

LITIGATION FORECAST 2019

WHAT CORPORATE COUNSEL NEED
TO KNOW FOR THE COMING YEAR

ANNUAL
JURISDICTIONAL
ANALYSIS

ANTITRUST TOOLS
FOR THE FOURTH
INDUSTRIAL
REVOLUTION

WELCOME TO YOUR NEW WAR ROOM

TODAY'S TECHNOLOGY IS NOT
ONLY STREAMLINING LEGAL
OPERATIONS, IT'S FINDING ITS WAY
INTO LITIGATION CASE STRATEGY.

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LITIGATION FORECAST 2019

The Drivers of Change



When it comes to trends in litigation, change is the only constant. That's been especially clear this past year, as we've seen unprecedented changes driven by plaintiffs, the executive branch, legislative actions, Supreme Court decisions, and, underscor-

ing all of that, technology. And that's just the beginning. Looking ahead, as the articles in this year's *Litigation Forecast* explain, the pace of change will accelerate, the origins of change will expand, and the road map your company needs to navigate these changes will have to be more informed, more forward-looking, and more resourceful than ever.

The key will be understanding—and deciding—where to focus your efforts. As Crowell & Moring partner Kent Goss notes in this issue's cover story, "The overall trend today is for companies to take fewer cases to trial, but to take the cases that are more complex and significant to the business." That approach reinforces the importance of anticipation, of paying attention to a wide range of factors, of being proactive with that information, and of using that knowledge to determine the highest priorities for your company.

Since we launched the *Litigation Forecast*, our goal has been to provide insight into the drivers of change and, in so doing, to help our clients respond to those drivers proactively, productively, effectively, and profitably. To keep the conversation going, please visit www.crowell.com/forecasts.

—MARK KLAPOW

Partner, Crowell & Moring
Editor, *Litigation Forecast* 2019



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COVER STORY: LITIGATION STRATEGY



WELCOME TO YOUR NEW WAR ROOM

How technology is finding its way into litigation case strategy: what to expect, how to evaluate the impact, and how several legal departments—at Cisco, Humana, and United Airlines—are already putting it to use.

The digital revolution is disrupting business on a daily basis as companies leverage technology to become smarter, more connected, more efficient, and more responsive. To a large extent, however, their legal departments and their law firms have been on the periphery of the profound technology-driven shifts that have transformed the business world. But that is all changing. Today, technology is not only streamlining legal operations, it's also finding its way into litigation case strategy—a move that will reshape the traditional formulas for courtroom success in the coming years.

There are several converging trends driving this change. One is the evolution of the technology itself, with rapid innovation in everything from analytics and artificial intelligence (AI) to knowledge management and videoconferencing. Law departments have already achieved real benefits from technology, but now those tools and solutions are becoming more sophisticated

and easier to use, and they are reaching into every aspect of the litigation cycle.

Meanwhile, law departments have a growing need for technology tools as they deal with an expanding universe of information from a variety of sources. “Data keeps growing exponentially, and obviously, in litigation, you want to get to the key pieces of evidence and find what’s most relevant and responsive,” says Heather Kolasinsky, senior legal counsel at the Louisville, Kentucky-based **Humana** health care company (for more on Humana’s approach, see sidebar on page 11). “The haystacks keep getting bigger, and that costs money and time. So you need to use technology to help you find the right information.”

The nature of litigation is changing, as well. “The overall trend today is for companies to take fewer cases to trial, but to take the cases that are more complex and significant to the business all the way because the client needs to take a stand or a case can set precedent for a docket,” says Kent Goss, a Crowell & Moring

partner and a member of the firm's Litigation Group Steering Committee in Los Angeles. "This drives costs up, and technologies such as analytics and AI-based automation will be needed to manage those costs." In addition, he says, "when you're litigating a high-impact case, you need to understand how to leverage technology to realize each and every incremental advantage. Litigation is an inexact science. The ability to gather and distill information quickly is critical to setting case strategy. The more solid data you have, the better your analysis is going to be and the more likely it will be that you have a good outcome."

By using technology to gain greater access to information, lawyers can find more accurate answers to critical litigation-related questions, from where and when to file to which arguments are likely to resonate with judges and juries. Trial lawyers on both sides of the courtroom are starting to harness technology to secure an edge—and the ability to use such tools will only be more important in the coming years.

In short, technology is evolving into a critical tool that can feed litigators the targeted information and insights they need to win—and contain budgets along the way. "For tomorrow's litigators, legal acumen and the ability to argue persuasively in court will still be critical. But now those litigators must understand how to leverage technology like never before. The days of a trial team without tech expertise are long over," says Shari Lahlou, a partner at Crowell & Moring in Washington, D.C., and co-chair of the firm's Antitrust Group. "For example, whether you're in a bench trial or a jury trial, it's important to focus on the most powerful points and avoid tangential arguments and documents. Leveraging technology in the right way can help funnel critical information to allow the litigator to more effectively put together the story with the evidence that supports it—and then deliver a crisp presentation of it in court."

TARGETING KEY LITIGATION PROCESSES

Digital tools are already an important consideration for legal departments. "We are constantly looking for areas where technology can automate work or help us be more efficient and ultimately enable our in-house team to focus on more strategic, higher-value work," says Leslie McKnew, vice president, litigation, at **Cisco** (for more on Cisco's approach, see sidebar on page 7).

"Technology has brought greater efficiency and effectiveness to legal operations and back-office processes, and it can do the same for litigation strategy," says Brian Paul Gearing, an Intellectual Property Group partner at Crowell & Moring in

New York. "There is no single silver-bullet technology that can address all of the challenges involved in a trial, but there are a variety of technologies that are opening new doors in early case assessment, e-discovery, litigation strategy, and even jury selection. Every litigator needs to embrace the use of technology as a core component of trial readiness to up their game and to serve their clients well today and into the future."

EARLY CASE ASSESSMENT

"Technology is going to be key to determining what to do with a case as soon as it comes in the door," says Humana's Kolasinsky. "What is your risk in this case? What's the time frame? How long should this case sit on your pile before you settle it or try it? What are all the various outcomes that can happen? You have got to figure those things out fairly quickly and accurately, and technology is going to be the way to do it."

That approach can be seen in the legal analytics platform from Menlo Park, California-based **Lex Machina**, which captures daily litigation data from a wide variety of sources, including federal and state courts and the U.S. Patent and Trademark Office (for more on Lex Machina's approach, see sidebar on page 10). This data is then cleaned up using natural language processing and machine learning technologies, as well as attorney experts, and analyzed to provide insights into a range of factors, from specific judges, courts, law firms, and individual attorneys to the findings, outcomes, and damages in cases.

For lawyers assessing a case, analytics capabilities can provide insights into similar cases—their outcomes, how long they took, how specific judges have handled them—to help them quickly assess the risks and rewards involved. For example, says Owen Byrd, chief evangelist and general counsel at Lex Machina, "if a company wants to sue a vendor over a contract dispute, it can use the data to understand their prospects of success and whether it really makes sense to pursue it, apart from the analysis on the merits. And you can look to see what sort of damage awards, down to the penny, have been generated by similar cases. You can get a sense of what's the most you can expect to receive and does it justify the litigation spend that it will require."

LITIGATION STRATEGY

Once a case is underway, today's analytics can be used to shape the company's approach to litigation. "It can give you critical



"The more solid data you have, the better your analysis is going to be and the more likely it will be that you have a good outcome." —Kent Goss

Leslie McKnew, Vice President, Litigation, Cisco

How are newer technologies helping your legal department?



For one thing, by bringing the e-discovery function in-house we are continuing to see savings in time, resources, and money. With their in-depth knowledge of our systems, data, and their substantive expertise, our e-discovery experts are incredibly effective at staying on top of new technologies and assessing whether they will drive increased efficiencies and cost reduction in our practice while meeting our standards. We have used types of predictive coding for document review in certain use cases. And our legal operations team is pursuing machine learning to spot non-standard or outlier provisions in contracts. We also use our collaboration tools as our standard way of working with each other and our law firms. All of our team meetings and nearly all of our internal team interactions are done over Webex video if we are not in the same office. And almost all of our case pitches, check points meetings, mock exercises, and expert interviews have somebody participating over our TelePresence technology. For our mock arguments, our counsel often is not local and neither are our mock judge panels, so we will have multiple locations participating in an exercise at the same time. We've also been doing more depositions over TelePresence. In addition to getting the personal connection and feeling like you are in the same room, these collaboration tools allow us to include a broader network of people, save on travel, and simplify and expedite scheduling.

How do you make sure new technologies are adopted and successful?

We have a legal operations team, and they do a great job of collecting feedback on what problems we are trying to solve, assessing new technologies, and ensuring that the technologies actually are a solution to the problem. They have taught us that when you bring new tools in, it's not just about the technology, it's equally critical to think about the people and processes. New technologies need to integrate into people's workflow. If it's not, you're just creating more work for them, which is the antithesis of why you're getting the technology in the first place. In addition, from the litigation perspective, you also need to make sure that when new applications are brought into the organization, they can extract data from your systems efficiently and support data preservation.

How else do you see technology impacting how you work with your firms or the services they offer?

We have integrated our collaboration tools into our workflows internally and with outside counsel. We use our Webex Teams platform to collaborate on and share documents in an efficient way. It takes us out of our email and provides a platform where we can work on documents internally and with our outside counsel in an efficient way. Looking ahead, I think law firms can increase their use of technology to capture all the lessons and knowledge that are in people's heads and anonymize the data they have about judges, venues, case types, strategies, and costs, and house it in a way that they and their clients can easily tap into it to make data-driven decisions.

statistics to guide your strategy in a particular venue before a particular judge. There are several points along the process where analytics and other technologies can help," says Gearing.

As mentioned earlier, analytics and AI technologies can provide insights into how opposing parties have behaved in similar cases. But some law departments are now applying that capability to assess their own patterns, as well. "Just as political campaigns will do opposition research on themselves, you can get insights into your own litigation strategies and behaviors so that you can anticipate how the other side is going to respond to you," says Lex Machina's Byrd.

Byrd recalls a situation in which an analysis was performed for a company involved in Abbreviated New Drug Application patent litigation. "We found that the judge in question ruled on claim construction just on the pleadings, without holding a hearing, over 80 percent of the time," he says. "The general counsel told us, 'That totally changes our strategy. We usually save our best argument for last to present it in the claim construction hearing rather than burying it up front in the plead-

ings, where it might not lodge in the judge's mind. Now we're going to put everything we've got into our pleadings.'"

Overall, having solid information on a range of litigation-related factors helps litigators and legal departments move past the traditional reliance on "anecdotal." That is, instead of drawing on the subjective experience and insights of colleagues and consultants, they can have a more objective, data-driven view of how litigation is likely to unfold—and use that to augment their professional acumen.

That's especially important in higher-stakes litigation, says Gearing. "There is often a lot on the line, and key litigation decisions can also be very significant business decisions for a company," he says. That means that analytics can be especially valuable as the legal department coordinates litigation strategies with the business.

"GCs work in companies that have applied analytics to every other element of corporate activity—marketing, finance, sales, operations," says Byrd. CEOs, he says, have come to expect data-driven strategies in those areas, and they have a

growing expectation to see them in the legal department. With analytics, attorneys can talk to business leaders using supportable, objective information about the risks and rewards involved in a case.

E-DISCOVERY

For the past few years, advanced legal technology has been focused primarily on discovery, largely because that area has felt the brunt of growing data volumes. In technology assisted review (TAR), for example, human experts process a small “seed-set” sample of a large collection of documents; the system then learns from their actions to automatically go through the complete collection and identify responsive documents. This “predictive coding” approach has not been adopted as quickly as some might have expected. But legal departments that are using it are seeing real benefits.

United Airlines, for example, draws on TAR for its largest and most complex cases (for more on United’s approach, see sidebar on page 9). “When you have a case with terabytes and terabytes of data, TAR is really your best option, especially when you have the usual budgetary constraints. We’ve been able to use it quite effectively when we need to get through a large swath of documents,” says Javaria Neagle, assistant general counsel, Litigation and IP, at United Airlines in Chicago. “The use of TAR is a time-saving measure, which translates into cost savings. And if it’s carefully trained and applied, it can return more accurate and complete results than a human review team would.”

E-discovery continues to advance and now encompasses not only predictive coding but also AI tools such as machine learning and natural language processing. That makes it possible to review more types of data—and especially unstructured data. With this ongoing evolution, says Neagle, “TAR is the wave of the future. I think that the need for human involvement with the seed set and in coding documents will continue to decrease as the technology becomes more efficient and more sophisticated.”

In time, Neagle speculates, these systems could become “smart” enough to work without human input and even provide guidance to e-discovery teams. “Today, we’re training the software to understand what’s responsive and what’s not,” she says. “But one day, the software is likely going to be able to train us.”

THE FUTURE OF JURY SELECTION

Technology is also transforming *voir dire*. “Attorneys often end up going with gut feelings and input from a few other lawyers and perhaps a consultant in the courtroom,” says Goss. Today, however, there is a great deal of online information about jurors, which is increasingly important in understanding juries. For example, Goss says, “millennials tend to not say much during the *voir dire* process, but they have a lot to say online. And they tend to be highly engaged during deliberations and to have strong opinions around issues like corporate responsibility to consumers and society.”

This growing range of online data has the potential to provide valuable insights into jurors. The problem, however, is that it is spread across numerous sources, which makes it cost-prohibitive to analyze using traditional methods. But new technology is enabling litigators to tap into that rich vein of data to complement the art of jury selection with a measure of science.

Case in point: Voltaire, a Telluride, Colorado, company, has developed a jury selection platform that gathers and analyzes a wide range of juror data. This includes not only information about addresses, employment, criminal checks, liens, licensing, and so forth, but also a wealth of web and social media data. “We look at publicly available information on social media platforms, directory listings, and at articles and posts by or about the individual,” says a company spokesperson. The platform then uses a proprietary algorithm and the IBM Watson AI platform to analyze psycholinguistics and behavioral characteristics, ultimately developing a profile of each prospective juror’s likely opinions, biases, and interests—factors that could affect their performance as jurors.

This concise report is delivered via the web to attorneys’ computers, tablets, or phones. Voltaire points out that the platform does not make decisions or recommendations per se. “We’re not scoring jurors or giving you a ‘go-no go’ decision,” the spokesperson says. “We’re analyzing this data and getting it to you in close to real time so that the experienced litigator can get an idea about what makes the jurors tick and use that insight to help make decisions in the courtroom. It’s not a persuasive tool—it’s a tool to help that attorney be more persuasive.”

“Some courts have been reluctant to allow in-depth examinations of jurors’ online data due to privacy concerns, while others have been open to the idea,” Goss says. “It will be interesting to see how courts weigh these issues. There will be a



“Advancing technology should not be seen as a replacement for lawyers but rather as a way to complement and enhance their capabilities. Tomorrow’s attorneys will need to understand what the technology can and cannot do for them.” —Shari Lahlou

Javaria Neagle, *Assistant General Counsel, Litigation and IP, United Airlines*

You've had some experience working with an outside vendor for technology assisted review (TAR). What lessons have you learned?



It is important to get your vendor and in-house teams on the same page. Your outside counsel, too. Educate every business partner, including your vendor, about the case objectives and the long-term litigation strategy. I spend time on case education

from senior leadership to individual team members. We discuss what the case is and what everyone's piece of the puzzle is. Getting all the parties on the same page leads to high-functioning teams who, in turn, understand their roles and communicate well with each other.

Does TAR have an impact on your internal processes?

One thing TAR sheds a light on is the need for corporations to have really robust record-retention policies. As these tools evolve and as they can process larger and

larger swaths of data, it's really important for companies to not only formulate their record-retention policies, but to abide by them. You need to have enforcement mechanisms in place to ensure that documents are destroyed pursuant to the record-retention policy—because ultimately TAR is designed to be a cost-savings tool, but it's only going to be a cost-savings tool if you're not accumulating mass amounts of unnecessary data in your company.

How is TAR affecting the way you work?

TAR means that there has to be a greater collaboration between myself and my outside counsel, in that we have to work very closely together and strategize at an early point about handling a complex case's discovery. TAR has the good effect of enabling closer relationships between outside counsel and in-house counsel. On a personal level, it forces me as the in-house lawyer to understand my case better, because you have to think about both the strategy and the details of the case early on in order to take full advantage of TAR.

tension between juror privacy and the belief that parties have a right to some transparency in the juror selection process.”

For its part, in the few years that Voltaire has been offering its platform, just one judge questioned the use of the software, says the company. Voltaire provided “a page or two worth of explanation that cleared that up right away, and the judge instantly permitted it.” The key, the spokesperson adds, is that “this is all based on publicly available information.”

ON THE HORIZON

Going forward, litigation technologies used at any juncture in the case life cycle can be expected to become more sophisticated, more real-time, and easier to use. Indeed, new applications are showing up with increasing frequency. For example, a company called Jury Lab is using facial-recognition software that reads facial “micro-expressions” to gauge mock jurors’ emotional responses. And a college student has created an AI chatbot that provides legal advice to people interested in fighting traffic tickets or filing lawsuits over data breaches, bank fees, or other commonly disputed transactions.

A basic tenet of the digital revolution is that while each of these technologies is powerful, they are most effective when used in combination. Take, for example, mock juries. This practice has already benefited from technologies such as videoconferencing that have reduced the costs of running mock exercises and make it feasible to use them more fre-

quently. Looking ahead, it's possible to see how that concept could be expanded with the combined use of AI, analytics, virtual reality, teleconferencing, and other technologies.

“You can imagine a virtual mock trial,” says Gearing. “You could bring in a mock jury, present your case, see how the opposing side might react and what the judge might say, and gauge jury reactions both in terms of what they say and how they act as they hear testimony. You would then get a virtual outcome of the trial and be able to tweak different parameters in your litigation approach—different arguments, different motions, and so forth. You could test lots of variables quickly and cheaply to really fine-tune your approach.” The full virtual mock trial is not likely to be a reality anytime soon, he adds, “but that kind of extrapolation of today's trends lets you see what may be possible down the road.”

“We regularly use our immersive TelePresence technology for mock exercises with counsel and even for depositions,” adds Cisco's McKnew. “We will have our lead attorneys, judge panels, and our in-house litigation team in multiple locations across the country. It feels like you are in the same room, and it's much easier to schedule and more cost-effective than flying people in from all over the country or the world.”

KNOWLEDGE MANAGEMENT

While such technology developments are happening on the front lines of litigation, similar changes are taking place in the

operational areas of legal departments and law firms. For example, knowledge management systems have been around for years, but recently, they have taken significant leaps forward. Today, they can not only find documents, emails, and other work product, they can also connect attorneys with the appropriate experts in the organization who can provide a deeper understanding and context for those items—a capability that can be a big help to litigators. And some systems are now incorporating AI to automate actions such as the extraction of relevant contract provisions. With an effective knowledge management system, says Lahlou, “you can leverage what’s already been done so that you are not only increasing efficiency, you are also being more effective. By not having to reinvent the wheel every time, you are able to focus more deliberately on the key strategic issues that will dictate your case plan.”

The growing set of technology tools at the litigator’s disposal adds to the importance of the legal operations function. With numerous systems to consider, it can provide the oversight needed to keep it all in order—and help navigate a way forward as the technology changes—and thus play a vital role in helping litigators win and keep costs down. “Good knowledge management should be foundational to client service in 2019. Legal operations functions are actively examining ways firms can be more efficient, and demanding that they leverage technology to do so,” says Lahlou.

MAKING THE MOST OF THE TECHNOLOGY

Over time, companies and IT departments have learned that success with a new technology depends not just on the technology itself, but on addressing factors surrounding the technology, such as rethinking workflows and processes and preparing people to adopt new ways of working. For legal departments, doing so will be critical to using technology in litigation.

At times, advances in technology may drive organizational changes. For example, Cisco brought the e-discovery function in-house and created a Litigation Lab within the legal department to handle that work. “They are our e-discovery experts and they partner closely with outside counsel,” says Cisco’s McKnew. “They’ve developed our e-discovery processes based on their in-depth knowledge of our systems and data, and they ensure we have an integrated and standardized process end to end. Equally important, they have a seat at the table and are a stakeholder with our IT and other internal teams when the company is evaluating and rolling

Q&A

Owen Byrd, Chief Evangelist and General Counsel, Lex Machina

How do you see technology affecting attorneys’ jobs?



Robots are not coming to replace the lawyers. In fact, these technologies can liberate lawyers to spend more of their time on the really high-value work that involves reason and wisdom and judgment and true counsel. We lawyers like to be fact-based, evidence-based. But litigation strategy has often involved gut feeling and conferring with colleagues in the firm or the department. This will help us bring more data-driven insight to the process.

How can legal analytics help during litigation?

We have a number of ready-made apps that make it easy to use the analytics on the spot. For example, if I am the defendant in a patent case and I want to move for summary judgment, I can push two buttons and come up with the last 10 examples where the presiding judge granted such summary judgment, as well as the last 10 examples where he denied it, and go right into the briefs that the lawyers filed in those instances. I can start with what worked last time.

Growing ease of use is a trend in technology.

How does that apply in law?

Making it easy to use these tools is critical. Otherwise lawyers just won’t do it. But ease of use can also change the way you use technology. For example, traditional legal research platforms are used mostly by researchers, librarians, and associates, rather than partners and corporate counsel. But legal analytics is best when used by those senior attorneys. It’s an iterative, interactive experience, and you won’t know what questions you can answer unless you are using it yourself.



“Every litigator needs to embrace the use of technology as a core component of trial readiness to up their game and to serve their clients well today and into the future.”

—Brian Paul Gearing

Heather Kolasinsky, Senior Legal Counsel, Humana

What have you learned from your experience with technology assisted review (TAR)?



TAR is here, and it's going to stay. We've found that it's a great tool. For those who are looking at TAR, I would tell them to make sure they really do their research into what the tool can do and how you can use it. Like any other tool, it can be really great when people know how to use it correctly—and if they don't, it can be really bad.

How are other technologies helping Humana formulate litigation strategy?

We do data analytics on our corpus of cases. Every year, we look at what came in the door, what the time frame was on cases, what they cost—those kinds of things. You have to know what your trends are. For example, maybe a few years ago you were taking four years to wrap up an average case, and now you are doing them in two and a half years—it's good to track that and understand why,

out new systems or technology. They have built excellent relationships with other stakeholders, and they ensure that our litigation and discovery requirements for all of our cases are satisfied. They also are a key partner in e-discovery negotiations to ensure we meet our obligations, and they drive immense savings in both time and money," she says.

Legal departments also need to consider how teams can work together more closely, across the department, with the business, and with outside firms. With analytics providing objective data and collaboration technologies making it easier to share documents and communicate, "everybody can come to the table with the same information, and everybody knows where they need to be involved in the process," says Humana's Kolasinsky. "It really needs to be a collaborative environment nowadays. And everybody's opinion needs to be heard so that you come up with the solution that best fits your case."

"Advancing technology should not be seen as a replacement for lawyers but rather as a way to complement and enhance their capabilities. That means that tomorrow's attorneys will need to understand what the technology can and cannot do for them and most effectively leverage it for their matters," says Lahlou.

"It's not just a question of technology, it's also a matter of change in people—how they think and do things with the technology," says Kolasinsky. "You can have the greatest knowledge management system in the world, but if your employees don't use it, you've spent a lot of money for nothing."

and to keep finding ways to be more consistent and take similar stances across matters.

Much of the industry is looking at contract and knowledge management, and that's where we are now. In the future, I can see using technology for root cause analysis, pre-litigation—looking at litigation data and trends to figure out the pitfalls for counsel on the front end of litigation, rather than being reactive.

How is technology changing the legal department and the legal profession?

Gone are the days of people not knowing what technology assisted review or predictive coding are. Nowadays, you really have to understand how those things work—at least enough to be able to explain it in a court.

AI and automation are really going to push the practice of law in new ways. We may be the last generation of "traditional" lawyers, rather than lawyers-as-technologists. And AI and automation will make interesting inroads into how privilege is decided and the ethical implications around who is practicing law.

"Lawyers need really good project management skills to run parallel work streams and drive solutions and decisions across functions," says McKnew. For litigation in particular, "many different things are happening in parallel and there are different facets to consider in real time." Project management skills, she says, are key to "maximizing efficiencies, particularly the time and resources of in-house legal teams, and we really feel it when our law firms lack these skills. We think this is a real differentiator for firms. The need for effective project management is critical for discovery but as you approach pre-trial and trial activities, its importance is only heightened."

In a world where technology is becoming a critical factor in winning, tomorrow's litigators and legal departments will need to keep up with fast-changing technology and be open to new tools as they emerge. But as important, they will need to maintain a degree of healthy skepticism and look beyond the hype and excitement that so often comes with new technology.

"New technology can be very appealing, and often very effective," says Goss. "But you have to be smart about how you use it. There is a lot of marketing buzz out there, and there is a big difference between using AI wisely and just adopting it as a kind of flavor of the month. So you need to keep an eye on the basic questions: What will this technology do for us and how well will it do it? Is it proven? Will it stand up in a trial? And above all, will this technology help us win in the courtroom?"

ANTITRUST

TOOLS FOR THE FOURTH INDUSTRIAL REVOLUTION



In what is being called the Fourth Industrial Revolution (4IR), the world is becoming increasingly digital, with a growing reliance on everything from electronic marketplaces and GPS guidance to emerging technologies such as artificial intelligence (AI), self-driving cars, the

Internet of Things (IoT), and 3-D printing, among many others. This transformation is opening the door to new markets, innovative business models, and increased collaboration. It also raises new antitrust concerns that are likely to attract the attention of antitrust enforcers and find their way into private litigation.

In a connected, data-driven world, a number of observers are questioning how antitrust regulators should deal with the new competitive dynamics that technology creates. Over the past few years, a robust debate has emerged about the efficacy of past antitrust policies, including a call to reexamine the degree to which antitrust laws should police highly concentrated markets. This suggestion has stirred up controversy by resurrecting an older concept: analyzing competition enforcement through the lens of market structure rather than consumer welfare. Although a great deal of the attention has been focused on the largest consumer-facing technology firms, this stance could also affect a wider variety of markets and firms.

This point of view has not yet gained traction with U.S. regulators or courts or resulted in any immediate change in legal doctrine. “But it is a good example of how 4IR technology innovations—and the new business models, markets, and intermediaries they create—are reshaping the antitrust discussion,” says John Gibson, a partner in Crowell & Moring’s Antitrust Group and chair of the firm’s 3-D Printing Digital Transformation Working Group.

WHEN SOFTWARE SETS PRICES

One of the topics that is receiving a great deal of attention in both the EU and the U.S. is the use of computer software to adjust prices in response to consumer or competitor activity, a practice referred to as algorithmic pricing. This concern dates back to 1993, when the Department of Justice brought an antitrust lawsuit against several travel industry participants for allegedly using a shared online reservation system to signal ticket prices to one another. But the issue has become more prominent as the proliferation of e-commerce and the growing sophistication of software make it easier for competitors to coordinate prices in real time.

In 2015, the DOJ filed its first e-commerce pricing algorithm-related lawsuit, in *United States v. Topkins*. There, an online seller of wall posters pleaded guilty to working with others to use software to coordinate prices for their products in an online marketplace, resulting in a \$20,000 criminal fine. More recently, a federal class action price-fixing suit filed in the Southern District of New York alleged that a ride-sharing company conspired with its drivers to use the company’s pricing algorithm to set the prices charged to passengers. “They were saying that it was a hub-and-spoke conspiracy, where the drivers agreed to set prices together, rather than set their prices independently,” Gibson explains. That case was ordered into arbitration in March 2018, however, so the key questions it raises will not be sorted out publicly in court.

THE COURT WEIGHS IN ON SUING ONLINE PLATFORMS

The U.S. Supreme Court could soon decide in *Apple Inc. v. Pepper* which purchasers can pursue private antitrust challenges to the conduct of online platforms.

Plaintiffs who purchased apps for Apple devices allege that Apple has inflated prices by (1) requiring that apps for its devices be sold only in its online store and (2) charging a commission to app developers—which they allegedly recoup through higher prices. Apple argues that plaintiffs lack standing under the 1977 U.S. Supreme Court decision in *Illinois Brick Co. v. Illinois*, which held that only direct purchasers can sue under the federal antitrust laws. That is, the plaintiffs here are “indirect” purchasers because they are customers of the app developers, not Apple. Plaintiffs rely on their direct purchases from Apple, which allegedly monopolizes the distribution of apps. At the November 26, 2018, oral argument, some justices expressed that this “closed system” may distinguish *Illinois Brick*.

“The Court appears prepared to revisit the *Illinois Brick* doctrine and evaluate its application to online platforms,” says Crowell & Moring’s John Gibson. “The Court could also broadly define direct purchasers, thus exposing firms to greater antitrust liability.”



"Regulators and the courts are saying essentially that we've been using a reliable set of antitrust tools for more than 100 years and those can apply to algorithmic pricing." —John Gibson

REGULATORS STAY THE COURSE— FOR NOW

Algorithmic pricing is on the radar of both the FTC and the DOJ. But so far, U.S. regulators have not seen a need to adjust their approach to antitrust enforcement. Their view appears to be that while algorithms can make it easier to collude, using them does not in itself constitute collusion. As former FTC Commissioner Maureen K. Ohlhausen explained in 2017, "Some of the concerns about algorithms are a bit alarmist. From an antitrust perspective, the expanding use of algorithms raises familiar issues that are well within the existing canon. An algorithm is a tool, and like any other tool, it can be put to either useful purposes or nefarious ends."

"Regulators and the courts are saying essentially that we've been using a reliable set of antitrust tools for more than 100 years and those can apply to algorithmic pricing," says Gibson. "That means that unless there are at least two people or two companies getting together and agreeing to do something anticompetitive—like set prices—there is no antitrust violation." In short, unless there is evidence suggesting that the design and adoption of algorithms by rivals was the means used in a conscious effort to coordinate pricing, it is unlikely that mere reliance on algorithms to track market trends and inform unilateral pricing decisions will rise to the level of an antitrust violation. If the rule were otherwise, antitrust enforcement could inhibit the development of innovative, technology-driven ways of improving market efficiency.

With that point of view in mind, says Gibson, there will probably be minimal antitrust enforcement action from regulators around algorithms in the near future. But he adds one caveat: Congress has recently expressed concern about the size and power of big tech companies, data aggregators, and platforms, which could translate into growing scrutiny of algorithmic pricing. Meanwhile, he says, "it seems likely that whatever litigation we see in this area is going to come from private-sector plaintiffs and intermittent government intervention, in extreme cases."

As so often happens, rapidly evolving technology may eventually prompt regulators to adopt new approaches. Well-established law differentiates between unlawful pricing decisions that reflect a conscious choice by rivals to coordinate and lawful decisions that reflect unilateral choices, even when they lead to parallel pricing. In time, AI software, rather than humans, may well write pricing algorithms—and in the pursuit of greater market efficiency, that software could conceivably design systems that fix prices among competitors without hu-

AMEX AND THE ONLINE PLATFORM

In June 2018, the U.S. Supreme Court ruled that American Express's anti-steering rules, which prevent merchants from promoting other payment cards to consumers at the point-of-sale, did not violate antitrust laws. In *Ohio v. American Express*, the Court held that AmEx was a "two-sided transaction platform" where a sale to one side of the platform cannot be made without a simultaneous sale to the other, and that antitrust claims in two-sided platforms must take into account how restraints on competition affect parties on both sides of the platform—here, merchants and cardholders.

"You now have to look at the net competitive harm," says Crowell & Moring's John Gibson. "The Court said that when examined that way, AmEx's relatively higher merchant fees may actually benefit merchants because these fees are used to fund AmEx's rewards program, which in turn brings in affluent customers."

AmEx may have a significant impact on online platforms. "For example, ride-sharing platforms would likely be considered two-sided for antitrust purposes," says Gibson. "They connect two groups that depend on the platform to process transactions, which occur simultaneously, and both sides benefit." Other online platforms, which might connect advertisers and users, for example, would probably be considered one-sided, unless a simultaneous transaction occurs.

These points are important, says Gibson, "because whether a court defines the relevant market as one-sided or two-sided will have significant ramifications for the plaintiff's burden of proof on its theory of competitive harm and the burden on the defendants of coming forward with a pro-competitive justification."

man intervention, and perhaps without humans even knowing it. "When that happens, it will be a watershed moment," says Gibson. And it will raise numerous questions: Can machines conspire with each other for antitrust purposes? Who should be held responsible if machines are writing such algorithms? In that world, he says, "the old tools may no longer work anymore to identify collusion. New tools may have to be crafted, and the fire of litigation will probably help forge them."

ENVIRONMENTAL

EMERGING CONTAMINANTS: LITIGATION FILLS THE REGULATORY GAP



The issue of emerging contaminants in the environment, particularly in drinking water, has made headlines over the past year, but there are still no binding federal regulatory standards for most of these chemicals. However, that has not

deterred states and private entities from suing to stop the release of these contaminants and to seek compensation. It appears that this trend will continue—and expand—in the coming year.

“Emerging contaminants” are chemicals that have been detected in water supplies but whose impact on human health and the environment is not yet fully understood because the science is still evolving. Perhaps the best known of these are the per- and polyfluoroalkyl substances (PFAS), a category that includes chemicals such as PFOA and PFOS, among others. PFAS have been used for decades and are found in products ranging from non-stick cookware and stain-resistant fabric and carpet to shoes, paint, and firefighting foam, and they have been found at sites and in drinking water systems across the U.S. In 2016, the EPA established health advisories for PFOA and PFOS in drinking water—but not enforceable regulatory standards.

Nevertheless, courts are seeing a growing number of PFAS-related suits “based on traditional tort theories such as negligence, nuisance, and failure to warn,” says David Chung, a partner in Crowell & Moring’s Environment & Natural Resources Group. For example, property owners, states, and environmental groups have sued manufacturers for releasing PFAS into the environment. Plaintiffs often follow the playbook established in MTBE gasoline-additive litigation by bringing a variety of claims in numerous venues. In 2017, two chemical companies, facing multidistrict litigation involving thousands of personal injury cases related to discharging PFAS into the Ohio River, reached a \$671 million settlement with plaintiffs. And in early 2018, a large manufacturer agreed to an \$850 million settlement in a PFAS suit that had been brought by the state of Minnesota.

THE NEXT WAVE

As significant as such cases are, “those tort suits seem like just the tip of the iceberg,” says Chung. With a lack of enforceable federal PFAS standards, he explains, “a number of states are filling the gap and moving under their own laws to enact binding standards that they can then enforce via litigation.” California, Colorado, Massachusetts, Michigan, Minnesota,

New Jersey, New Hampshire, and Vermont, among others, have established or have proposed establishing standards or guidelines for PFAS in water—and some of these standards are much stricter than the federal advisory limits of 70 parts PFOA and PFOS per trillion. Other states are exploring similar measures. And after July 2019, California businesses will be prohibited from discharging *any* amount of PFOS or PFOA into drinking water.

For states worried about safety and cleanup costs, such regulation is prompting action. In a recent case, the state of Michigan finalized residential drinking water cleanup criteria for two common types of PFAS chemicals under its Natural Resources and Environmental Protection Act. The same day, the Michigan Department of Environmental Quality filed suit under that law against a footwear manufacturer to ensure that the company continued its investigation and cleanup of PFAS-contaminated water. A few months later, Michigan Governor Rick Snyder asked the state’s attorney general to immediately file PFAS suits against a major PFAS manufacturer and “other responsible parties.” With the growing patchwork of PFAS regulations across states, says Chung, “it’s likely that the situation we’re seeing play out in Michigan will be replicated elsewhere in the near future—and the number of state statutory PFAS suits could explode.”

Chung also expects to see more emerging-contaminant suits based on federal statutes—primarily the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act. “RCRA suits have been brought by state governments and environmental groups, and more could come,” he says. “The plaintiffs in those suits are saying that industrial wastes that contain these emerging contaminants are ‘solid waste’ under RCRA, and that the defendant industrial facilities have caused or contributed to a condition that presents or may present an imminent and substantial endangerment to health or the environment.”

Meanwhile, an emerging-contaminant suit filed under the Clean Water Act’s citizen suit provision against a chemical company in the Eastern District of North Carolina in August 2018 by the Southern Environmental Law Center on behalf of Cape Fear River Watch, an environmental group, argues that PFAS emissions into the air, soil, and groundwater from a company plant in North Carolina constitute unauthorized discharges from a point source under the Clean Water Act. Among other things, the suit alleges that air emissions from stacks either land directly into jurisdictional surface water, or fall onto land and then infiltrate the



"A number of states are filling the gap and moving under their own laws to enact binding standards that they can then enforce via litigation." —David Chung

groundwater before migrating over to jurisdictional waters. "This lawsuit builds upon the voluminous body of litigation involving indirect discharges, e.g., via groundwater or air dispersion, to jurisdictional waters, and begins a new chapter of Clean Water Act litigation over emerging contaminants," says Chung.

HOW FAR DOES GROUNDWATER GO?

At the same time, the question of whether the Clean Water Act imposes liability for pollution from point sources that reach jurisdictional waters via groundwater migration, whether it involves emerging contaminants like PFAS or more conventional pollutants, is rapidly evolving. "Does groundwater migration cut off liability? When, if ever, are discharges via groundwater covered by the Clean Water Act? What about air emissions from stacks that eventually reach jurisdictional water via wind dispersion? Those are all questions being litigated in courts nationwide," says Chung. Even septic systems have become the target of groundwater migration suits. "All of these suits, and the conflicting judicial decisions, draw further attention to the need for some kind of clarity from the Supreme Court and/or the EPA about the reach of the Clean Water Act.

"There are new suits filed seemingly every month on the indirect discharge/groundwater migration theory and the Clean Water Act," Chung continues. "And we now have squarely conflicting decisions from courts of appeals. There are now two cases where parties are seeking Supreme Court review of this theory." One of these was filed by the County of Maui in Hawaii after an unfavorable decision from the Ninth Circuit in a case involving treated sewage injected into wells that eventually reached the Pacific Ocean through groundwater. The other was filed by Kinder Morgan Energy Partners, challenging a loss in the Fourth Circuit in a case involving a pipeline leak in South Carolina. If the Supreme Court weighs in, its ruling will have a significant impact on Clean Water Act citizen suits, including those involving emerging contaminants.

Equally significant would be the impact of any action taken by the EPA on setting enforceable standards for PFAS. The agency has signaled that this is an area of interest, but it is not clear how quickly it will move or whether it has the resources to create and enforce such standards in the near future. But doing nothing may become increasingly difficult. State and federal politicians have urged the EPA to take action, and at least one group, the Ohio Environmental Coun-

THE SHIFTING EPA BATTLEGROUND

Under the Trump administration, the EPA has been working hard to roll back regulations, but many of the agency's key priorities have not been finalized.

That does not mean that there has been no activity or no litigation. But a great deal of the litigation to date has focused on delay rules—postponing the application of a number of Obama-era rules. Many of the lawsuits challenging delay actions have led to rulings against the agency because it hadn't followed the correct procedures in its delaying actions.

"We are still waiting on final high-priority rulemakings by the Trump EPA," says Crowell & Moring's David Chung. For example, a proposed Affordable Clean Energy plan, designed to replace the previous Clean Power Plan, was just proposed in August 2018. Other expected actions have yet to be proposed.

But that may be about to change. "In the coming year, we are probably going to see the rubber hit the road, with more final actions of substance," says Chung. In part, that's because the EPA has now had time to develop new rules.

"As the agency moves closer to final actions on its highest priorities, litigation will shift from the largely procedural to the substantive," says Chung. "That litigation could have significant ramifications for years or decades to come."

cil, has submitted a petition for rulemaking on PFAS to the agency. "Once you're talking about the potential shutdown of drinking water supplies, the issue and the concern cross party lines," says Chung.

If the EPA continues not to take action, environmental groups are likely to sue, for example, by arguing that the agency is taking too long to perform its duty to respond to rulemaking petitions. And if the agency does establish enforceable standards, litigation is likely to follow. "If and when the EPA is ready to do something in the form of regulatory standards, that's going to lead to both rulemaking challenges and governmental and citizen-suit enforcement actions," Chung says. "If this follows the typical high-profile rulemaking path, the end of the tunnel is litigation in one form or another."

GOVERNMENT CONTRACTS

BID PROTESTS ENTER A SHIFTING LANDSCAPE



Protests challenging the awarding of federal contracts have become increasingly contentious as contractors fight for a limited pool of government dollars. Two recent protest decisions of the U.S. Court of Appeals for the Federal Circuit

will have a significant impact on contracts and protests—but contractors should be prepared for potential fundamental changes to the protest process itself.

Contractors wishing to challenge the awarding of a federal government contract can protest in several forums: the procuring agency, the Government Accountability Office, or the U.S. Court of Federal Claims (CFC). The Federal Circuit—which sits in appellate review of the CFC—weighs in on protests infrequently. “But the Federal Circuit took up two significant bid-protest questions in the past year,” says Anuj Vohra, a partner in Crowell & Moring’s Government Contracts Group and a former trial attorney in the Department of Justice’s Commercial Litigation branch. These cases looked at agencies’ obligations to procure commercially available items and the appropriate scope of agency corrective action.

The first of these cases began in 2015, when Palantir, an information technology and data solutions company, filed a pre-award protest at the GAO challenging an Army procurement for a \$206 million data-driven intelligence system. Palantir argued that the Army had tailored the procurement to the development of an entirely new system without considering whether a commercial solution was already available—which Palantir believed it offered—to meet the Army’s needs. In so doing, Palantir argued, the Army violated the Federal Acquisition Streamlining Act of 1994, which requires agencies to utilize commercial solutions to meet their needs “to the maximum extent practicable.”

After the GAO denied the protest, Palantir took the case to the CFC and won, in a decision published in 2016. The government then appealed that ruling to the Federal Circuit. In September 2018, a three-judge panel unanimously affirmed, concluding that the Army had indeed failed to conduct a FASA-mandated analysis of the availability of a commercial solution to meet its needs.

By affirming the CFC decision, says Vohra, “the Federal Circuit has confirmed that an agency must undertake a full-some analysis of the availability of commercial items to meet its needs. And if the agency doesn’t, there is now a decision out there that provides the basis for a legitimate protest claiming that the agency failed to meet its obligations under FASA. So

from the protestors’ perspective, this is significant, and it puts another arrow in their quiver.”

The second case—*Dell Federal Systems, LP v. United States*—considered an agency’s ability to craft corrective action taken in response to a protest. Several IT contractors had been awarded contracts to supply computer systems—desktops, laptops, and so forth—to the Army. In response to protests filed by multiple unsuccessful offerors, the Army announced it would take corrective action by conducting discussions and requesting revised proposals. The original winning bidders filed a case at the CFC, saying that the corrective action was too broad and therefore improper. The CFC agreed, finding that an agency’s corrective action needed to be “narrowly tailored” to address the specific error(s) identified in a protest, and thereby limiting the discretion that agencies have in determining such actions.

“That was surprising, because the courts have usually been highly deferential to an agency’s determination of what constitutes appropriate corrective action,” says Vohra. That surprise was relatively short-lived, however. In October 2018, the U.S. Court of Appeals for the Federal Circuit reversed the lower court, reaffirming that corrective action is assessed under a “rational basis” standard.

DOD: TURNING TO STREAMLINED AGREEMENTS

Those cases will have a real impact for contractors, but they should be viewed against the background of other trends that could bring even deeper change to the world of bid protests. For example, the Department of Defense is especially interested in procurement reform and looking to enter into agreements by way of its “Other Transaction Authority” (OTA).

An OTA agreement allows an agency to engage non-profits, research institutions, and private-sector companies without the constraints of the traditional federal procurement process. The goal is to make it easier for innovative companies that don’t usually work with the government—typically, tech companies—to do so. It’s not a new idea: NASA has possessed similar authority since the late 1950s. The DoD has had authority to issue OTA agreements since the 1990s, but in 2016, Congress authorized the DoD to more freely utilize them for actual production contracts without competition, so long as the award of such an OTA followed a prototype OTA that had been subject to competition.

This change is significant. OTAs appeal to the DoD because access to innovative technology is key to its mission, and the



“The Federal Circuit has confirmed that an agency must undertake a fulsome analysis of the availability of commercial items to meet its needs.” —Anuj Vohra

availability of production OTAs should streamline the process from prototype development to availability to the end user. “This lets them work with contractors not only to develop but also to produce new and not readily available goods, typically in the IT arena and other highly technical industries,” says Vohra. “It gives them an opportunity to pull innovation from Silicon Valley and the types of contractors that don’t typically perform government contracts.”

In addition, OTAs make it easier to forge a contract with a vendor because they limit delays and complications. “An OTA is not subject to the requirements of the Federal Acquisition Regulation,” says Vohra. “And importantly, the award of an OTA is not generally protestable. To the extent that the DoD wants to avoid the protest process and its attendant delays, the use of OTAs may provide a means for doing so.” With Congress taking almost yearly action to encourage the DoD to use OTAs, he says, “contractors should pay close attention to how the DoD uses them in the coming year.”

The use of OTA awards likely won’t eliminate protests altogether. While the award of an OTA itself is not subject to protest, the GAO has exercised its jurisdiction to consider whether the DoD’s use of its OTA, as opposed to a more traditional procurement mechanism, was appropriate. And the CFC has not yet weighed in on agency use of OTAs (or even the question of whether it could). Thus, the DoD’s decision to enter into more OTA agreements is likely to increase the amount of litigation surrounding the breadth of that authority.

MORE CURRENTS OF CHANGE

Vohra also points to the Section 809 Panel, created as part of the 2016 National Defense Authorization Act, which is exploring a variety of changes to streamline the government procurement process, including protest reform. The panel’s final report is expected in January 2019. But ideas discussed by the panel over the past year, Vohra says, have included eliminating the GAO’s and CFC’s jurisdiction over protests of DoD procurements, or creating a new forum within DoD to expedite the protest process by resolving them in as little as 10 days.

For its part, Congress continues to express an interest in procurement reform, including changes to the bid protest process. The John S. McCain NDAA for FY 2019, passed in August 2018, directs the DoD to study the frequency and effects of bid protests at both the GAO and the CFC, and to develop a plan for an expedited protest process for DoD procurements valued at less than \$100,000.

Overall, says Vohra, “there is this overarching possibility that we will see significant changes to the protest process. That change is likely to be incremental, and we’re likely a ways away from an entirely different process. But this definitely is something that government contractors need to be aware of and thinking about.”

THE MATERIALITY QUESTION CONTINUES

In 2016, the U.S. Supreme Court’s *Escobar* ruling clarified that False Claims Act liability may result from a contractor’s implied certification of compliance with statutory, regulatory, or contractual requirements if compliance with a particular requirement was “material” to whether the government would have paid a vendor. “Since then, the salient question has been how to determine materiality,” says Crowell & Moring’s Anuj Vohra. “How do you figure out whether your noncompliance with a requirement is something that would have triggered the government’s payment or nonpayment?”

The stakes can be high: In early 2018, a Florida district court pointed to the rigorous *Escobar* standards for materiality in vacating a \$347 million jury verdict in an FCA case against a group of nursing home operators, noting that despite being aware of the contractor’s noncompliance with the contractual requirement in question, the government had continued to pay the contractor’s claims (*U.S. ex rel. Ruckh v. Salus Rehab., LLC*).

Courts continue to struggle with the question of whether a misrepresentation about compliance with a requirement was material to the government’s payment decision, and have raised the possibility of discovery as a way to answer it. “Motions to dismiss FCA claims have sometimes been denied because the courts have said that based on what we know right now, we just can’t tell. So they have allowed discovery that speaks to materiality,” says Vohra. That may be a key point going forward, he adds. “Discovery on materiality is something attorneys for the government and for the contractors defending against claims will continue to face in the coming year—and it’s something that can make difficult False Claims Act defenses that much more complicated.”

JURISDICTIONAL ANALYSIS

TIME TO TRIAL, FAVORABLE COURTS, AND OTHER LITIGATION TRENDS

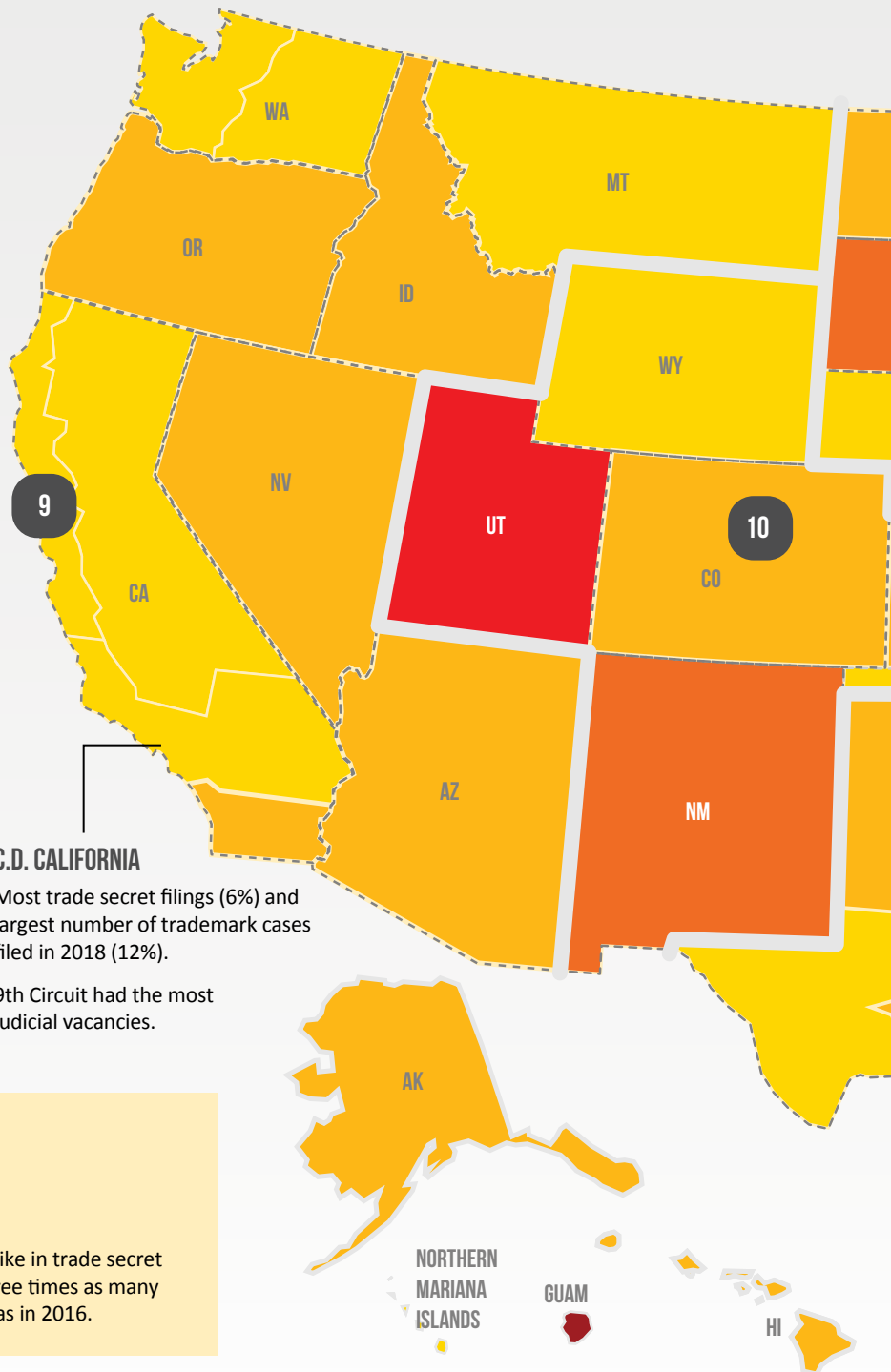
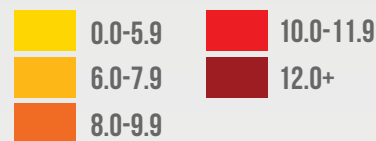


Several litigation trends set in motion by recent events continued in 2018 and have now become the “new normal.” In 2018, D. Delaware, as predicted, overtook E.D. Texas for the largest number of patent cases filed, a trend set in motion by the May 2017 Supreme Court decision in *T.C. Heartland*, which made personal jurisdiction for corporations a driving force in patent litigation forum selection. Another continuing trend: trade secret litigation has skyrocketed—tripled since 2016. This is no anomaly. Macro trends like the digitization of intellectual property, surging employee mobility, and reduced patent protection for software and business methods have combined with the Defend Trade Secrets Act of 2016 to make trade secret litigation an increasingly popular and effective tool for protecting high-tech assets. D. New Jersey has the most product liability filings, in large part due to the *Johnson & Johnson Talcum Powder Products Liability Litigation* multidistrict litigation (MDL) filed in the last months of 2017. But D. New Jersey is also the most frequent venue for non-MDL medical device and pharmaceutical product cases, due to the large number of device and drug manufacturers headquartered in that venue, again based on *T.C. Heartland*.

—KEITH HARRISON, Partner, Crowell & Moring

DISTRICT COURTS FOR CIVIL CASES

Average number of months from filing to disposition



D. New Jersey and E.D. Louisiana make up nearly 50% of all product liability cases filed in 2018.

3X

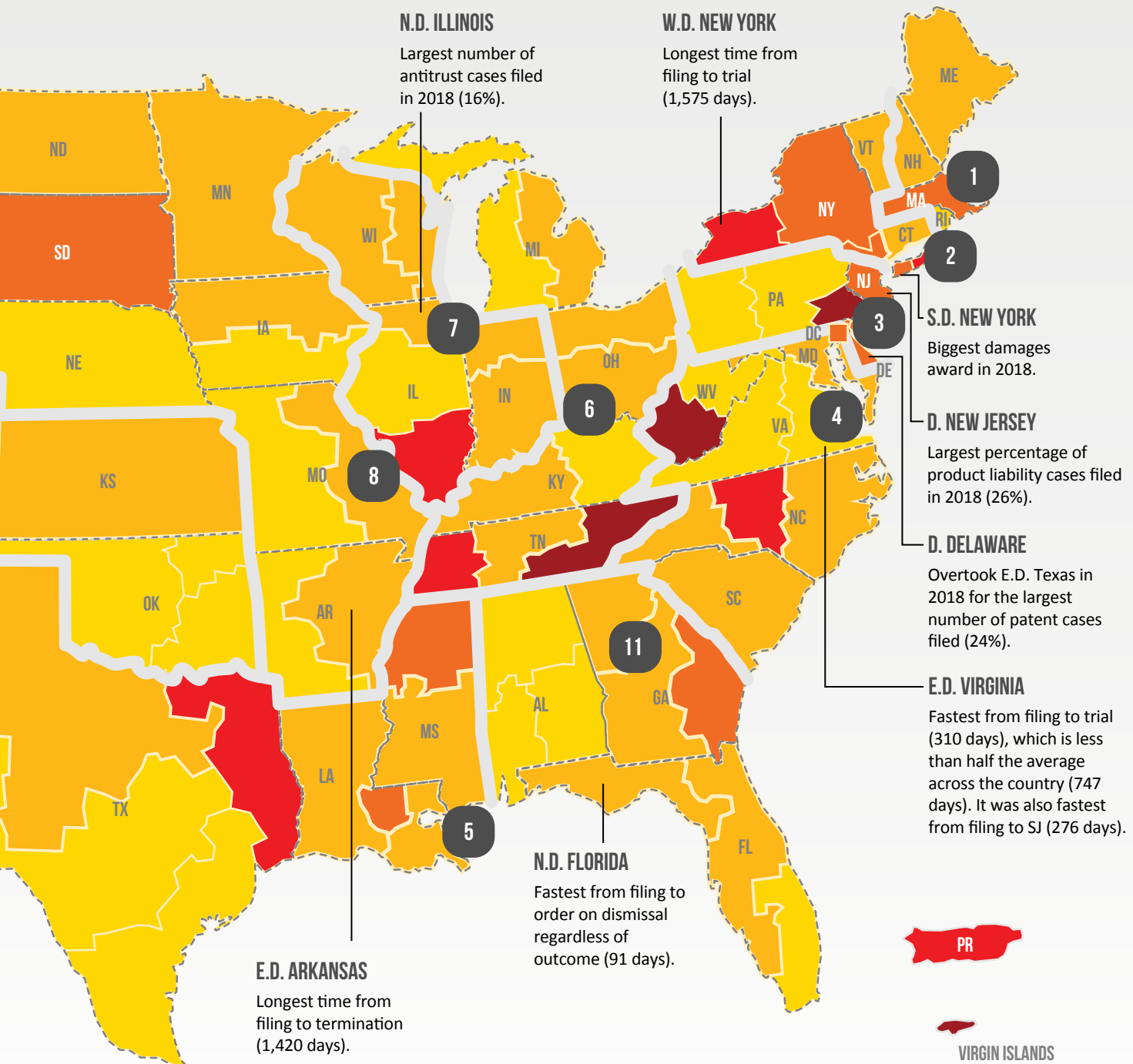
There was a spike in trade secret filings, with three times as many filings in 2018 as in 2016.

UNITED STATES COURTS OF APPEALS

CIRCUIT	NOTICE OF APPEAL TO DISPOSITION IN MONTHS	S. CT. REVERSAL RECORD
1ST	13.6	1 OF 1
2ND	10.9	2 OF 4
3RD	7.9	3 OF 3

4TH	5.4	N/A
5TH	9.6	3 OF 4
6TH	7.5	4 OF 4
7TH	8.5	4 OF 7
8TH	7.2	2 OF 3

9TH	11.7	12 OF 15
10TH	8.4	1 OF 3
11TH	7.8	5 OF 6
DC	12.5	4 OF 5
FED.	14.0	2 OF 3



INTELLECTUAL PROPERTY

TAKING IP IN NEW DIRECTIONS



In the past year, two appellate rulings have revisited long-standing IP-related concepts: fair use and damages for lost profits overseas. Together, they could empower IP owners who decide to pursue litigation.

The first of these, in *Oracle v. Google*, revolves around the Java programming language. Starting in 1995, Java was an open-source technology from Sun Microsystems, and as such, it was widely used by software developers in a range of programs over the course of two decades. Sun was eventually purchased by Oracle, which took ownership of Java and added modifications to it.

When Google implemented its Android operating system for its smartphone, it used Java APIs—pieces of software that streamline the connecting of applications. In 2010, Oracle sued Google for copyright infringement over the use of those APIs. Google, for its part, claimed that its utilization of Java was fair use, a common justification in the technology world.

The case gained prominence because of the fundamental role that APIs play in the technology industry. APIs are not the components of a software application that provide the features and functions that people use and that differentiate one software product from another. Instead, they serve the more utilitarian role of enabling one system to communicate easily with another, so that applications, data, and computing services can be shared easily across different systems. APIs make it possible, for example, to click on a Twitter link and go to a website, make airline reservations through a third-party mobile app, access cloud-based applications via computer, or provide seamless online sales across channels.

Typically, software developers write APIs for their applications because they want those applications to work with other systems, and developers have long assumed that they can leverage APIs under fair use. But *Oracle v. Google* calls that assumption into question. After years of trials and appeals, the case came to the Federal Circuit, which, in March 2018, reversed a lower court decision and said that fair use did not apply. Google has indicated that it plans to appeal to the U.S. Supreme Court, and it is widely anticipated that the Court will hear the case.

The ultimate outcome of the lawsuit could have ramifications far beyond the monetary damages involved. “The question of whether fair use defenses for APIs are available to developers and companies will have a tremendous impact on the technology industry,” says Arthur Beeman, a partner in

Crowell & Moring’s Intellectual Property and Litigation groups. And it’s not just the technology industry that will be affected. APIs are a key enabler of technology-driven innovation, making it possible to link and combine disparate platforms to create new products and services, build business ecosystems, and implement new business models. More broadly, such innovations often have a far-reaching effect across business and society, prompting some observers to talk about the growing “API economy.”

The Federal Circuit’s decision appears to essentially close the door on the fair use argument, Beeman says, “and that has been widely viewed as something that will have a chilling effect on development and innovation in the industry. There are a lot of companies that think they are working under the umbrella of fair use, and now they may not be.” At the same time, the decision may strengthen the hand of companies with technology-based IP. “This could create a situation where there is enhanced leverage for licensors,” he adds. “If you have a copyright on things like APIs and the licensee feels that they can’t claim fair use, you have a stronger position in any licensing negotiations.”

With the aggressive IP litigation strategies being pursued by some technology companies, GCs will need to assess their risk in light of these developments—and keep a close watch on the case if it goes to the Supreme Court.

KEY POINTS

A Changing Landscape

Two decisions in the past year have up-ended long-standing IP-related activities.

Less Open Technology?

The fair use defense in software reuse has been thrown into question.

Extended Reach

IP owners can now go after infringement damages based on overseas sales and profits.



“There are a lot of companies that think they are working under the umbrella of fair use, and now they may not be.”

—Arthur Beeman

DAMAGES AND OVERSEAS PROFITS

In June 2018, the U.S. Supreme Court, in *WesternGeco LLC v. ION Geophysical Corp.*, held that a company could recover patent damages for lost profits overseas—“a tremendous departure from prior case law, which had restricted damages to domestic injury only,” says Beeman.

In this case, WesternGeco, a developer of technology used to survey the ocean floor, had sued ION, a competitor, for patent infringement. ION had been manufacturing components for a competing surveying system, which it then shipped to companies abroad that combined the components to create a surveying system that was essentially identical to WesternGeco’s. A jury trial found that ION had infringed, and awarded damages of nearly \$106 million in royalties and lost profits. ION filed a motion to set aside the verdict, based on the long-standing precedent that U.S. patent law allows damages based only on U.S. sales, not for lost profits in overseas sales. The district court denied the motion, but the Federal Circuit reversed that decision. The Supreme Court agreed with the district court, in large part because the original infringing behavior had taken place in the U.S.

WesternGeco has immediate implications for GCs at manufacturers, pharmaceutical firms, telecom companies, and

other companies that have large patent portfolios. “If you are looking at asserting your patents, you will want to factor in the extent to which you can collect profits from overseas as part of your due diligence,” says Beeman.

In addition, “the *WesternGeco* case has triggered a great deal of discussion as to how it will affect innovation in the United States and whether it will impact trade relations with certain nations,” he says. U.S. manufacturers making or assembling products to be sent overseas, for example, could be at risk of incurring higher infringement-related damages. Observers have noted that this could prompt some U.S. manufacturers to shift production overseas—a possibility that runs counter to the administration’s goal of bringing manufacturing back to the U.S. If a shift to overseas production does take place, it could prompt legislative action to change IP law accordingly.

The Supreme Court’s *WesternGeco* ruling was intentionally narrow, but it remains to be seen how courts will interpret it going forward. One possible indicator: In October 2018, the district court in Delaware applied it broadly to increase damages in a civil patent case (*Power Integrations, Inc. v. Fairchild Semiconductor International, Inc.*). “Ultimately,” says Beeman, “*WesternGeco* raises the stakes in terms of patent damages. The landscape of patent litigation, and how claims are pled and worked up, will be reshaped by this decision.”

SURVIVING THE IP AUDIT

Today, more software companies are conducting audits of their customers to ensure compliance with licenses. “This is one way to insert more certainty and predictability into the monetization of their IP,” says Crowell & Moring’s Arthur Beeman. That means companies are increasingly likely to undergo audits—which can be intrusive and can lead to penalties and even litigation.

There are several steps that can help companies avoid problems, but a key one is to manage communications with the vendor when an audit is underway. “Be clear and firm upfront about what information you will and will not provide,” says Beeman. “It’s not unusual for vendors to ask for information you don’t need to provide under the licensing agreement.” In addition, software firms may try to reach employees in various departments to look for information that could be used

to increase pressure on the company, so it can be important to restrict such access and centralize communication with the vendor—and to route that communication through counsel. Companies should also make sure that the tests vendors run to audit systems do not collect information that they are not contractually obligated to provide—and that they can review the results before they are released to the vendor.

Prevention can also help. Beeman suggests that companies conduct a self-audit to document what software features are being used in order to make sure they are in compliance with licensing agreements—and proactively address any problems. “It’s better to catch these things on your own before an audit and, if necessary, obtain the proper licenses, rather than be surprised by an audit’s findings,” he says.

LABOR & EMPLOYMENT

THE STATES STEP INTO #METOO



Since the #MeToo movement took hold a year ago, there has been a wave of high-profile sexual harassment claims against companies and a number of prominent figures—many of whom have been removed from their roles as executives and leaders. The ensuing litigation is just beginning to wind its way through the courts, and its full impact is yet to be felt.

“There have been a lot of complaints raised and individuals terminated, but few cases have been fully litigated,” says Ellen Moran Dwyer, a partner in Crowell & Moring’s Labor & Employment Group and chair of the firm’s Executive Committee. “So we haven’t seen a real shift in the legal and liability standards that apply in harassment cases—but that may be coming. Over time, the courts will have to grapple with these issues.”

In the near term, however, increased litigation risk is coming from another quarter, in the form of state laws enacted over the past year. By August 2018, according to an Associated Press analysis, about half of U.S. states had passed laws related to #MeToo issues—and the trend has continued. Some of these laws have focused largely on state governments themselves—requiring harassment training for statehouse employees, for example, or prohibiting the use of public money to fund harassment settlements. But a growing number of states have also passed #MeToo-related legislation that is focused on private-sector employers—a list that now includes Arizona, California, Delaware, Maryland, New York, Tennessee, Vermont, and Washington.

WHAT’S IN THE LAWS

This new legislation varies from state to state, but some common themes are emerging. Often, says Dwyer, “states are taking up legislation to enhance the transparency of harassment complaints lodged against an employer. In doing so, states are seeking to avoid a situation in which serial harassers are free to victimize multiple employees and move from company to company undetected.” New state laws, for example, are limiting the use of non-disclosure agreements (NDAs), which many see as tools that have enabled harassers to silence victims and continue their behavior over the course of years. “New York and California have enacted legislation that prohibits an employer from requiring an employee to agree not to disclose the facts underlying her sexual harassment claim,” says Dwyer. “You can have an NDA that prohibits disclosure of the amount

of money paid to resolve a claim, but the employee must remain free to disclose the underlying facts.”

Dwyer notes that a number of legislatures, perceiving mandatory arbitration as a means to conceal or bury harassment claims, have outlawed provisions in employee handbooks and agreements that mandate the arbitration of sexual harassment claims. Other states have extended the statute of limitations for sexual harassment claims “to afford employees more time to come forward with claims of sexual harassment, recognizing that it often takes time before an employee is comfortable speaking up,” she says. California, for example, recently increased its statute of limitations from one to three years.

Meanwhile, at least one state—New York—has addressed third-party victims in its laws, with a statute that makes employers liable for the harassment of contractors and vendors working for them. “The language of the statute is very vague,” says Dwyer. “In effect, it says that liability depends on the degree of control the employer has over the alleged harasser. Exactly what degree of control is required and the corresponding bounds of employer liability to non-employees under this new legislation are issues we expect to play out in the courts.”

Finally, some state laws have gone further, mandating the disclosure of complaint data to state agencies and directing the

KEY POINTS

#StatesToo

A growing number of states have been passing #MeToo-inspired legislation covering employers.

New Requirements

Laws often include limits to forced arbitration and NDAs and mandate interactive training.

Focus on Prevention

With these multistate, piecemeal changes in the law, employers should update their harassment policies and training.



“As more state and local laws impose these requirements, it becomes increasingly challenging for large companies to develop and implement uniform policies to address harassment in their workplaces.” —*Ellen Moran Dwyer*

agencies to take a more active role in investigating complaints. Signaling the states’ interest in monitoring employers’ handling of sexual harassment complaints more closely, a new law in Maryland requires businesses with at least 50 employees to provide public reports to the state’s civil rights commission that recount details about the company’s sexual harassment settlements and confidentiality agreements. And a new Vermont law mandates the creation of an online portal on the attorney general’s or the state’s human rights commission’s website, in addition to a telephone hotline, to facilitate both the reporting of complaints and state agency oversight of investigations.

THE OUNCE OF PREVENTION

Many of these new state laws focus on preventing, rather than remediating, harassment. Some go so far as to spell out specific provisions that companies need to include in their harassment policies—which can get complicated. “As more state and local laws impose these requirements, it becomes increasingly challenging for large companies to develop and implement uniform policies to address harassment in their workplaces,” says Dwyer.

Required sexual harassment training is a key component of most of this legislation over the past year. Several laws call for interactive training—either online or in person—to educate employees about the bounds of acceptable workplace conduct and avenues to report harassment. A Delaware law, for example, requires companies with 50 or more employees to provide such training, and goes on to spell out the topics that must be covered, such as the illegal nature of sexual harassment, the use of examples to define it, and the complaint channels through which to report it. Dwyer also points to recent guidance issued by the U.S. Equal Employment Opportunity Commission that not only calls for more robust harassment training but also “shifts the focus from simply defining prohibited conduct to fostering engaged and civil relationships in the workplace.” Says Dwyer, “This focus on civility reflects a fresh awareness that workplace cultures built on foundations of civility and respect tend to have many fewer incidents of harassment and sex-based misconduct.”

Employers should take state lawmakers’ emphasis on prevention to heart—both to head off problems before they start and to support an affirmative defense if they become entangled in litigation. Most mature companies have anti-harassment policies in place, but with the recent enactment of a patchwork of state legislation, those policies should be revised and updated. Employers should likewise double their

PAY EQUITY GOES GLOBAL—AND LOCAL

Over the past year, the issue of gender pay equity continued to gain traction. In the U.K., for example, a movement called #PayMeToo has emerged, and U.K. law now requires companies with more than 250 employees to disclose information about their gender wage gaps annually. “That legislation has triggered similar legislation in other countries,” says Crowell & Moring’s Ellen Moran Dwyer. “So we’re seeing the increased globalization of pay equity concerns and gender pay gap reporting.”

In the U.S., Dwyer says, “there is growing interest in this issue from boards of directors and often an interest in more transparency.” In addition, a number of states—including California, Massachusetts, New York, New Jersey, and Oregon—have revised their pay equity laws to expand protections around gender pay differences. Typically, these changes have eased wage-comparison criteria to be more employee-friendly or banned salary-history questions in hiring. In the coming year, says Dwyer, “we’ll see more litigation, especially class litigation, under these state statutes.”

efforts to understand and enhance the civility and cultures in their organizations as a core part of their risk mitigation strategies in the perilous #MeToo space. Cultivating relationships of trust and respect between leaders and their employees, and confidence in harassment reporting channels and the fairness of employers’ remediation efforts, should serve as a powerful prophylactic against harassment and ensuing litigation.

“That’s important,” Dwyer says, “because in many sophisticated companies, the problem is not so much the overt physical conduct but rather subtle, nuanced behavior.” Effective training, she notes, “educates employees about how others experience them and about what makes people uncomfortable. It’s really just trying to create a workplace where people understand each other and trust each other.” In that kind of culture, she says, “when someone has a complaint, they are more likely to speak up and report it internally—without launching a full, aggressive investigation that can lead to litigation.”

TORTS

WATCHING THE GROWING MULTI-PLAINTIFF CHALLENGE



In the product liability arena, a growing number of multi-plaintiff trials are finding their way into consolidated litigation, including multidistrict litigation (MDL). Many see this bundling of plaintiffs as confusing to juries. But a number of courts are open to the strategy—and that

is creating challenges for defendants.

Consolidated litigation is used when there are numerous plaintiffs in related lawsuits, often in MDL. A small subset of representative plaintiffs is selected for bellwether trials, where each plaintiff's claims are heard separately. These trials provide test cases that can inform the litigation of the rest of the plaintiffs' cases. Thus, if there were 1,000 plaintiffs with similar claims, five might be picked as being representative of the entire group and heard separately in a series of bellwether trials.

But some plaintiffs are looking for a different approach. "Rather than adjudicate these cases one at a time, some plaintiffs are trying to lump cases together in one bellwether trial, with one jury hearing those multiple cases at the same time," says Andrew Kaplan, a partner at Crowell & Moring and vice-chair of the firm's Mass Tort, Product, and Consumer Litigation Group. The rationale for such a move is that hearing cases individually when there are a large number of plaintiffs is too inefficient.

From the plaintiffs' perspective, the potential for high awards offers another incentive. In a high-profile, multi-plaintiff trial in 2018, for example, a jury in Circuit Court of the City of St. Louis delivered a \$4.69 billion verdict against Johnson & Johnson over the company's talc-containing products.

TOO MUCH FOR JURIES?

For defendants, the multi-plaintiff approach creates significant challenges. Often, product liability lawsuits involve fairly

complex information and arguments. "Even when you're talking about the same product and the same type of alleged injury, there are real differences in each case that need to be analyzed by the jury," says Kaplan. For juries hearing a number of cases at once, it can be difficult to keep the separate cases and facts straight, or to clearly understand the nuanced differences across claims.

Perhaps worse, says Kaplan, "that approach is prejudicial to the defendant. If you have one plaintiff saying this product caused injury to me, a jury can judge that based on the facts of that case. If there are six people who are claiming similar things, it suggests that there is no issue about causation—that the injury actually happened. Juries think, Why else would there be so many people in this trial?"

That perception issue also comes into play when plaintiffs rely on experts to build their case. "The problem becomes especially acute in a situation where the science is dubious. When you have a dozen or more plaintiffs in the courtroom, the sheer number of plaintiffs improperly bolsters the science that lays at the foundation of the claims," says Kaplan.

Experience supports the idea that the multi-plaintiff approach affects juries' perceptions. For example, juries often return nearly uniform verdicts for all cases in a multi-plaintiff trial, even though the facts and claims differ among plaintiffs. In addition, it seems that the same sort of evidence can lead to different outcomes as the number of plaintiffs in a trial grows. Kaplan points to a series of related trials involving DePuy, a hip implant manufacturer, over the past few years. "The first bellwether trial was a single-plaintiff case in the Northern District of Texas, which ended with a verdict for the defense," he says. "The next trial, with five plaintiffs, resulted in a \$550 million plaintiff verdict. The following six-plaintiff trial ended with a \$1 billion plaintiff verdict. And most recently, another six-plaintiff trial produced a \$247 million plaintiff verdict. That suggests that juries have a hard



"Even when you're talking about the same product and the same type of alleged injury, there are real differences in each case that need to be analyzed by the jury." —Andrew Kaplan

time making an independent, fair evaluation if there are multiple plaintiffs.”

With such amounts at stake, plaintiffs have increasingly pursued the multi-plaintiff approach, especially in the medical device and pharmaceutical fields. “They recognize the pressure that’s asserted on companies when they bring claims of hundreds or thousands of people at a time,” says Kaplan. Often, the plaintiffs’ bar uses aggressive tactics in setting up this litigation. “They will typically advertise widely, often spending millions of dollars to recruit a large number of plaintiffs,” he says. “Increasing the number of plaintiffs creates the illusion that there is a real issue, even if most of those lawsuits are driven by someone seeing an advertisement on TV. And that high volume of plaintiffs then lets them argue that they need a consolidated multi-plaintiff trial to handle it efficiently.”

This “build it and they will come” approach to inflating the number of plaintiffs often casts too wide a net, Kaplan continues. “It creates a consolidated litigation where there is a low bar to entry,” he says. “If you are just signing up names and telling people that they will collect money at the end if there is a settlement, you’re naturally going to get a lot of weaker claims thrown into the mix. Plaintiffs’ attorneys will often start by bringing their stronger cases and then quickly add an inventory of people who really have nothing in the way of a claim.”

THE COURTS’ VIEW

The willingness to hear consolidated multi-plaintiff trials varies across courts, but over the past two years, the strategy has been endorsed by two federal appeals courts. In February 2018, the Fourth Circuit confirmed the use of consolidated multi-plaintiff trials in *Campbell v. Boston Scientific*, and more recently, says Kaplan, “the Fifth Circuit has not prohibited the DePuy hip implant bellwether multi-plaintiff trials.”

Kaplan says that the push for consolidated multi-plaintiff trials—and the associated advertising that invariably follows—can be expected to continue. “For the plaintiffs, there’s really little to lose in trying this strategy,” he says. “We will probably see more of a push for this in places where courts and jury pools tend to favor plaintiffs, such as St. Louis and certain jurisdictions in West Virginia, Illinois, Florida, and elsewhere. And if we see more courts allowing it, then plaintiffs will be encouraged to use this strategy even more.”

That is by no means a given, however. Kaplan notes the

A WARNING ON FAILURE TO WARN

Today, companies are seeing an uptick in “failure to warn” cases, in which plaintiffs claim that they were harmed by a product because of a lack of warning about potential injury.

One reason for the increase, says Crowell & Moring’s Andrew Kaplan: “Failure to warn claims are easier to prove than actual product defect claims, so we’re seeing more of these cases filed and progressing to trial.”

Plaintiffs may also be leveraging changes in jury attitudes, according to research with jury surveys and mock juries—and experience in actual trials, says Kaplan: “Jurors now appear to be more accepting of arguments that put the burden on the company to provide warnings on their products.” Younger jurors, in particular, are willing to see that as a company’s responsibility and to judge a company’s actions based not just on the actual warning and harm, but on the company’s broader values, as well. “It’s sort of a moral barometer question for them. So you’ll see plaintiffs’ attorneys asking juries questions like, ‘Is this company good? Wouldn’t a good company want to warn its customers about these things?’” he says.

In addition, jurors who have become accustomed to internet searches and online shopping are more inclined to expect access to a wealth of information about virtually anything—including products. “Many jurors now see a lack of warning as a company withholding information and taking away their freedom to make their own choice about using a product,” says Kaplan.

With these changing juror perspectives, he says, “results in actual cases are showing that failure to warn claims are more successful than other defective product claims. And when the plaintiffs’ bar sees a model that works, they are going to flock to that.” Litigators need to be aware of these shifting jury attitudes and tailor their approaches accordingly.

potential for judicial backlash against the use of multi-plaintiff trials, and there have been indications that some judges see problems with the practice. In a 2016 surgical-mesh case, Judge Clay Land, chief judge of the U.S. District Court for the Middle District of Georgia, noted that plaintiffs’ attorneys had quickly expanded the plaintiff pool from 22 to 850 with “tag-along” plaintiffs who had frivolous claims, and took them to task for doing so. “He threatened the plaintiffs’ lawyers with sanctions if they brought more cases like that,” says Kaplan. “He also took exception to the whole consolidation process over that very issue—and he urged other judges to watch for these tactics in other consolidated trials.” It remains to be seen if other courts will follow that lead.

WHITE COLLAR

AGs: WATCHING OUT FOR CONSUMERS



State attorneys general have assumed a substantial enforcement role in recent years, and that trend continues. Companies need to be aware of the litigation risk this brings in several key areas—and to understand the potential opportunities that this trend creates, as well.

Today, state AGs are active on many fronts, from antitrust and environmental issues to the opioid epidemic. But they are especially focused on consumer protection—a natural fit for a group attuned to dealing with issues that resonate with the public. “The vast majority of AGs are elected,” says Rebecca Monck Ricigliano, a partner in Crowell & Moring’s White Collar and Regulatory Enforcement Group and former first assistant attorney general of New Jersey. “The few who aren’t are appointed by the governor and confirmed by the state senate.” As a result, they are sensitive to the attitudes of constituents—and “consumers” is a category that includes a wide swath of those constituents and cuts across social and political lines. “So consumer protection is a really good way for an AG to make a mark,” she says.

Going forward, many AGs may be even more active on behalf of consumers as the Consumer Financial Protection Bureau and other federal consumer protection efforts are scaled back. Over the past year, groups of AGs have weighed in with the federal government on a variety of consumer-related issues, from net neutrality and the financial fiduciary rules to the Affordable Care Act, 3-D printing of guns, and cutbacks of federal regulations designed to protect nursing home patients.

TWO KEY AREAS OF FOCUS

Ricigliano says that in looking ahead to 2019, general counsel need to be aware of two areas of consumer protection that are on AGs’ agendas:

- **Elder abuse and fraud.** AGs are pursuing more cases where senior citizens are victims. In 2018, the National Association of Attorneys General finished up an annual campaign targeting elder abuse, including financial exploitation, and many state AGs have established their own elder abuse units. In February of last year, a number of AGs participated in a coordinated multistate sweep of elder fraud cases that resulted in criminal charges for 200 people who were “engaged in financial schemes that targeted or largely affected

seniors,” according to a release from the Department of Justice, which helped coordinate the sweep. “In total, the charged elder fraud schemes caused losses of more than half a billion dollars,” the DOJ noted. And in the health care arena, Ricigliano adds, “it’s not just consumer fraud that companies need to think about if they’re working with government. Many states have their own false claims acts, often with whistleblower provisions.”

- **Technology.** With technology now an integral part of consumers’ lives, AGs are looking at everything from cryptocurrency to mobile phone apps. In particular, they have made data privacy and cybersecurity a high priority, prompted in part by several well-publicized data breaches. For example, in May 2018, the New Jersey AG’s office announced the creation of a Data Privacy and Cybersecurity unit that will work with other state agencies to investigate breaches and bring actions to protect residents’ information. And in March 2018, the New York AG’s office, which has participated in a number of data privacy-related investigations, joined with the Massachusetts AG to investigate Facebook’s sharing of user data following the Cambridge Analytica scandal.

For most corporations, the chances of being involved in truly egregious fraudulent behavior are slight. The real risk lies in the less obvious problems, where seemingly innocent business practices can lead to unintentional violations of regulations. “In some states, there are requirements that prices need to be clearly displayed,” says Ricigliano. “Or there may be rules about how a company does its billing or about making sure consumers are aware of fees that they are going to incur. Activities relating to the consumer’s pocketbook usually get the attention of AGs and create risks for companies.” Not surprisingly, many of the less obvious risks today are technology-related. “Is the corporation doing enough to advise people about the availability of parental controls? What are the opt-in and opt-out provisions for smart products’ data use? Are customers being advised about how their information is being used?” she says.

WORKING WITH AGs

In assessing risk, companies should factor in the wide range of discretion and power that AGs have. They can enforce state laws and some federal laws, pursue civil suits on behalf of the state or citizens, issue opinions to state agencies, act as



“Unlike the DOJ, [AGs] have an extraordinary ability to identify an issue, enforce it through civil or criminal actions, and then look at holistic policy or legal changes.”

—Rebecca Monck Ricigliano

public advocates in a number of areas, and propose litigation, among other things.

In addition, says Ricigliano, “a big difference between AGs and the federal government is that the federal government might have a few local districts in a state—New York has four federal districts, for example. But the AG covers the entire state. So they can take a really broad look at the issues and concerns of their constituents and figure out how to best tailor not only enforcement actions but programmatic policy changes. Unlike the DOJ, say, they have an extraordinary ability to identify an issue, enforce it through civil or criminal actions, and then look at holistic policy or legal changes.”

What’s more, Ricigliano continues, “AGs have the power to come together in concerted multistate actions, which can be a litigation morass for companies and result in very large fines.” The best known of these actions is, of course, the 1998 \$246 billion Tobacco Master Settlement Agreement. But AGs have continued to collaborate in areas such as loan and mortgage foreclosure fraud and, most recently, suing opioid manufacturers.

While weighing the growing risks of litigation at the state level, companies should also view this trend as an opportunity—and look for ways to leverage AGs’ heightened interest in consumer protection. That could mean collaborating with the AG to attack fraud perpetrated on the company by scam artists or robo-callers identifying themselves as company agents, for example. In that type of case, says Ricigliano, “because the state AGs have that ability to look at an issue holistically, they can issue press releases warning of the scam and get the word out through the media to more quickly and efficiently educate the public and protect consumers.”

Collaboration might also involve working with the AG’s office to help identify consumer fraud in the company’s industry, or participating in the AG’s fraud-education programs for consumers. Or it could mean proactively approaching the AG’s office when a company’s internal investigation finds that it is inadvertently violating some consumer protection rule.

“Those kinds of actions may not make a problem go away,” says Ricigliano. “But they will allow you to become a known quantity and be seen as a good corporate citizen. If you’re self-reporting a problem, it’s much easier to engage a state AG with a remedial plan of action if you have a relationship with that office—if you have come to them before as an aggrieved party or as a partner. It’s a much easier conversation if there is already an existing relationship.”

COOPERATION: STILL HARD TO PIN DOWN

Companies involved in government investigations usually face a difficult choice: disclose potentially privileged information to get credit for cooperation and risk waiving privilege or hold privileged information back and risk missing out on full credit. It’s not always clear which route is best.

Case law has not provided clarity on what waives privilege in communications with the government or enforcement agencies. Erring on the side of caution, attorneys communicating with the government on behalf of their corporate clients will often share factual information obtained from privileged witness interviews by verbally providing hypothetical scenarios or blending information learned from multiple witnesses, rather than attributing information to specific witnesses.

In late 2017, a magistrate judge in the *SEC v. Herrera* case issued an opinion that served as a warning to attorneys who do not hew to the more cautious approach outlined above. In *Herrera*, attorneys for General Cable Corp. had conducted an internal investigation into accounting errors. When reporting their findings to the SEC, the firm’s attorneys provided “oral downloads” of witnesses’ individual interviews to the commission. When the SEC later sued several General Cable employees in the matter, the defendants asked for the written notes and memoranda for the interviews verbally recounted to the SEC. In late 2017, the court ruled in their favor, saying that the company had already disclosed the information to a potential adversary—the SEC—orally.

“The decision in *Herrera* shows the danger of providing verbatim information—even verbally—to the government, but it can be hard to know exactly how much information can be shared without waiving privilege,” says Crowell & Moring’s Rebecca Monck Ricigliano. “As a result,” she adds, “it is critical to understand the judicial landscape where an investigation is taking place and adjust strategies for engaging on the facts with the government accordingly.”

PRIVACY & CYBERSECURITY

TARGETED DATA PRIVACY LAWS INCREASE RISK



Data privacy has been a growing source of class action litigation for some time—and now, an emerging breed of state laws is opening the door to new areas of risk.

“A number of states have enacted data privacy legislation designed to protect not just personal data in general,

but very specific types of personal data, such as biometric and genetic information,” says Gabriel Ramsey, a partner in Crowell & Moring’s Litigation, Intellectual Property, and Privacy & Cybersecurity groups. This trend really began with the passage of the Illinois Biometric Information Protection Act in 2008, which covers information about biometric identifiers such as fingerprints, retina or iris scans, voiceprints, and hand or facial scans. Other states, such as Washington and Texas, have passed comparable biometric data laws.

In a similar vein, Alaska, Oregon, Illinois, and other states now have laws protecting genetic information—which could have ramifications not only for firms that offer DNA analyses to consumers, but also for hospitals and research centers that keep that type of information. And it appears likely that more states will adopt such legislation, if for no other reason than political expediency, because data privacy continues to be a major concern for the public.

“This growing patchwork of laws obviously affects traditional and start-up tech companies that are involved with biometric technology,” says Ramsey. But the use of biometric data is becoming more widespread, and the technology is found in a growing range of products and services across industries.

“Many types of companies are at risk from niche state laws because many use these types of data in their businesses,” says Ramsey. For example, a wide variety of brick-and-mortar companies have been sued over their use of fingerprint-enabled time-and-attendance systems, including an ambulance company, a convenience store chain, a janitorial services firm,

and an auto repair company. But beyond these traditional contexts, biometric data is increasingly used in a wide array of disruptive digital technologies used in entertainment, health and fitness applications, financial services, and targeted user-specific applications. “Sometimes the technology is being used in middleware that is baked into other products—things like smartphone apps—where their use is fairly invisible to consumers,” says Ramsey. “As the technology develops and expands, more and more companies will have to think about this.”

GROWING BIPA LITIGATION

The Illinois biometric legislation remains the most prominent and strongest of these targeted privacy laws. BIPA says that companies collecting and storing biometric data need to inform individuals that they are doing so and get written consent for keeping their data. It also prohibits companies from selling or disclosing that data in most situations, unless the individual agrees. Notably, it provides a right of action to individuals, along with significant penalties of \$1,000 per negligent violation and \$5,000 for intentional or reckless violations. It also allows plaintiffs to recover attorneys’ fees and costs.

For several years after the act was passed, courts saw little litigation around BIPA. But over the past two years, plaintiffs have filed dozens of BIPA lawsuits, a trend presumably driven by both the growing use of biometric technology in business and the potential for significant damages. As these cases move through the courts, the issue of standing has emerged as a key point of contention. “The question is basically whether violating the statute constitutes enough harm to create an injured class and confer standing, or whether standing requires that there be actual injury or damage,” says Ramsey.

The courts have been divided on this issue. In *McCullough v. Smarte Carte, Inc.*, for example, a company used scanned fingerprints to enable people to open storage lockers. Plaintiffs



“Many types of companies are at risk from niche state laws because many use [biometric] data in their businesses.”

—Gabriel Ramsey

sued, saying their biometric information had been collected without their consent. However, in 2016, the Northern District of Illinois found that there was no concrete injury and therefore no standing. In 2017, in *Vigil v. Take-Two Interactive Software, Inc.*, plaintiffs alleged that they had not received notice that their facial scans, used to create online video game avatars, would be stored. In this case, the Southern District of New York also found that there was not sufficient actual injury to confer standing.

DIFFERING OPINIONS

Other courts have differed. In *Monroy v. Shutterfly, Inc.*, plaintiffs said that Shutterfly, which allows users to upload photos to a website, was automatically extracting biometric information from these photos—including information about photo subjects who were not even users of Shutterfly. In 2017, the Northern District of Illinois said that this was enough to confer standing, even for non-Shutterfly users. Later, in *Patel v. Facebook, Inc.*—a suit involving Facebook’s “tagging” feature for marking photographs—plaintiffs argued that the company was collecting and storing their biometric information without giving users notice or getting their consent. In 2018, the Northern District of California ruled that the mere allegation of a failure to comply with BIPA’s requirements in those areas constituted a sufficiently pled invasion of privacy and a sufficiently pled injury for standing.

“These types of cases are important to watch as they make their way to the higher appeals courts and some sort of consensus starts to emerge,” says Ramsey. “The litigation is still testing the waters, and if a few of these cases get traction, the damages could theoretically amount to billions of dollars. That could start to create a feedback cycle that would only encourage more lawsuits.” Such developments could have a similar effect on state legislators, prompting the passage of new biometric and genetic data privacy laws in more states, or laws that focus on new types of specialized data—“perhaps something like a law specifically governing location-based data or other data that consumers or legislators perceive as particularly sensitive,” Ramsey says. This in turn could further bolster the enforcement authority of state attorneys general. Such developments would compound the complexity of the existing patchwork of state privacy laws.

In this environment, companies need to make sure that they clearly understand how they are using biometric information and other types of specialized data—and have processes

FROM THE EU TO THE U.S.

On May 25, 2018, the EU’s General Data Protection Regulation took effect, providing a rigorous set of rules designed to give individuals more control over how their personal data is used. In less than an hour, an EU form of a class action suit was filed under the regulation, to be followed by many others. “There has been aggressive litigation leveraging GDPR’s requirements,” says Crowell & Moring’s Gabriel Ramsey. “European collective and group actions against major technology companies have accelerated dramatically.”

Historically, class action suits have not been allowed in many EU countries. But the GDPR gives individuals the right of private action and allows them to assign their claims to nonprofit organizations to litigate on their behalf. A number of GDPR class action cases have been filed by privacy activist groups on behalf of plaintiffs. “These new litigation paths pose considerable uncertainty, given that they are untested and the law is just developing. And the GDPR poses substantial penalties and gives plaintiffs the right to seek monetary compensation,” says Ramsey. “These features create a new risk of frivolous profit-motivated lawsuits in Europe that we will see play out in the coming years.”

Last June, not long after the EU regulation was in place, the California Consumer Privacy Act took effect. It differs from the GDPR in some ways, but like the GDPR, it represents a stricter approach to protecting data privacy and gives people the right to access their data and the right “to be forgotten” and have their data deleted. Many observers expect other states to follow. As that happens, the GDPR could provide a model for understanding the future of the U.S. litigation landscape. Says Ramsey, “Watching the broad trends as GDPR-related litigation unfolds in Europe might provide insight into how litigation under the California statute and other similar statutes will evolve.”

in place to ensure compliance with rules about gaining consent and using and safeguarding that data. More broadly, they should work to close any gaps that may exist between legal departments and product-development groups. “That’s a long-standing issue; risk management in this kind of technology-related area is really about getting your legal team culturally integrated with your engineering team,” says Ramsey. “Risk often flows from a disconnect between the fast-moving groups implementing products and the more deliberate legal function. When the lawyers are not part of the team, a technology product can easily end up bringing legal complications. So you have to figure out how to build trust between the legal and technical teams and integrate compliance into the design-build process from the very beginning.”

CORPORATE

\$28 TRILLION AND PERSONAL LIABILITY: ERISA ROARS BACK



In the 45 years since the Employee Retirement Income Security Act of 1974 (ERISA) went into effect, U.S. retirement plan assets have soared to a staggering \$28 trillion. With a pool of assets that large, there's been an explosion of ERISA class actions in recent

years. Indeed, the 10 highest ERISA class action settlements in 2017 with respect to employer-sponsored retirement plans totaled nearly \$1 billion. With courts increasingly siding with plaintiffs in ERISA retirement plan cases, there appears to be little hope that the trajectory of these class actions will reverse. At the same time, plaintiffs are exploring new avenues of attack.

Historically, ERISA litigation has focused on the duties, responsibilities, and actions of the retirement plan's fiduciaries—typically, the board and company executives. Under ERISA, those fiduciaries are charged with one main objective: to act solely in the best interests of plan participants. Class action suits against companies have alleged that fiduciaries have violated that rule by, for example, making imprudent decisions regarding investment choices, or failing to manage plan documentation or monitor people hired to carry out plan duties.

In recent years, ERISA fiduciary litigation has increasingly focused on excessive plan fees and expenses. “There has been an increase in class action litigation by plan participants who are basically saying that their employer’s 401(k) plan charged them too much—and the plan fiduciaries should have shopped around and found better deals,” says David McFarlane, a partner in Crowell & Moring’s Corporate, Health Care, Tax, and Labor & Employment groups in New York. “And those can be huge lawsuits. In some, the employer has ended up being on the hook for reimbursing retirement accounts for millions—sometimes hundreds of millions—of dollars.”

The focus on fees is not the only change taking place in ERISA 401(k) litigation. Under the law, fiduciaries are held personally responsible for their decisions—or even those of their co-fiduciaries—and plaintiffs are beginning to take advantage of that. “Recently, we’ve started to see lawsuits naming individuals as defendants, not just companies,” McFarlane says. “It used to be that only the plan sponsor would be sued by a class of 401(k) participants. Now we’re seeing executives and board and committee members being named individually—meaning that their house, their car, and their savings are at risk for something they may not have known was happening

under their watch.” The fiduciaries involved with a retirement plan usually include members of the board of directors, the CEO, the CFO, the vice president of human resources, and “any employee in the company who has discretion to make a decision with respect to the administration of the retirement plan,” he says.

Often, businesses will carry directors and officers’ (D&O) liability ERISA fiduciary insurance as a hedge against personal liability exposure. However, those policies might not be sufficient when it comes to ERISA fiduciary litigation. “D&O policies may not cover ERISA-related liability at all, or there may be special provisions, such as requiring executives to get annual fiduciary training,” McFarlane says. “Even if there is coverage, it might be woefully inadequate compared to the size of the plan or the risks involved.” Insurance companies are beginning to take notice of the size of ERISA class actions and are tightening restrictions on D&O ERISA coverage and adjusting premiums.

UP NEXT: HEALTH PLANS UNDER ERISA

Retirement-focused litigation has resulted in a significant body of jurisprudence and regulatory interpretation, which has set the stage for the next wave of ERISA litigation: employer-sponsored health plans. The United States spends approximately \$3 trillion a year on health care, making the oversight of company health plans an attractive target for plaintiffs. Such plans have been covered by ERISA since it was passed, but over the course of four decades, there has been comparatively little litigation on that front. However, that has been changing with rapidly rising health care costs and the implementation of the Affordable Care Act, which required more companies to provide medical insurance. These factors prompted employers to collect cost-sharing premiums from employees or become self-insured, thus creating a new target for ERISA fiduciary breach actions.

“The plaintiffs’ bar is now arguing that those employee premiums and other costs, such as pharmacy rebates, are ERISA plan assets, and that every decision that a plan sponsor makes with respect to use of those plan assets is a fiduciary decision,” says McFarlane. “The idea is that if you are not keeping your eye on details like co-pays, types of coverage, pharmacy benefits, and lower premiums, you may have committed a fiduciary breach and may be sued under well-developed theories from retirement plan litigation.” As a result, he adds, “fiduciaries overseeing health plans have to be exceptionally careful to follow the same golden rule that they have to follow



"It used to be that only the plan sponsor would be sued by a class of 401(k) participants. Now we're seeing executives and board and committee members being named individually."

— David McFarlane

with retirement plans. Make sure that what you're doing is solely in the best interest of participants." Personal liability is especially relevant in this area, because there are often more fiduciaries involved in the administration of health plans than retirement plans.

Looking ahead, fiduciaries' decisions about monitoring costs and who they appoint and hire to administer health plans will be important drivers of ERISA litigation—and often, companies are not fully aware of this growing threat. At the same time, the already intense focus on 401(k)s and pensions can be expected to continue. Altogether, these trends have the potential to put more companies and a wider group of company fiduciaries at risk of becoming class action targets. In addition, says McFarlane, a growing interest in areas such as cybersecurity breaches of plan accounts and the recovery of plan assets can be expected to open up new areas of fiduciary exposure.

In all of these ERISA issues, the key is prevention. McFarlane notes that the best protection for employers and D&O insurers is to demonstrate that the plan sponsor has undertaken regular and in-depth compliance reviews of retirement and health plans. That means providing proof that the plan sponsor has reviewed plan documentation for compliance with applicable law, undertaken review of governance and delegation of authority structures, provided external fiduciary training, and demonstrated regular monitoring and benchmarking. In general, companies need to make sure that their fiduciaries perform due diligence and follow clear decision-making processes. "One of the best ways to get early dismissal of a lawsuit is to show that the plan fiduciaries did their job—not a job held to the standard of perfection, but one that demonstrates reasonable and prudent compliance with their fiduciary duties," he says.

With the increasing emphasis on personal liability, companies also need to make sure that people in those roles are qualified for the job—a factor that may be getting more scrutiny. In September 2018, after losing a class action lawsuit against New York University over the handling of retirement funds, the plaintiffs turned around and sued for the removal of two of the fiduciaries involved—an action based on the court's ruling that noted that the two lacked the capabilities needed to effectively oversee the plan. "It's more important than ever to have people in those fiduciary roles who understand their responsibilities and the issues involved," says McFarlane. "You don't want someone who is just going to rubber-stamp the decisions of others."

RECOVERY AND THE RETIREMENT PLAN

Taking action to recover damages awarded in class action suits has become an increasingly common practice for companies—but they need to pay attention to recovering retirement and health plan assets, as well.

"Plan sponsors have a duty to consider and participate in antitrust and other class action recovery efforts in order to maximize returns and assets for plan investments on behalf of plan participants," says Crowell & Moring's David McFarlane. "Companies haven't really focused much on their retirement and health plans when thinking about recovery. But they need to." Pursuing recovery may well be in the best interest of plan participants. As a result, he says, "failure to do so may expose the officers, directors, and others to personal liability under ERISA."

For example, a class action suit might involve faulty equipment purchased by a corporation. At the same time, however, the corporation's retirement plan might have invested in that equipment manufacturer and thus have a potential claim against it. The corporation needs to keep the two identities separate—that is, the pension committee needs to pursue its own claim, independent of the company. And if there is a settlement that covers both parties' claims, the committee needs to sign off on its portion—the company cannot do so for that portion. If it does, it could be at risk of violating its fiduciary duties to plan recipients.

At times, a corporation may decide not to pursue recovery of damages against another company for business reasons—the company in question might be a partner or customer, for example. However, says McFarlane, "the pension plan cannot consider those factors as governing—it can only consider what is in the best interest of the plan participants. So except in extraordinary situations, it has a compelling duty to go after those plan assets." Otherwise, he adds, "plaintiffs could bring a class action lawsuit against the company and the fiduciaries individually, arguing they have breached their duty by not attempting to bring those assets back into the pension plan."

E-DISCOVERY

AI: E-DISCOVERY GETS SMARTER



E-discovery does not sit still. To provide high-level service, practitioners necessarily deal with legal technology at the bleeding edge of development. This involves the embrace of nascent artificial intelligence (AI) in combination with

other analytic tools and techniques to tackle increasingly challenging discovery projects. As ever-expanding volumes and sources of information strain the capacity of counsel to manage discovery, AI is coming just in time.

AI is the subject of much hype and misunderstanding. Some companies refer to all of their software offerings as AI, making it no more than a marketing term. At base, however, the term refers to “technologies that can mimic and enhance human thought processes and capabilities,” says John Davis, senior counsel at Crowell & Moring and co-chair of the firm’s E-Discovery & Information Management Group. While there is no true thinking machine with self-awareness, there are educable tools that perform a fair imitation. Used by experienced practitioners, he says, “AI can be a real boon to discovery in litigation and investigations as well as transactional inquiries, leading to quicker, more accurate, and defensible results.”

Two types of AI that are having a significant impact on e-discovery are machine learning and natural language processing (NLP). Machine learning, as the name suggests, uses mathematical models to assess enormous datasets and “learn” from feedback and exposure to additional information. This enables the models to uncover hidden patterns and make predictions or determinations on their own about targeted data. NLP enables computers to effectively communicate in the same language as their users, advancing the ability of the machines to understand written and spoken human language and more closely approximate human cognitive patterns.

Increasingly powerful analytics have also expanded the scope of tasks that can be automated, as well as the types of possible searches and analyses. Today’s e-discovery and compliance tools can tease out hidden patterns in the text fragments and disassociated communications of millions of electronic files to categorize and cluster documents by concepts, content, or topic. For example, AI-fueled “sentiment analysis” goes beyond term searches to look for indicators of relevant behavior, such as concealment, deceit, panic, or concern. “AI is reaching the point where the technology can even identify facial expressions and voice patterns in videos and recordings that point to certain sentiments. This, in conjunction with analyses

of subjects’ writings and transactional data, can form a fuller picture of individual and group conduct,” says Davis.

AI systems can also search for anomalies—“irregular occurrences or omissions, things that are or are not there, contrary to expectations,” says Davis. “People are now more guarded about how they communicate in emails. They may avoid emailing about a sensitive subject or use a different terminology or channel. These analytics help you look for out-of-character communications, code language, or patterns that point toward underlying meaning. For example, if someone who is usually chatty in texts suddenly sends one saying, ‘Just call me on my cell,’ the system can flag that.” It can also find suspicious gaps in communication frequency that can raise red flags for further inquiry or signal failures of production or destruction of evidence.

Even at this relatively early stage, AI has a proper place in the discovery tool kit. “It’s not yet the stuff of science fiction, where sentient robots are going to replace all the lawyers,” says Davis. Instead, “AI gives counsel and clients more leverage with large sets of data. It extends their reach and allows them to work faster and more efficiently, with higher confidence in quality.”

AUTHORITIES ARE SIGNALING ACCEPTANCE

Courts and regulators continue to be open to the use of advanced technology in e-discovery, with some preferring it to conventional review. For example, in *U.S. ex rel. Proctor v. Safeway, Inc.*, the plaintiff objected to Safeway’s production of 575,000 documents based on a keyword screen and produced without review. In March 2018, the U.S. District Court for the Central District of Illinois agreed that Safeway’s document dump failed to meet its Rule 26(g) obligation to make a reasonable inquiry and certify the production as complete and responsive, but declined to require a document-by-document review. Instead, the court ordered Safeway to use a technology assisted review process to identify likely responsive documents and then review them for production. The Antitrust Division of the Department of Justice has issued guidance similarly noting its preference for TAR over keywords.

Also significant was the Northern District of Illinois’s decision in *In Re Broiler Chicken Antitrust Litigation* in January 2018, where the court adopted a detailed process for validating the use of machine learning-based TAR in identifying likely relevant documents in massive datasets. “This is a robust protocol



"AI gives counsel and clients more leverage with large sets of data. It extends their reach and allows them to work faster and more efficiently, with higher confidence in quality."—John Davis

that, while probably more than is needed for many cases, predictably will be influential in the courts. It gives comprehensible direction for acceptable workflows and levels of transparency, so courts and parties won't have to think as hard about a technical topic," says Davis. "We see now that the debate has moved from whether these technologies are acceptable or not to how TAR should best be implemented to assure reliability."

That question is likely to be a key issue going forward, as AI becomes more prevalent and sophisticated. While the traditional use of search terms in discovery is well understood, AI technology is a "black box" to most observers. It can be nearly impossible to reconstruct how the machine makes decisions about data. Even knowledge of the code in abstract would not be revealing, as the algorithms react to input (the dataset and human feedback), which is different for every matter and provokes adaptation through the learning process. "We've gotten to the point where few people, including many experts, really understand the math and the technology underlying these AI search capabilities," says Davis. However, the stakes are high, and courts and parties will continue to seek clarity—and counsel will need to be there with answers. "I can see a push from industry circles and experts toward more transparency and standardization in AI operations," says Davis. Expansions of unmonitored AI applications and concerns about potential bias in AI decision-making are likely to fuel that trend. "Validation exercises alone may not be sufficient. We may see AI methodology being subject to something like the *Daubert* standard, requiring expert testimony."

Meanwhile, AI will continue to progress. For example, says Davis, "next-generation AI will aid in integrating disparate types of information, such as audio, video, and transactional, and be better able to recognize languages and dialects through natural language processing. This will enable attorneys to ask the machine more semantically complex questions and receive nuanced responses organized across information types." The ability to tie differentiated datasets together into a comprehensible whole is becoming more important as attorneys work with more streams of information, under more exacting standards and timelines.

"Advances in AI will enable the software to anticipate and suggest complex questions that may be applied to the data for a variety of circumstances. It will permit better search and understanding of discovery information and will get attorneys closer to the answers that matter," Davis continues. "AI technology will save money and provide better results. It needs to be considered for any complex e-discovery strategy."

E-DISCOVERY MEETS DATA PRIVACY

Since the EU's General Data Protection Regulation went into effect in May 2018, its impact has been felt in everything from sales and marketing to finance and compliance—and the legal department.

The GDPR imposes restrictions on the use of the personal information of EU data subjects. For companies with operations and data in Europe, the GDPR creates challenges for discovery in U.S. courts. For example, the GDPR in many ways encourages controllers and processors to restrict the amount of personal information processed to only that which is needed, and to justify such use. "This raises the difficulty level in transferring personal data from the EU to the U.S., which is not considered to offer comparable protections," says Crowell & Moring's John Davis. "Although the GDPR did not significantly change pre-existing restrictions and exemptions for transfer, the enhanced process and potential penalties for non-compliance have really focused attention. We are likely to see an accelerating GDPR impact in terms of reduced amounts of data coming from Europe through the discovery process."

While keeping an eye on European regulations, companies also have to comply with U.S. discovery orders—which can be something of a balancing act. "Counsel should be sure to educate courts and requesting parties about the particular burdens and barriers involved in sourcing data from overseas, and get them involved in creative solutions. Certainly, GDPR effects are relevant for proportionality arguments as well as in discussing the scope and staging of discovery," Davis says.

Managing such issues in cross-border matters "can be intensely complicated," he adds. The U.S. also has its share of information restrictions, and more can be expected at both the federal and state level. The California Consumer Privacy Act of 2018 is already influencing other authorities to act similarly. "These developments have raised the bar for counsel. Now more than ever, it is important to be thoughtful in dealing with personal information in discovery," Davis says.

HEALTH CARE

DOJ: PUTTING LIMITS ON GUIDANCE



In early 2018, the Department of Justice released its Brand Memo, which prohibits civil litigators from using agency guidance, instead of laws or regulations, as the basis for enforcement actions, including actions taken under the False Claims Act.

For companies working with federal health care programs, that was welcome news. Each year, they contend with thousands of newly issued or revised guidance documents from a variety of agencies, leaving them struggling with requirements that can be confusing, conflicting, or out of date. At the same time, health care contractors are frequent targets of FCA claims. “The substantial majority of False Claims Act recoveries, which hover between \$3 billion and \$4 billion a year, comes from the health care and life sciences space,” says William Chang, a partner in Crowell & Moring’s Health Care Group and a former trial attorney at the DOJ Criminal Division, Fraud Section. The Brand Memo gives those health care

accountable for complying with volumes of unspecified guidance that the agencies themselves might not understand. In addition, he says, “FCA claims mostly arise out of government contracts. If government contracts are effectively exempt from the Brand Memo because of the catch-all provisions, why would the memo have been created to deal with FCA claims?” Overall, he says, “the Brand Memo would be pointless if agencies can do an end run around it and effectively create law by putting these broad clauses into contracts.”

Recent government actions support that assessment. For example, in a Medicare fraud case filed two years ago, “the initial DOJ complaint said that all Medicare Advantage organizations must comply with laws, regulations, and guidance documents,” says Chang. “But after the Brand Memo, the word ‘guidance’ did not appear in the DOJ’s summary judgment motion. Nor did the DOJ continue to allege that Medicare Advantage Organizations ‘must comply with requirements set forth in ... guidance documents.’” Instead, the amended complaint references only a specific guidance



“If government contracts are effectively exempt from the Brand Memo because of the catch-all provisions, why would the memo have been created to deal with FCA claims?”

—William Chang

contractors a new avenue of defense in FCA litigation.

But in the year since the memo’s release, “government contractors and academics alike continue to question how it should be interpreted,” says Chang. A key question involves government contracts that typically include “catch-all” language saying that the contractor will follow all relevant government agency guidance. “So even though noncompliance with obligations that appear in only sub-regulatory guidance cannot be a basis for FCA enforcement, contractors wonder if they can still be held accountable under the FCA for noncompliance with a contractual certification to abide by guidance,” he says.

Chang says that is unlikely for several reasons. For example, he explains, the memo is based on the requirements under the Administrative Procedure Act and the constitutional norms of due process, fair notice, and the separation of powers—and these are violated by contract clauses that make contractors

document, which the Medicare Advantage contract had expressly identified and incorporated.

Looking ahead, Chang says the Brand Memo will probably not result in the DOJ intervening in fewer FCA cases, largely because the DOJ already tends to focus on actions with a strong statutory or regulatory basis. But the memo may result in the DOJ’s dismissals of *qui tam* suits. “When the department digs into the *qui tam* and it turns out that the relator is actually relying on guidance documents and talking about requirements that don’t exist in a regulation or statute, the DOJ has the authority to dismiss,” he says. The department has rarely exercised that authority. Over the past year, however, DOJ leadership has been calling for the dismissal of and actually dismissing more *qui tams*—a view reflected in the department’s 2018 Granston Memo, which said that early dismissals were important for controlling the costs and burdens associated with pursuing meritless claims.

TRADE

BIG QUESTIONS FOR THE CIT



Historically, the Court of International Trade has focused on relatively narrow, highly technical matters relating to customs duties and trade litigation matters. But now it finds itself on the front lines of high-profile battles over the regulation of global business.

“The Trump administration’s aggressive trade policy has dramatically increased the scope and scale of litigation at the Court of International Trade,” says Daniel Cannistra, a partner in Crowell & Moring’s International Trade Group. “Suddenly, the court, which is not well known to a lot of people, is dealing with the same issues that are showing up on the front page of *The New York Times* every week or so.”

The trade-policy cases coming before the court involve fundamental questions about international business and presidential actions. “These very large-scale economic and constitutional issues are going to sit with the Court of International Trade to get resolved in the first instance,” says Cannistra. He notes that

a three-judge CIT panel, rather than a single judge, because of its potentially broad impact. The group’s motion said that “it is hard to imagine a more significant case” and that the issue “affects countless businesses and individuals in the United States and abroad, both directly and indirectly.” The CIT apparently agreed, granting the request for the panel in September. The case is likely to be resolved in 2019—and because about 20 percent of the U.S. economy is based on these metals in one form or another, the decision will affect a broad range of businesses.

COMING SOON?

Following that, the CIT is likely to address the issue of import tariffs on Chinese goods—and here again, Cannistra says, “Trump’s entire China trade policy will ultimately be reviewed by this court. This goes to the president’s authority to negotiate with trading partners—and the Court of International Trade is going to have the first voice on whether or not he can unilaterally rewrite the tariff schedule for the purpose of negotiating



“[The CIT] may well be faced with three constitutional issues in the next 12 months, all of which will impact the economy as a whole.” —**Daniel Cannistra**

in nearly four decades, the court has handled just two constitutional issues. Now, he points out, “it may well be faced with three constitutional issues in the next 12 months, all of which will impact the economy as a whole.”

The first of these three issues is already before the CIT—the administration’s placing of limits on steel and aluminum imports based on national security concerns, an approach not used in U.S. trade policy since the oil crisis of the 1970s. “The question is, was it in fact a constitutional use of presidential powers to suddenly impose 25 percent import duties on all steel and aluminum products coming into the U.S.?” says Cannistra. The plaintiff in this suit, the American Institute for International Steel (AIIS), an industry trade group, is challenging the constitutionality of the president’s actions and of the law that was used to justify those actions, Section 232 of the Trade Expansion Act of 1962.

In June 2018, the AIIS requested that the case be heard by

trade agreements. Congress, not the president, has the power to tax imports, so this case will rest at the intersection of executive authority to negotiate with foreign countries and the power to impose taxes and regulate commerce.” The other constitutional issues that appear to be on the CIT’s horizon include the new United States-Mexico-Canada Agreement, which is sure to contain questions concerning executive authority over trade.

The consequences of these decisions will be profound. For example, if the CIT upholds one of these administration trade policies, what will it mean to a company’s global supply chain? Will production need to be relocated from one country to another? These shifts are not made overnight; the court’s decisions will affect companies for years. General counsel should keep a close eye on these cases and be ready to help their companies understand their ramifications—and navigate the web of complex and critical questions raised by evolving trade policy.



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LISTENING IN THE DIGITAL AGE



In this year's *Litigation Forecast*, we report on how lawyers from all sides are witnessing a generational shift in the delivery of legal services—led by technology. It's not, as our lawyers point

out, that technology will replace lawyers; it's that technology—AI, automation, TAR, data analytics, and more—will “complement and enhance their capabilities.” But these changes go far beyond becoming more efficient. Technology today is helping to shape litigation strategy and impact the very real decisions once made only by senior trial lawyers. Technology tools and tech consultants now have a permanent place in the litigation strategy war room, and the entire profession will continue to face uncharted

territory as tools become smarter and more powerful. What hasn't changed is the need for law firms to stay close to their clients, and to understand the need for greater collaboration and flexibility as case strategies become more informed and sophisticated. Listening, it turns out, is more important than ever in the digital age. That's why we center this year's cover story not only on the insights of some of our leading litigators, but, more importantly, on the voices of leading in-house counsel who are marrying the best of technology and talent to manage their dockets. We look forward to hearing from you, as well, and to continuing the conversation in the years to come.

—PHIL INGLIMA
Chair, Crowell & Moring