very powerful defense tool."

—*Steven Allison*



Consumer fraud and labor and employment still account for the lion's share of class action lawsuits, but courts are seeing a growing number of insurance and data privacy class actions.

"If the mooting of class plaintiffs is validated by the Supreme Court, it becomes a very powerful defense tool," says Allison. If not, this tool will not be available, although other uses of unaccepted Rule 68 offers, such as attacking the adequacy of the class representative, may still be available. Even if the Supreme Court does validate the practice, he says, "there will still be a lot of secondary litigation about whether an offer is full relief or not. In a lot of statutes that set damages, it's not clear what to do about attorneys' fees, for example. So you get into questions of how much someone was really harmed, and it can get tricky."

WHO'S IN, WHO'S OUT?

One of the most basic questions in a class action is who is in the class. And courts continue to struggle with the methods used to answer that question.

"The issue of ascertainability comes up a lot, especially in food and false advertising cases," says Allison. "If you're talking about a case involving a lot of low-price products, like cereal, people don't keep records of their purchases. So how can you know who legitimately belongs in the class?" One approach is to essentially have class members identify themselves through affidavits—and some courts have rejected that approach, while others have approved it.

The current focus on ascertainability has been driven in part by the Third Circuit's *Carrera v. Bayer Corp.* decision, which said that methods for determining ascertainability could not require "individualized fact-finding or mini-trials," as with signed affidavits, and needed to be "reliable and administratively feasible" and allow defendants their due process right to challenge class membership. Since then, says Allison, "there have been numerous challenges to the ascertainability of classes. And there has been a significant split among the various circuit courts on the issue." For example, recently in *Mullins v. Direct Digital, LLC*, the Seventh Circuit rejected the "heightened ascertainability" standard of *Carrera*.

Jones v. ConAgra Foods, Inc., a high-profile ascertainability case on appeal in the Ninth Circuit, bears watching, especially given the volume of false advertising and food-related litigation in that circuit. Here, the plaintiffs claimed that ConAgra used a variety of misleading labels for different canned tomato products over a six-year period, and suggested having class members identify themselves through sworn statements. The District Court rejected that approach, saying that people could not be expected to accurately recall all the ConAgra products they had purchased over the years and then remember which ones had which labels.

The Ninth Circuit's ruling in *Jones* will shed more light on ascertainability challenges, especially in a key jurisdiction. "But it would be one more indicator, not the final answer," says Allison. And if a split continues between key circuits, he says, "it's going to start a real battle to be in a favorable jurisdiction, and perhaps lead to something that the Supreme Court will decide to take up."

TCPA EXPOSURE INCREASES

For years, the Telephone Consumer Protection Act (TCPA), which prohibits companies from making unsolicited electronic contact with consumers, has been a key driver of class actions. And with recently revised FCC regulations, the act is likely to be the source of even more litigation.

In a July 2015 order, the FCC broadened TCPA liability for companies that contact consumers via phone, text, or fax. It also left a number of terms undefined and created gray areas that may make compliance difficult, says Crowell & Moring's Steven Allison. "The FCC order has made these TCPA class actions more likely, and more difficult to defend," he says. "Virtually every business that has any kind of affirmative phone or text outreach to customers will see increased exposure to TCPA class actions." For those companies, he says, "you absolutely have to have a robust TCPA compliance program in place, as you are a likely target."

ENVIRONMENTAL

ENERGY DEVELOPMENT PROJECTS FACE GROWING OPPOSITION

Environmental non-governmental organizations (ENGOs) are using every tool at their disposal to delay and block new energy development projects, says Kyle Parker, a partner in Crowell & Moring's Environment & Natural Resources Group who heads the firm's Anchorage office.

"From intense permitting and litigation challenges to aggressive lobbying and social media campaigns, ENGOs are forcing companies to defend their initiatives every step of the way. And they are teaming up to share information, resources, and tactics," says Parker.

An example of the intensifying pressure that energy companies are facing was seen in Royal Dutch Shell Plc's battle with environmental groups over oil and gas exploration drilling activities off the northwest coast of Alaska. In a near decade-long fight to block its exploration program, Shell had to overcome repeated ENGO regulatory and legal challenges under the Clean Air Act, Oil Pollution Act of 1990, Marine Mammal Protection Act, and the National Environment Policy Act, among others. Opposition was led by an alliance of nine national and Alaska-based environmental groups that included EarthJustice, the Sierra Club, and the Wilderness Society.

On three separate occasions, Shell overcame aggressive ENGO challenges initiated in multiple legal forums and secured required permits for its drilling programs only to have the project stymied by other challenges, such as President Obama's extension of the Gulf of Mexico drilling moratorium, which was imposed following the BP spill, to the Arctic (2010); unavailability of required equipment (2012); and, most recently—after safely completing its first Chukchi well since the early 1990s—falling oil prices.

The regulatory and legal issues Shell faced in pursuing the Chukchi Sea project underscore the significant risks associated with exploration activities undertaken by oil and gas companies—something the public often discounts. The company's experience also illustrates the tough challenges 2016 may hold for other energy companies seeking to move forward with pipelines, storage facilities, and other critical infrastructure throughout the United States.

Publicity resulting from challenges to high-profile energy projects—amplified by the reach and immediacy of social media—is proving to be an increasingly effective springboard for ENGO fundraising, Parker adds. "Their ability to coordinate

"The demand for new infrastructure is growing rapidly, but in community after community, these initiatives face fierce opposition." —*Kyle Parker*

CLEAN POWER PLAN: AN EPIC BATTLE AHEAD

A battle over the legality of the EPA's newly issued Clean Power Plan will be fought in the U.S. Court of Appeals for the D.C. Circuit during 2016 and, quite likely, eventually in the U.S. Supreme Court.

Since being published in the *Federal Register* last October, the plan has emerged as one of the most heavily litigated environmental regulations. As of early December, 28 judicial challenges had been filed in the D.C. Circuit seeking to block the plan. The challenges are led by four groups: utilities and rural electric cooperatives*; coal companies and the National Mining Association; the U.S. Chamber of Commerce and the National Association of Manufacturers; and a coalition of 24 states.

In addition, nine motions have been filed asking the D.C. Circuit to grant a stay to block the standards until litigation is resolved. A ruling on these motions is likely to occur in early January.

Following that ruling, a briefing on the merits of the case is expected to follow in the spring, with the D.C. Circuit making a decision on merits by the end of 2016. Should the case reach the Supreme Court—and many expect it will—the high court may not issue a ruling until 2017 or even 2018.

Critics of the Clean Power Plan call the move an illegal power grab. They argue that the existing Clean Air Act does not authorize a national mandate on greenhouse gases and that the president is overstepping his regulatory authority to impose sweeping changes without new legislation from Congress.

Critics also argue that the Clean Air Act already regulates power plants and prohibits the agency from writing a second rule that would cover a source that's already regulated. Another argument is the "fence line" dilemma: opponents question EPA's selection of three carbon-reducing measures to set state targets, because two of the measures—use of natural gas and zero-carbon energy—fall outside the fence line of a power plant and, therefore, beyond the scope of the EPA's Clean Air Act authority.

The Obama administration described its new plan as "fair and flexible" because it allows states to decide how best to reduce greenhouse gases. In court, the EPA will argue the act's language is ambiguous and that, because the agency has not regulated greenhouse gases previously, the new standards are lawful.

"Whether you are for or against it, it's legally risky," says Crowell & Moring's Kyle Parker. "It's a novel application of a rarely used provision of the act. It comes on the heels of a line of Supreme Court decisions that expressed skepticism about the scope of EPA's regulatory authority under the Clean Air Act."

* Crowell & Moring represents the National Rural Electric Cooperative Association in its legal battle against the rule.

and raise money has put ENGOs in a position where they have the resources to go after many more projects, even ones that may have longstanding environmental safety records."

At the same time, the recent boom in domestic oil and gas production has enhanced the nation's ability to meet its domestic energy demands, as well as created the opportunity to transform the U.S. into a leading exporter of finished petroleum products, natural gas liquids, and even crude oil. "The demand for new infrastructure is growing rapidly, but in community after community, these initiatives face fierce opposition," Parker says. "And the battles aren't limited to oil and coal. Now groups are fighting to stop gas pipelines and power transmission lines, as well as wind farms and solar arrays."

Heading into 2016, the energy industry should anticipate increased ENGO opposition to infrastructure development on multiple statutory and regulatory fronts, he notes, including:

- Permitting and litigation challenges to the construction of new natural gas pipelines and other infrastructure, including gas storage projects, proposed liquefied natural gas export terminals, and new gas-fired electric generation capacity.
- Actions seeking to compel federal agencies to account for alleged damage from oil and gas development, as well as putting sensitive lands off limits to development.
- Efforts to expand chemical disclosure rules and enforcement. In Wyoming, ENGOs are using court challenges to compel the state's oil and gas permitting agency to disclose the chemicals that are injected underground during fracking.
- Challenges to the development of gas storage facilities and lobbying efforts at the state level seeking to block the construction of such facilities based on potential environmental harm and adverse community impacts.
- Actions to leverage expanding wildlife protections to prevent or minimize development. As the scope of the Endangered Species Act broadens, ENGOs are likely to push for additional restrictions on energy development.
- Efforts to expand Clean Water Act jurisdiction. ENGOs may exploit ambiguities in the new definition of "waters of the United States" issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to bring citizen suits alleging Clean Water Act violations for discharges to areas that newly qualify as "waters of the United States."

"The common goal is to make it as complicated as possible to move forward with energy development," says Parker. "A delay is often a victory in the eyes of these groups."

GOVERNMENT CONTRACTS

MORE PROTESTS, NEW BATTLEGROUNDS

For federal contractors, protests against contract awards continue to be an increasingly familiar part of doing business—and if anything, those protests are becoming more vigorous.

"Government agency budgets continue to be constricted, and that is increasing the competition for available dollars," says Lorraine Campos, a partner in Crowell & Moring's Government Contracts Group. "Thus we've seen an uptick in the number of bid protests being entered by contractors." According to a report from the Congressional Research Service, total government spending (adjusted for inflation) fell 25 percent between 2008 and 2014, while the total number of protests increased 45 percent. What's more, an increasing percentage of those protests now appear to involve contracts awarded by civilian agencies. "While bid protests have traditionally tended to involve military contractors, we're now seeing more from commercial or civilian contractors," she says.

In some cases, contractors are becoming more involved in the government's handling of protests and proactively intervening in the proceedings. "In the past, the winning party would just sit back and let the government and the losing party duke it out," says Campos. "Now, winners are more likely to help the government develop its case, especially when there is a massive record involved."

Campos says that there are now more bid protests targeting multiple award schedules. Under these schedules, the General Services Administration (GSA) selects vendors and negotiates contract prices, terms, and conditions for routine items. Then, agencies simply select the items they need from a catalogue, using individual task orders under the overarching contract, thus avoiding the need to renegotiate every purchase. However, budgets have prompted some agencies to begin asking for competitive bids for task-order purchases, meaning that the vendors already approved under the main contract have to compete once again. The structure of bidding at that level naturally opens the door to more protests.

THE CHANGING PROTEST LANDSCAPE

The procuring agency, the U.S. Court of Federal Claims, and the U.S. Government Accountability Office (GAO) can hear

"While bid protests have traditionally tended to involve military contractors, we're now seeing more from commercial or civilian contractors." —*Lorraine Campos*

bid protests. However, for a variety of reasons, including the GAO's ability to stay the award of a contract, the GAO is often the forum of choice by contractors. Nevertheless, bid protests at the GAO are somewhat less likely to succeed today. From 2001 to 2008, the office sustained protests 22 percent of the time, according to the Congressional Research Service. By 2014, that sustain rate had dropped to 13 percent. Some of that decline may be due to agencies' willingness to take corrective action in response to protests, thereby resolving the issue before the GAO issues a decision. But the decline also suggests that fewer protests are succeeding on the merits.

For many contractors, losing a protest at the GAO is not the end of the story—and a growing number are finding that another venue is open to their arguments. "The U.S. Court of Federal Claims, which hears "appeals" of GAO decisions has the ability to revisit protests denied by the GAO—and the high-dollar, long-term awards are being vigorously protested there," says Campos. "This has effectively added an appellate process for unsuccessful protestors, giving them the proverbial second bite of the apple," she says. For contractors that win at the GAO, then, "it's important to understand that it may not be over, because the losing party could have an opportunity to bring issues regarding the agency's procurement activities up again at the court—and thus delay the contract award."

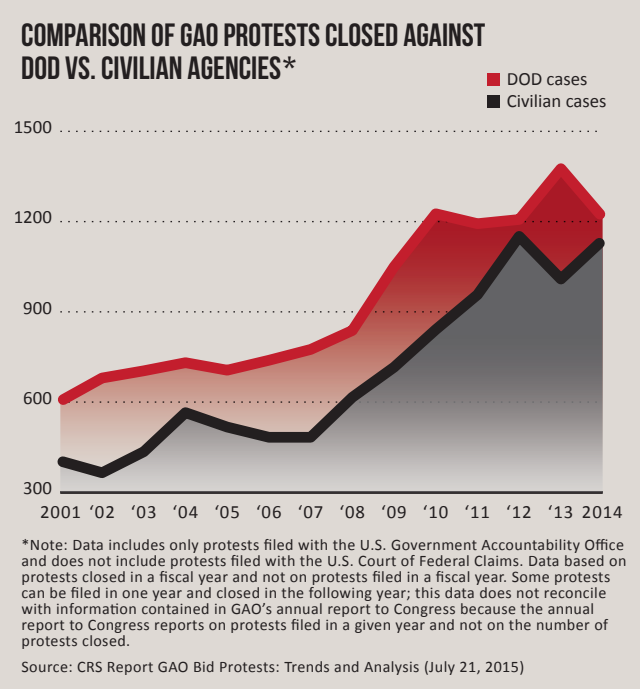
PROTESTS AS A DELAYING TACTIC

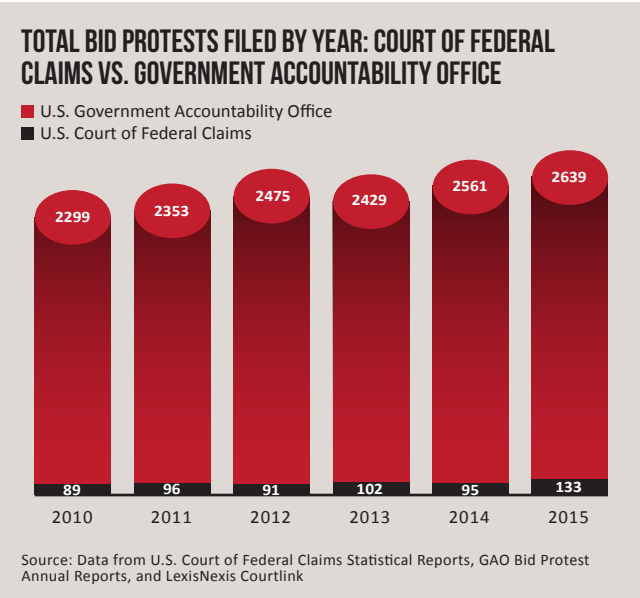
Whichever the venue, the growing competition for federal dollars is prompting some companies to go to great lengths to hold onto business—even if it's only a temporary gain. "A number of contractors appear to be using the bid protest as an intentional delaying mechanism," says Campos. Here, incumbent contractors are incentivized to file a protest even when they see little chance of winning.

"When a protest is filed at the GAO, in most cases a stay is issued and performance under the contract continues for the duration of the protest," says Campos. "So if an incumbent ultimately loses a contract award, by filing a protest with the GAO and obtaining a stay, the incumbent contractor will be granted several more months of performance during the pendency of the protest. So from their perspective, there is really nothing to lose—and significant profits to gain."

It is difficult to say with certainty how many protests are really just tactics for delay. But the issue is significant enough that in mid-2015 Congress raised it in the National Defense Authorization Act (NDAA) for 2016. The NDAA instructs the Department of Defense (DOD) to conduct a study to find out how protests and associated delays affect agency performance and how frequently protests are used simply to create delays.

Bid protests—and associated litigation—will continue to be a regular part of the government contracting landscape in the coming year. Agencies are still working with tight budgets, the intense competition for available dollars remains, and it seems clear that funding is not likely to increase in 2016. "This is an election year, and I doubt that budgets will be increased," Campos says. "So the number of bid protests, at the agency level, GAO, and the Court of Federal Claims, is likely to keep growing."





Top: Bid protests coming through the GAO continue to rise—and commercial contractors from outside the defense industry account for a growing percentage. *Above:* A significant number of contractors are appealing protests to the Court of Federal Claims.

INTELLECTUAL PROPERTY

TIME TO PLAY OFFENSE

When the number of patent litigation filings declined in 2014, after four years of sharp increases, it raised hopes that recent changes to patent practice instituted by Congress might, in fact, be working to stem the tide of frivolous district court lawsuits.

These changes included the creation of the Patent Trial and Appeal Board (PTAB) at the U.S. Patent and Trademark Office (USPTO).

But the numbers went back up in 2015, based on a surge of filings by non-practicing entities (NPEs), and these filings were on pace to set a new record by year's end.

NPEs are not the only ones getting in on the action. Recently, more traditional patent owners have been instituting patent litigation more frequently as they seek to maximize profits from their patent portfolios. "Even for companies that have acquired patents for the purpose of using them defensively—i.e., to keep from getting sued—there's a pressure to monetize those assets as much as possible," says Michael Jacobs, vice-chair of Crowell & Moring's Intellectual Property Group. "Many of these companies have spent millions developing these portfolios, and there's an increasing sense that they should look toward playing more offense."

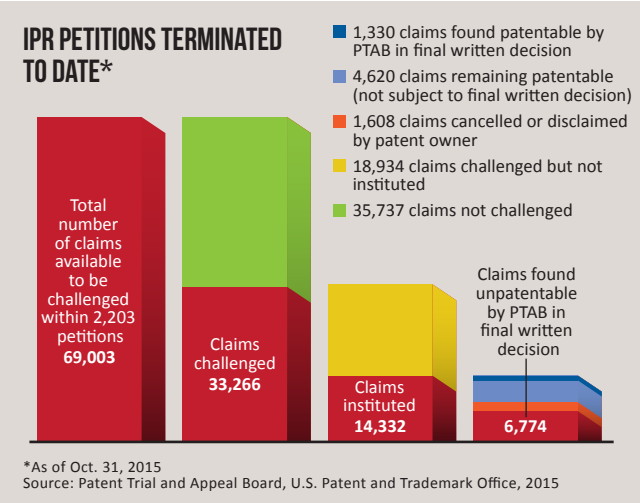
With an increasing caseload, says Jacobs, both the PTAB and the federal courts will continue to adjust how to best handle patent disputes as they strive for that elusive balance between encouraging innovation by protecting patent rights while discouraging abuses of the patent system.

PTAB: STILL IN FLUX

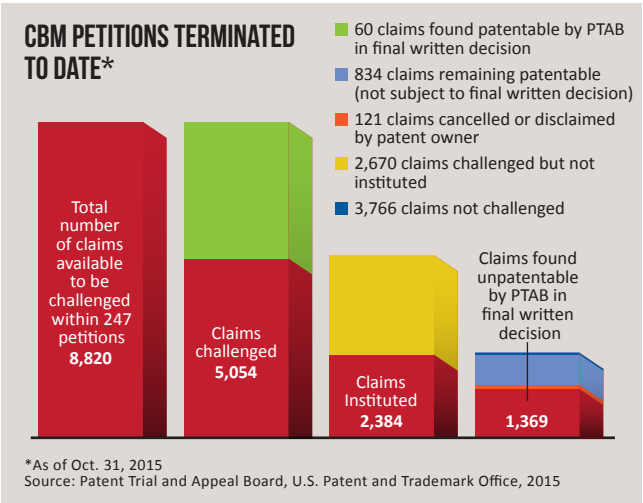
After three full years of *inter partes* reviews (IPRs) at the PTAB, many questions regarding how the new venue for challenging patents would operate have been settled. Still some issues remain in flux. Jacobs, who has handled many cases before the PTAB and its predecessor (the Board of Patent Appeals and Interferences), says its judges have held firm to the promise of limited discovery in IPRs consistent with the PTAB's mission of being cheaper and quicker than district court litigation.

In recent months, however, the PTAB has shown a greater willingness to allow patent holders to amend their patent

"Even for companies that have acquired patents for the purpose of using them defensively, there's a pressure to monetize those assets as much as possible." —*Michael Jacobs*



Of the claims to be challenged through IPR petitions, nearly half—48.2%—were challenged, and 43% of those claims were instituted. The PTAB found 47.3% of those to be unpatentable.



Of the claims to be challenged through CBM (covered business method) petitions, 57.3% were challenged and 47% of those were instituted. The PTAB found 5.4% of those to be unpatentable.

claims in IPRs—and therefore make them more likely to withstand challenges. While the PTAB has still only granted a patent holder's motion to amend a handful of times in its three-year history, it did indicate in two 2015 decisions that it might be lowering the bar.

That easing of restrictions on claim amendments may be in response to criticism that the PTAB has been too hard on patent holders, Jacobs says. For example, in a 2013 speech, Randall Rader, then-chief judge of the U.S. Court of Appeals for the Federal Circuit, referred to the PTAB as a "death squad" for patents.

Jacobs believes the criticism is not entirely fair and suggests that it may be partly the result of the PTAB's record of overturning software patents. He points out that both the PTAB and federal courts are more likely to reject software patents under the new patent-eligibility standards set by the U.S. Supreme Court in its 2014 *Alice v. CLS Bank* decision.

In June 2015, the Federal Circuit for the first time reversed a PTAB ruling in an IPR that a claim was unpatentable, but it has generally given PTAB judges broad deference. Jacobs predicts that this is likely to continue.

THE COURTS: LETTING PTAB HAVE ITS SAY

According to the USPTO, between 80 and 90 percent of the IPRs before the PTAB are directed to patents involved in litigation in U.S. district courts. In fact, it is a common defense strategy for a party accused of infringement to file a petition for an IPR in an effort to have the disputed patent overturned, says Jacobs. USPTO statistics indicate that in more than half of all cases, district court judges grant a stay to let the PTAB make its ruling on patentability first.

Whether district court litigation is stayed by the district court judge pending the outcome of the PTAB review depends on several factors, including where the suit has been filed, Jacobs says. If the litigation has been filed in a district that is known for maintaining a speedy pace, such as the Eastern District of Virginia, a stay may be less likely than in districts with longer timelines.

The impact of some recent amendments to the Federal Rules of Civil Procedure (effective on December 1, 2015) could help streamline the patent litigation process, as will likely become clearer this year, Jacobs notes. One amendment is aimed at reducing the costs and duration of complex litigation by requiring the court and litigants to consider "proportionality" when deciding the permissible scope of discovery.

Another amendment eliminates complaints based on Form 18 in the Federal Rules, which has effectively allowed patent-owner plaintiffs to file complaints that provide little specificity to defendants. Jacobs, who represents both defendants and plaintiffs in patent cases, says that enhanced pleading requirements are a welcome development.

"IP litigation is among the most complex and costly types of litigation," he says. "If you're going to bring suit, you need to at least have done your homework first. Getting rid of Form 18 is a great start in that regard."

LABOR AND EMPLOYMENT

NEW CHALLENGES IN DISABILITY AND EXEMPT STATUS

Increasingly vigorous enforcement by government agencies is creating gray areas in labor and employment law, raising difficult compliance questions and opening the door to more litigation.

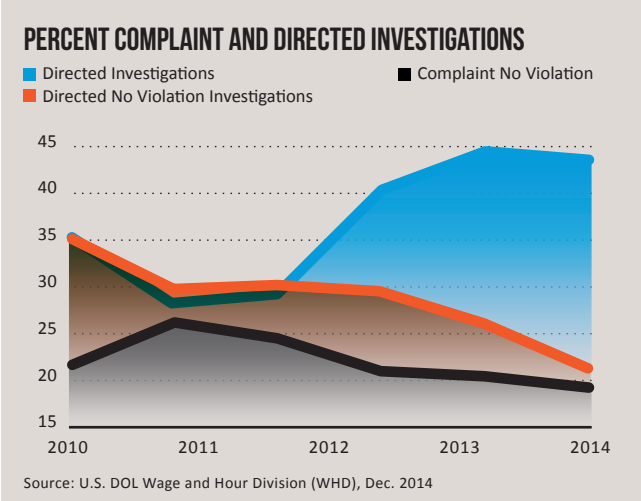
The Equal Employment Opportunity Commission (EEOC) has been more aggressive about bringing its own lawsuits, as well as supporting private party cases, to enforce the Americans with Disabilities Act (ADA). Some of these suits challenge fairly widespread practices maintained by sophisticated employers. At the same time, "the rules are getting more complex and murky, as EEOC regulations and evolving case law expand the definition of who's disabled and what kind of conditions have to be accommodated," says Thomas Gies, a Labor & Employment Group partner at Crowell & Moring.

In June 2015, the situation became even more complicated, with the U.S. Supreme Court's ruling in *Young v. United Parcel Service Inc.* UPS had been sued by a pregnant worker who said that the company had violated the ADA by failing to accommodate her pregnancy-related work limitations, while it had accommodated other employees who had similar work restrictions imposed by their physicians. The Fourth Circuit said that the employee had no right to sue, but the Supreme Court disagreed, holding that the employee had the right to pursue her claim.

"In practice, this raises the possibility that pregnancy needs to be regarded by employers as a disability," says Gies. "Any time you've got a Supreme Court decision that further complicates employer compliance, it almost always leads to additional litigation."

The increasingly broad definition of disability can make compliance difficult for even the most thoughtful employers. "Companies understand how to accommodate an employee in a wheelchair," says Gies. "But when an employee has a mental illness, how do you accommodate him or her? These issues are hard to deal with." The law, he adds, says that employers must provide a reasonable accommodation for a person's disability, but not if it creates an undue burden for the employer. "The question is, what is reasonable? What's an undue burden?" he says. "So you see those issues being volleyed back and forth—and the answers are often found in expensive court cases."

"Any time you've got a Supreme Court decision that further complicates employer compliance, it almost always leads to additional litigation." —*Thomas Gies*



The DOL has been pursuing more of its own wage and hour investigations. These investigations have also become less likely to determine that no violations have taken place.

EXPANDING OVERTIME ELIGIBILITY

Wage and hour litigation has increased in recent years to the point where such cases account for more filings in federal courts than all other types of labor and employment claims combined. And, says Gies, "we may see another spike in those cases in the coming year or two."

The reason? The Department of Labor's (DOL) proposed new rules defining "exempt employees" who receive a salary and aren't entitled to overtime pay under the Fair Labor Standards Act (FLSA). One key change affects the minimum salary level required for exemption. For years, the rules have said that in order to be exempt, employees must make at least $455 a week, or $23,660 a year for a full-time employee. The new rule will raise that to $970 per week, or $50,440 per year, starting sometime in 2016. "The department is more than doubling the amount of salary that one has to make in order to be properly classified as exempt," says Gies. "Most estimates say that there are between 5 million and 10 million such employees who are currently classified as exempt but who don't meet that minimum." That means companies will find that numerous salaried employees now need to be paid overtime if their salaries are not increased to match the new minimum.

What's more, complying with the FLSA's overtime pay requirements is not always simple, particularly for white collar employees working in a variety of industries. The traditional line between work life and personal life is often blurry, thus raising new questions about the definition of "work." For example, if an employee calls or texts a customer from home on a weekend, those few minutes may count as time worked for which overtime pay may be required. "So we have a law that's been on the books since the New Deal that doesn't really apply well to the changing nature of today's work environment," says Gies. "It's very difficult to set up all the record keeping required and account for all that."

EMPLOYEES TAP INTO WHISTLE-BLOWER REGULATIONS

Today, it's increasingly common for employees who run into problems at work to cite the law—not antidiscrimination law, but rather whistleblower protections, says Crowell & Moring's Thomas Gies. "We're seeing a lot of cases where employees who are disgruntled for one reason or another say that they are in trouble at work because they are whistleblowers who were critical of the boss or the company," he says. "The way that the regulations are written makes it fairly easy to make that claim."

Whistleblower regulations are affecting employers in other ways as well. In April 2015, the Securities and Exchange Commission (SEC) entered into a consent decree with a large engineering firm that agreed to pay a fine for insisting that employees sign a confidentiality agreement that limited what they could say to third parties, including government enforcement agencies, about a pending internal investigation. "This really wasn't a problem with employee reporting of financial irregularities, but the SEC decided the agreement would have a 'chilling effect' on future whistleblowers," says Gies. Overall, he adds, "this was a situation where the SEC became involved in an employment matter, which is something that sends shockwaves through most public companies."

The new rules are also likely to change the DOL's longstanding "primary duties test," another factor used to determine exempt status. Previously, a company had to demonstrate that an employee's primary duty was exempt. For employees in first-level managerial positions, this has meant that the most important thing he or she did was supervise and manage others. "So, a fast-food manager may make French fries at times, but it's incidental to their job, which is managing," says Gies. Under current rules, those managers *may* be properly classified as exempt.

Now, the DOL is likely to require a numerical test to determine whether the employee is engaged in exempt duties—much like California, which requires that at least 50 percent of the work performed involve exempt managerial tasks. "You'll actually have to put a stop watch on employees sometimes," says Gies. "And if that fast-food manager is making French fries 48 percent of the time, that's way too close to the line." Here again, a great many currently exempt employees would no longer meet the test for exemption, with millions more individuals being added to the millions affected by the salary-level test.

Although the details of the final rules are not set, it is clear that companies will need to rethink their approaches to exempt employees—and often go to court to resolve the issue. "The last time they changed these regulations was a decade ago, and there was a flood of misclassification litigation that followed," says Gies. "I think we're going to see that pattern emerge again with these changes."

TORTS

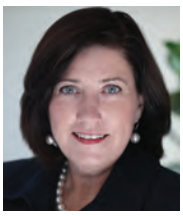
NEW TECHNOLOGIES RESHAPE PRODUCT LIABILITY

The Internet of Things (IoT) links a variety of devices to the network, from household appliances to automobiles, and it is opening the door to a range of new products—and new litigation risks.

"A trend to watch in the coming year is the growth of technology-based products and possible litigation risks, including both potential privacy and product liability claims," says Cheryl Falvey, co-chair of Crowell & Moring's Advertising & Product Risk Management Group and former general counsel of the Consumer Product Safety Commission (CPSC). Products are becoming smart and interconnected, she says, "and these developments are raising questions about how the new technologies fit into the more traditional product liability laws."

One of those questions is what constitutes a product defect in this interconnected world. Traditionally, defects have to be linked to some actual harm in order for lawsuits to proceed in federal courts. But now, says Falvey, plaintiffs are filing tort cases involving connected technology-based products where there is only the potential for harm, rather than actual injury. "These might involve a product that you thought was going to give you a certain functionality but didn't work exactly as expected, though no real harm resulted," she says. "So is that enough to meet the Article III constitutional requirement for standing?" Under the governing law, that answer should be no because no injury has occurred.

Another key area of concern is security, because the IoT involves a variety of devices on an open network. "With a home automation system, for example, someone might be able to hack into the system and affect the functionality of anything from your automatic garage door opener to your home heating system. In addition to wreaking havoc with these systems, the hacker might steal data collected by these home systems or the phone through which they are operated," says Falvey. As these products proliferate, plaintiffs are likely to bring more lawsuits around those types of problems, where the claim is based not on an actual attack's taking place, but the mere possibility that such an event might occur. "The heart of this issue is whether the case needs to truly involve a defect that led to harm, or if there is just a vulnerability that could lead to harm in the future," she says. As she explains, "the tech world is used to rolling out fixes and patches to vulnerabilities well



"The heart of this issue is whether the case needs to truly involve a defect that led to harm, or if there is just a vulnerability that could lead to harm in the future." —*Cheryl Falvey*

before any defect manifests, and yet product liability law tends to take a more static and less fluid view of product design over time. But an interconnected technology system is constantly evolving and changing, as new products are brought online and software is updated remotely. The product design and functionality constantly evolve, and whether the legal principles can evolve as well is something we are watching."

A case currently before the U.S. Supreme Court, *Spokeo v. Robins*, may provide more insight into the question of standing. *Spokeo* is a Fair Credit Reporting Act case, but its outcome on the question of standing could have an impact on product liability, privacy breach, and other tort litigation. In this case, the plaintiff claimed that Spokeo, a data aggregator that provides information about individuals on its website, had included inaccurate information about the plaintiff and had therefore violated the federal act. Spokeo argued that there was no injury, so the plaintiff had no standing. "The Court is addressing the question of whether a plaintiff who suffered no concrete injury can participate in litigating a case on the theory that they feel like their information is potentially being used in a way that they don't like," says Falvey. The Ninth Circuit ruled in favor of the plaintiff. If the Supreme Court affirms that ruling, Falvey says, "you can see how that could open up a whole host of no-injury claims premised upon alleged statutory consumer protection violations. In such cases, actual harm should be a hard floor to meet the injury requirement."

THE CHANGING ROLE OF PRIMARY JURISDICTION AND PREEMPTION

Preemption continues to be an important defense in tort litigation, and it is likely to play a role in the litigation that is emerging around the IoT. The primary jurisdiction doctrine gives courts the opportunity to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue being considered by an administrative agency. Referring to the home automation example, Falvey says, "if your phone and your garage door can be hacked, might that not fall under the responsibility of the Consumer Product Safety Commission as a regulator to decide whether the product is defective? Should the Commission be ensuring that products don't have a defect or mandating recalls, and should the courts defer to the federal agency in that area?"

Preemption often comes up in food labeling cases, where plaintiffs make claims about issues such as mislabeled "healthy products" or failure to mention the presence of genetically modified ingredients. In the past, courts have often stayed such cases in order to give the Food and Drug Administration (FDA) a chance to address labeling issues covered by existing or pending FDA regulations. Recently, however, some courts have decided not to wait. "Because the FDA hasn't acted, the courts have allowed states to move ahead with labeling laws, and plaintiffs to move ahead with labeling claims, based on those theories," says Falvey. Unless the regulator signals an intention to act—something the FDA finally did on "natural" claims by taking up a petition to address that issue in November—courts will continue to work the cases on their dockets.

Cases based on new connected technologies may fare better with preemption arguments because regulators may be more likely to weigh in. In general, federal agencies are focused on cybersecurity, and that could put new technology-enabled products in their sights. In addition, says Falvey, "with cars becoming more automated, the National Highway Traffic Safety Administration (NHTSA) is very interested and has issued detailed guidance on how systems in cars should be interconnected and operate. And in a recent product liability case involving airplane parts, the Federal Aviation Administration (FAA) wrote to the court in support of preemption, saying that aircraft design and certification are pervasively regulated by the FAA." Overall, she says, "it will be important to watch this evolving intersection of litigation and regulation."

NEW RISKS ON THE HORIZON

It is always difficult to predict the future. However, says Crowell & Moring's Cheryl Falvey, "by tracking the activities of federal agencies, states' attorneys general, and non-governmental organizations, it is possible to identify some key areas of emerging tort risk." These include:

E-CIGARETTES, LIQUID NICOTINETTES, AND LIQUID NICOTINE

In 2015, the FDA called for data, research, and comments to support regulatory action. "FDA regulations are expected to focus on childproof packaging and warning labels, as well as potentially tougher standards for advertising," says Falvey. Meanwhile, pending legislation in several states aims to tax these as tobacco products, which will require stricter packaging and labeling.

MICROBEADS

The Microbeads-Free Water Act of 2015 passed on December 23, 2015, the last day of the legislative year. Companies will have to stop using microbeads in their products by July 2017. The federal law preempts the laws in eight states that had already banned microbeads. A large number of manufacturers have stopped or plan to stop using them. And the National Institutes of Health recently awarded a $3.6 million grant for further research into the material.

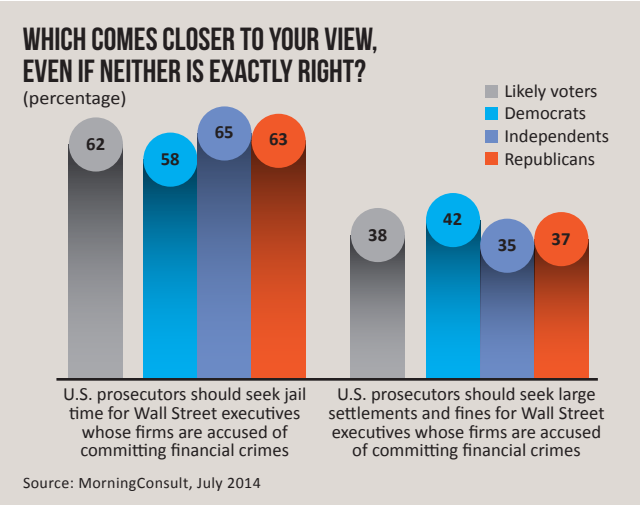
SYNTHETIC TURF

Health advocates are increasingly concerned about the safety of recycled tires (crumb rubber) in the artificial turf used in stadiums and playgrounds. Both the CPSC and the EPA have retreated from their past assurances about the material's safety, citing the limited nature of studies. In September 2015, Yale University reported finding a variety of chemicals in such products, many of which have no history of official government testing.

WHITE COLLAR

THIS TIME, IT'S PERSONAL

Last September, a memo by Deputy Attorney General Sally Yates sent shock waves through executive suites around the country.



Public sentiment may be contributing to a new emphasis on criminal convictions over fines by the Department of Justice, according to an online poll or registered voters conducted by MorningConsult, a Washington, DC-based technology and media company.

The memo stated that companies facing prosecution that want credit for cooperation must turn over evidence of wrongdoing by specific individuals. Previously, companies could get credit for disclosing improper practices without identifying individuals. The new policy makes clear that providing complete information about individuals' involvement in wrongdoing is a threshold that must be crossed before the government will consider any cooperation credit.

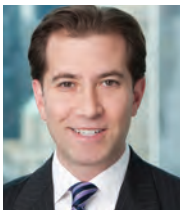
Seven years after the financial crisis, the Obama administration appears to be reacting to criticism that it had coddled Wall Street executives by largely declining to prosecute senior bank officials, even as it imposed billions in fines for misconduct. Whether the new guidelines will result in a parade of executives heading to prison remains to be seen. What's more certain is that the guidelines will raise the stakes in investigations and settlement talks and present new dilemmas for companies.

The memo also stated that prosecutors should focus on individuals from the outset of the investigation and that, in most cases, prosecutors will not shield individuals from criminal exposure when resolving a matter with a corporation. Companies that receive credit for cooperation can save billions in fines and potentially avoid the criminal charges that can spur corporate collapse. But "with the bar for cooperation set so high, some companies will inevitably decide not to cooperate at all and litigate the case in court rather than spend so much time and effort in an internal investigation that could ultimately send their executives to jail," says Daniel Zelenko, a partner in Crowell & Moring's White Collar & Regulatory Enforcement Group and a former federal prosecutor with the Antitrust Division of the U.S. Department of Justice (DOJ) and former branch chief at the Securities and Exchange Commission's (SEC) Enforcement Division.

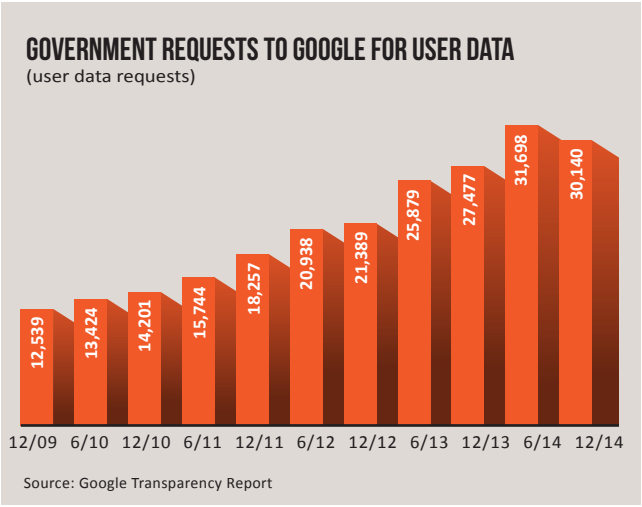
MAKING A CASE

Prosecutors will still find it challenging to send executives to prison, Zelenko says. They must prove the knowledge of and intent to carry out a criminal act, and it's unclear whether the DOJ will dedicate the extra manpower needed to make these cases. It's also unclear how far the DOJ will go to pursue executives who are foreign citizens or who are based in other countries—cases that bring their own complications.

Nonetheless, "general counsel facing an investigation must grapple with a new dilemma," Zelenko says. "How much do you want to protect your company against fines



"Some companies will decide to litigate rather than spend so much time and effort in an internal investigation that could send their executives to jail." —*Daniel Zelenko*



Growing government requests from companies for personal data has sparked concerns that the "third-party doctrine" is enabling privacy invasion.

and criminal charges, and how much do you want to demonstrate that your company is a place where employees' rights are protected? Companies that appear too eager to turn over evidence against their own employees risk challenges in attracting and retaining employees."

One way a company could signal respect for its employees' rights is through a Directors & Officers insurance policy, which covers attorneys' fees for cases involving civil or criminal conduct occurring within the scope of employment. While most large companies have such policies, they may wish to bolster them through increasing coverage limits or expanding coverage to former employees, Zelenko says.

Another way to signal respect for employees' rights is through internal policy: companies that discipline employees who refuse to talk with regulators may want to rethink that approach. In any case, companies will still face a tough choice. They could encourage employees to retain experienced counsel at the beginning of the internal investigation. But those employees may be advised not to cooperate in an internal investigation, which would help the company receive cooperation credit from prosecutors. "In 2016, counsel can expect a lot more tension around the negotiating table," Zelenko concludes.

OTHER ISSUES TO WATCH

ELECTRONIC SEARCH AND SEIZURE

This may be the year the Supreme Court takes up the "third-party doctrine," which says there is no reasonable expectation of privacy in information voluntarily conveyed to a third party. In 2012, Justice Sonia Sotomayor joined many legal experts when she suggested that the doctrine should be reconsidered given the reams of personal data citizens now routinely convey through digital devices. If the Court overturns the doctrine, then the government may need a search warrant—and not just a subpoena—to demand personal information that companies store on behalf of their customers.

INSIDER TRADING

A 2014 ruling by the Second Circuit, *United States v. Newman*, upended more than 30 years of legal precedent by establishing that the government must show that a tipper has received a benefit "of some consequence"—not just a casual friendship, for example—in return for the tip. The ruling significantly narrows the definition of insider trading on which courts and prosecutors rely. Last October, the Supreme Court denied the DOJ's petition to review the ruling.

SEC FORUM SELECTION

It's clear why the SEC prefers to handle cases through its in-house administrative law judge: an analysis by *The Wall Street Journal* found that these judges were more likely to rule against defendants than were federal district judges. But by mid-2015, two federal judges in separate cases found that the SEC had not appointed its judges in a constitutional manner. As more defendants cite these rulings, "it will be a complicating factor for the SEC," and it may ultimately force changes in how the judges are appointed, Crowell & Moring's Daniel Zelenko says. (For more on administrative law judges at the SEC and elsewhere, see White Collar, page 44, in the 2016 Crowell & Moring *Regulatory Forecast*.)

HEALTH CARE

BIG CHANGES MAY OPEN THE DOOR FOR PLAINTIFFS

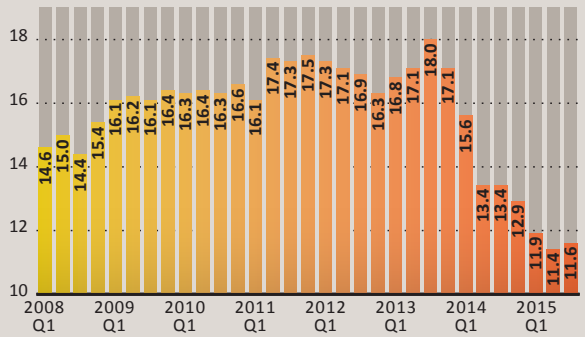
Sweeping changes in the health care sector could spark new litigation in 2016, says Jennifer Romano, a Crowell & Moring partner and a member of the firm's Commercial Litigation and Health Care groups.

As the industry continues to deal with the False Claims Act, disputes between states and managed care contractors, and disputes between health plans and both their customers and their provider networks, Romano sees at least three trends that could contribute to an uptick in lawsuits, especially class actions. First, the Supreme Court's 2015 *King v. Burwell* decision—which upheld federal tax credits through the Affordable Care Act (ACA)—means the ACA is here to stay. As a result, millions more people will have health coverage. And that, Romano says, means there will be many millions more potential individual plaintiffs, with more potential claims. Ever-increasing regulation from federal and state governments means new causes of action through which to bring these claims.

Also, significant mergers are underway among some of the country's biggest health plans. While it is unclear what the proposed mergers mean for new litigation in 2016, Romano notes that "the plaintiffs' bar is paying more and more attention to the health care industry and looking for targets. Increasingly, they see it as an area ripe for class action suits."

Another area is data privacy, which is regulated by the federal Health Insurance Portability and Accountability Act (HIPAA) statute but also, increasingly, under myriad state laws. Health care companies big and small are finding themselves victims of cyberattacks. Many experts are saying if you have valuable health care information about individuals, it is not whether you will be attacked, but when. A cyberattack on a health care company can bring tough regulatory action as well as private claims of negligence, unfair business practices, or statutory violations. "Health care companies are attacked once by criminals and then again as they have to defend against a wave of lawsuits and regulatory actions," Romano notes.

PERCENTAGE UNINSURED IN THE U.S. BY QUARTER



Source: Gallup

The percentage of uninsured Americans has dropped sharply since the ACA health insurance requirement took effect in early 2014.

TYPE OF HEALTH INSURANCE IN THE U.S.
(among 18-64 year olds)

	4th Q 2013 %	4th Q 2015 %	Net change (pct. pts.)
Current or former employer	44.2	43.0	-1.2
Plan fully paid for by self or family member	17.6	21.2	3.6
Medicaid	6.9	9.3	2.4
Medicare	6.1	7.4	1.3
Military/Veteran's	4.6	4.6	0.0
A union	2.5	2.7	0.2
(Something else)	3.5	4.6	1.1
No insurance	20.8	14.2	-6.6

Source: Gallup

More Americans are covered through Medicaid, Medicare, and individually purchased plans. The percentage covered through employer plans has dropped slightly.

Romano says she expects to see more attacks on health plans' processes, procedures, and disclosures, including reimbursement practices. For example, a group filing suit on behalf of New Jersey chiropractors recently obtained class action certification for its complaint alleging that one health plan's reimbursement practices for out-of-network claims were inconsistent with plan contract language.

"Health care companies will continue to get hit from all sides," says Romano. "When an industry is undergoing so much change, some in the plaintiffs' bar see opportunity."

"The plaintiffs' bar is paying more and more attention to the health care industry and looking for targets. Increasingly, they see it as an area ripe for class action suits." —*Jennifer Romano*

PRIVACY AND CYBERSECURITY

DATA BREACHES: OPENING THE FLOODGATES FOR THE PLAINTIFFS' BAR

Corporate information systems are being targeted by criminals, hactivists, employees, and even nations. As these attackers expand their efforts, breaches—and litigation—continue to rise.

"Companies with personal data or trade secrets are under persistent and relentless attack," says Crowell & Moring partner Jeffrey Poston, co-chair of the firm's Privacy & Cybersecurity Practice. No industry is immune. From retailers to auto manufacturers to financial institutions, U.S. and global companies are in the crosshairs. Government agencies have also experienced breaches.

Even university systems are a focus of cyberthieves. "Universities are often a goldmine of valuable data," says Poston. "They have personal information about students and employees, health information if they have medical facilities, and trade secrets and technical data if they do R&D."

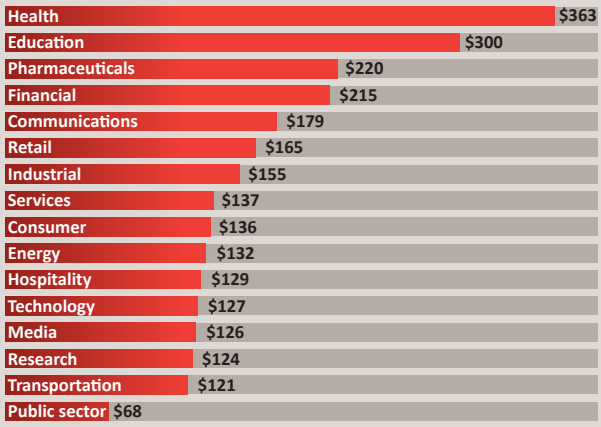
Across industries, such breaches are leading to more litigation. "The plaintiffs' bar is very active in this area," says Poston. "And because breaches can involve the personal information of thousands or millions of people, we are likely to see even more class action lawsuits filed in the coming year." Significant breaches can also attract the attention of both federal and state regulators, as agencies show increased interest in cybersecurity and the protection of consumer information. These lawsuits are not limited to incidents targeting consumer data. With the rise of the Internet of Things, intrusions into an array of devices are giving rise to lawsuits alleging negligence and product liability claims.

The growing number of highly publicized breaches is also giving plaintiffs another tool in litigation. "If other companies in your industry have been attacked and then you have a breach, there is surely going to be a plaintiff's line of inquiry asking what, if anything, you did when you heard about your competitor being hacked five months ago," says Poston. "Have you implemented any of the lessons learned from the previous attack in your own organization? Already, class actions in this space reference prior incidents, such as the breaches at Sony, even though the company being sued wasn't involved in those incidents."

In this environment, companies need to ensure that they have effective security policies that not only meet regulatory requirements but also acknowledge the current state of threats. At the same time, they need to prepare for the worst, with an incident response plan that anticipates these attacks and plans for the investigation, protection of customers and the company, and remediation efforts that need to follow a data breach or cyber incident. The incident response plan should be supplemented with tabletop exercises to develop an organization's "muscle memory." "This will be an ongoing threat," says Poston. "Compliance and incident response teams should be meeting now to prepare for what may come."

"Because breaches can involve the personal information of thousands or millions of people, we are likely to see even more class action lawsuits filed in the coming year." —*Jeffrey Poston*

PER CAPITA COST BY INDUSTRY CLASSIFICATION
(consolidated view (n=350), measured in dollars)



Source: 2015 Cost of Data Breach Study: Global Analysis, Ponemon Institute/IBM

With information systems across industries under relentless attack, data breaches can be very costly for the companies that are hit.

INSURANCE

INTERPLAY: COURTS AND ARBITRATION PANELS

Despite more than half a century passing since their enactment, the parameters of the grounds for vacating arbitration awards set forth in Section 10 of the Federal Arbitration Act (FAA) remain elusive. Corruption, fraud, "undue means," "evident partiality," misconduct in refusing to hear pertinent evidence, and a check on the arbitrators' "powers" underpin the vacatur grounds in Section 10. Yet litigants are often left to wonder exactly how courts will apply each of these factors to the particular circumstances leading to a challenged arbitration award. While Congress designed Section 10 to preserve due process in arbitration, the cases that followed seemed driven by courts' hesitation to intrude into the arena of private dispute resolution.

"While *First State* illustrates the First Circuit's deference to the arbitration process, *First State* should not be read as providing arbitrators carte blanche to resolve disputes." —*Harry Cohen*

THE "PAYMENT PROTOCOL"

The First Circuit U.S. Court of Appeals, in *First State Insurance Co. v. National Casualty Co.*, recently shed light on the application of Section 10, specifically addressing the power of an arbitration panel to issue equitable relief when "interpreting" the underlying reinsurance agreement at issue. In *First State*, the arbitration panel included in its award a "payment protocol" that governed the reinsurer's obligation to pay claims on a going-forward basis. The reinsurer sought to vacate on the basis that the panel had exceeded its powers by effectively rewriting the parties' reinsurance agreement to contain terms to which the parties never agreed.

Focusing on the arbitration panel's inherent authority to "interpret" the underlying contract, the First Circuit rejected the reinsurer's argument. The Court framed the sole inquiry as "whether the arbitrators 'even arguably' construed the underlying agreements and, thus, acted within the scope of their contractually delineated powers." The Court explained that "as long as an arbitration award 'draw[s] its essence' from the underlying agreement, it will withstand judicial review—and it does not matter how 'good, bad, or ugly' the match between the contract and the terms of the award may be."

Indeed, the Court expressed indifference to whether the result was reasonable, equitable, or objectively appropriate, clarifying that "whether the arbitrators were [in fact] correct either in their interpretation of the underlying agreements or in their implementation of a particular payment protocol is not within our purview."

"While *First State* illustrates the First Circuit's deference to the arbitration process, *First State* should not be read as providing arbitrators carte blanche to resolve disputes," says Harry Cohen, a partner in Crowell & Moring's Insurance/Reinsurance Group. As the U.S. Supreme Court made clear in *Stolt-Nielsen v. Animal Feeds International Corp.*, courts will vacate arbitration awards when "arbitrators stray…from interpretation and application of the agreement and effectively dispense their 'own brand of industrial justice.'" Just such a scenario occurred in, for example, *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda Ltd.*, where the Third Circuit vacated an arbitration award as exceeding the panel's authority because the parties' reinsurance contract "require[d] the enforcement" and did not permit the "elimination" of its provisions.

"In the coming year, we expect to see continued deference by the courts to the interpretive powers of arbitrators as courts work to balance litigants' rights under FAA Section 10 with their decisions to employ a private means of resolving disputes," says Cohen. "Where that balance is struck," Cohen adds, "will depend on the particular issues, facts, and circumstances and, to some extent, on the manner in which the arbitrators express the results they reach."

TAX

WHAT GOES AROUND...

This could be a banner year for companies seeking to overturn burdensome tax regulation, thanks to a landmark ruling by the U.S. Tax Court.

Last July, in *Altera v. Comm'r*, the court confirmed that the Department of the Treasury must engage in reasoned decision-making under the Administrative Procedure Act (APA) when promulgating tax regulations—the first time that particular test has been applied to tax rules. The decision opens up an avenue for challenging IRS regulations for which the agency hadn't sufficiently explained its position at the time of the rulemaking.

"Every case involving a regulation that hurts you will include an investigation as to whether Treasury engaged in proper rulemaking," says David Fischer, a partner in Crowell & Moring's Tax Group. "Whether the IRS properly addressed comments made during the rulemaking process will be especially important."

There's much irony in the Tax Court's decision, says Fischer. The IRS has long asserted that its interpretations of the Internal Revenue Code by tax regulation deserve the same level of deference from courts as regulations issued by all other agencies, and the Supreme Court agreed by granting the agency so-called *Chevron* deference. At the same time, the IRS has asserted that it did not have to satisfy the APA, as other agencies must. "We've expected this ruling, or something like it," Fischer says. "If the IRS wants *Chevron* deference, they have to follow the rules."

How many IRS rules could be threatened? One academic found that more than 40 percent of IRS regulations did not properly follow the APA's notice-and-comment rulemaking procedures.

CALLING FOR BACKUP

To fight these battles and others in 2016, the IRS may be calling in reinforcements in the form of outside counsel. Many government agencies routinely employ outside counsel, but not the IRS. So litigators across the country were surprised recently when the agency first engaged a prominent law firm in a large tax case. "The IRS already has both the Department of Justice (DOJ) and its own district counsel attorneys at its disposal," notes Fischer. "Now it is expending additional resources to target particular businesses even as it faces severe budget cuts."

State tax authorities are also starting to engage outside counsel, says Fischer, who expects the practice will continue—and that relationships between the parties will take on a harder edge. "Litigation may be more expensive than before," he says. "It will be less cordial, more formal, and more hardball."

BEWARE OF TAX "BOUNTY HUNTERS" AND WHISTLEBLOWERS

Watch out: states are increasingly calling in tax bounty hunters—private tax consultants engaged under contingent fee arrangements—to identify and develop tax assessments. "The financial motivation may be a contingency fee rather than simply finding the accurate amount of taxes owed," Crowell & Moring's David Fischer says. "Taxpayers are questioning the fundamental fairness of a government activity like taxation being outsourced to firms that may be motivated by profit, rather than accuracy." The best way to fight the bounty hunters, Fischer asserts, is to work directly with the taxing authorities to ensure that the figure owed is accurate—and to argue against the use of a firm motivated by contingency fees.

Meanwhile, plaintiffs' attorneys are increasingly working with internal whistleblowers on tax-related class actions in areas such as sales tax collection. The suits are most common in gray areas such as Internet commerce. "The main way to avoid these suits is to do the right thing from an ethical standpoint, use effective methods of training, and keep meticulous records," Fischer says.

"Every case involving a regulation that hurts you will include an investigation as to whether the Department of the Treasury engaged in proper rulemaking." —*David Fischer*

E-DISCOVERY

REINING IN E-DISCOVERY

A number of changes to the Federal Rules of Civil Procedure took effect in December 2015 that promise to reshape, and rationalize, some fundamental aspects of e-discovery in federal litigation.

These changes address the increasing discovery challenges created by ever-growing amounts of electronic information. "Today, the cost of discovery can sometimes outweigh the potential value of the claims in the case," says Jeane Thomas, chair of Crowell & Moring's E-Discovery & Information Management Group.

The revised rules include two key changes on that front:

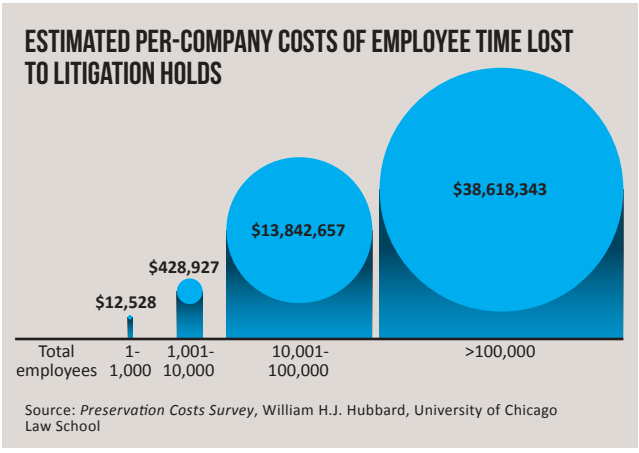
"Law departments need to quickly understand the scope of what they likely will need to produce. You can no longer wait six to nine months to figure it out." —*Jeane Thomas*

- **Redefining what material is discoverable (Rule 26(b)(1)):** Traditionally, discovery has been permitted for anything that is "relevant"—a broad term that often led to unreasonably costly efforts. The new rule says that such requests need to be "proportional" as well. Requests need to consider factors such as the importance of the discovery to resolving the issues at stake, the amount in controversy, and whether the burden or expense of discovery outweighs its benefits. In short, instead of broad requests for information, parties now need to draft targeted requests that are proportional and reasonable.

- **Clarifying spoliation sanctions (Rule 37(e)):** Courts have varied in their approach to sanctions when parties destroy discoverable information, with some taking a hard line. Even when spoliation has been unintentional, says Thomas, "some courts have given the jury adverse inference instruction, basically saying they should assume that the deleted information would have been harmful to the spoliating party's case. That's often a case-determinative sanction." As a result, she adds, "companies stopped deleting information altogether to avoid the risk of sanctions, increasing the cost and complexity of discovery."

Under the new rules, spoliation resulting from unintentional negligence no longer warrants severe sanctions. "They can be imposed only when the court finds that the party destroyed evidence intentionally to keep the other party from using it." This reduced risk of sanctions, she says, "enables companies to implement sound information governance policies that include the routine destruction of electronically stored information—to avoid the costs associated with over-preservation."

The revised rules simplify matters for companies responding to discovery requests—but they also place new responsibilities on those companies. Traditionally, responses to discovery requests have been broad "boilerplate" objections followed by lengthy negotiations, but that is no longer sufficient. "With amendments to Rule 34(2)(B) and (C), the responding party has to state specifically what it is objecting to in the request, what it is going to produce, and the date it will produce it by—all within 30 days of receiving the request," says Thomas. "That means that law departments need to have a litigation-response plan ready and quickly understand the scope of what they likely will need to produce—because you can no longer wait six to nine months to figure it out."



The need to preserve documents for discovery places a number of growing burdens on companies—including the cost of large amounts of employee time.

RECOVERY

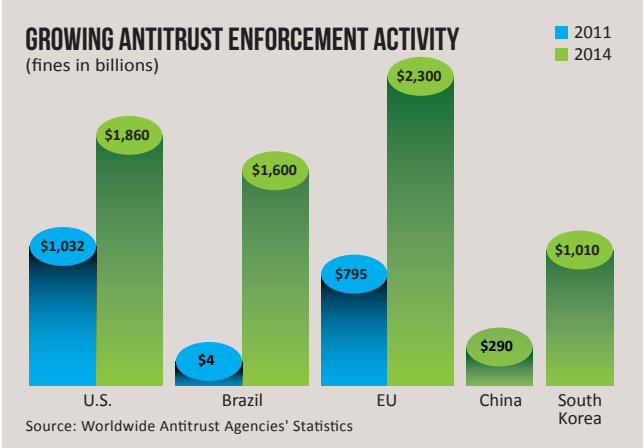
THE GROWING GLOBAL OPPORTUNITY

An increasing number of U.S. corporations have found that a more proactive approach to recovering damages can be well worth the effort. And with the evolution of private damages laws in many countries, the opportunities for recovery are now expanding globally.

In the U.S., the pursuit of private damages is well established, and law departments have successfully pursued significant recoveries in areas such as antitrust, intellectual property, and trade cases, among others. "Some efforts have worked so well that the corporate law department is changing from being a cost center to a profit center," says Jerome Murphy, a partner in Crowell & Moring's Antitrust and Commercial Litigation Groups.

However, in most other countries, the legal frameworks have provided only limited opportunities to recover private damages. But that is changing—particularly in the antitrust arena. In recent years, some European countries—including the U.K., Germany, and the Netherlands—have become more open to such actions. In addition, a major shift is now underway with the implementation of the European Union (EU) Directive on antitrust damages. The Directive is designed to provide a uniform EU-wide approach that allows individuals and companies to claim damages when they are victims of anti-competitive behavior, while also making it easier for them to access the evidence they need to prove their claims. This Directive was adopted in late 2014, and EU countries are required to implement it in their national laws by December 2016.

Meanwhile, a number of Asian countries are showing a growing interest in stricter antitrust enforcement, with some—such as Japan, South Korea, and Taiwan—allowing private antitrust actions. Over the past few years, China has been especially active. Under the country's Anti-Monopoly Law (AML), regulators have fined a number of auto companies and suppliers along with contact lens, dairy, chipset, and LCD screen producers. In 2015, the fines were the largest yet under the AML, with one company fined almost $1 billion—and it appears that the focus on enforcement will continue. The AML allows private actions, and although those have been slow to develop, in time "China's aggressive enforcement may lead to follow-on private litigation, opening the door to significant recovery opportunities," says Murphy.



Antitrust enforcement is becoming more rigorous in many countries—and fines are growing. In more and more countries, this increased activity is opening the door to private antitrust lawsuits—and potentially, more recovery opportunities.

To take full advantage of these types of opportunities, law departments need to carefully coordinate their international recovery efforts across jurisdictions. Although more and more countries allow private damages suits, "there are significant differences in jurisdictions," says Murphy. "There are many variables to consider—costs, the extent of discovery, the defenses that are allowed, and the potential damages that may be awarded." Companies may also consider using the leverage gained through recovery to negotiate better agreements, rather than collect funds—something that might make sense when they're dealing with a key supplier that they would rather not take to court.

At the same time, law departments should monitor the changes in legal frameworks taking place around the globe. For example, many countries are stepping up intellectual property enforcement, which could bring additional recovery opportunities. Overall, says Murphy, "with the increasingly global nature of private damages actions, in-house counsel need to think about the real potential of recoveries outside the United States, and coordinate their efforts accordingly."

"Some efforts have worked so well that the corporate law department is changing from being a cost center to a profit center."

—Jerome Murphy

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