Crowell

Litigation Forecast 2023

What Corporate Counsel Need to Know for the Coming Year

Class Actions: The Evolution Continues

Developments in Key U.S. Districts and Global Regions

Annual Jurisdictional Analysis

Analytics 2.0: The Future is Now

Prior editions of the *Litigation Forecast* focused on the growth and increasing importance of legal analytics. Sophisticated analytics has become an invaluable tool in practice and, as discussed in these pages, in identifying broader trends in the courts.

Nowhere is the need for good analytics more evident than in defending class actions, where class members often cross jurisdictional boundaries. Reinforcing that point, our cover story takes a close look at the intricacies of class action venue, a critical strategic decision in defending any class action. In addition, our annual Jurisdictional Analysis provides insights into key district-by-district trends.

But good analytics requires technology-conversant lawyers who want and are able to implement them. Attorneys such as those represented in this volume provide a nuanced understanding of the jurisdictions they're talking about and how clients should proceed. As these attorneys explore the trends evident in a number of U.S. districts and international regions, we hope you'll come away with insights not only into how these attorneys think but into how the firm operates on its clients' behalf.

MARK KLAPOW
Partner, Crowell & Moring
Editor, *Litigation Forecast 2023*

The Right People, the Right Place, the Right Time

Both the business of law and the delivery of legal services have experienced fundamental changes in recent years. This has made it critical that we, as a firm, are able to not only offer our clients the right legal knowledge and experience, but to offer it in the right markets at the right time. This is a theme that runs through every article in this *Litigation Forecast*: certain jurisdictions are trending toward certain types of case filings, and successful firms will ensure that their clients have representation where and when it's needed most.

To do that, we have made significant investments in talent in the key jurisdictions where our clients' most important matters are taking place. We've added experienced attorneys in Chicago and Denver, on both coasts, and throughout Europe and the UK. As a firm, our goal is always to position ourselves to handle our clients' most important litigation both around the country and around the world in the best, most strategic, and most responsive manner. This goal is now more important than ever.

As always, we hope you'll find this *Forecast* provocative, informative, and useful as you move into the year ahead. We look forward to hearing from you and to continuing the conversation.

PHILIP INGLIMA
Chair, Crowell & Moring

CREATOR & EDITOR Mark Klapow
SENIOR EDITOR & PROJECT MANAGER Ezra Crawford
ASSOCIATE EDITOR Justin Kingsolver
GRAPHIC DESIGN AND BRANDING MANAGER Raquel Konde

LEVERAGE MEDIA LLC
EDITORIAL DIRECTOR Mike Winkleman
DESIGNER James Van Fleteren
WRITERS Peter Haapaniemi, Gordon Schonfeld, Jennifer Taylor
COPYEDITOR Sue Khodarahmi
PROJECT MANAGER Andrea Olstein

Class Actions: The Evolution Continues

Facing a number of Supreme Court decisions and an overarching trend against class actions, plaintiffs' attorneys have pivoted, adapting their strategies to fit new legal realities

Over the past decade, the Supreme Court has decided a series of cases limiting who, where, and how individuals can pursue their claims on a class-wide basis. This trend coincided with the Court's shift to the right and started with the 2011 *AT&T Mobility LLC v. Concepcion* decision, which established the enforceability of arbitration provisions in consumer contracts, including provisions waiving the right to pursue a class action. Later, the 2017 decision in *Bristol Myers Squibb Co. v. Superior Court of California* limited where plaintiffs can bring broad, nationwide or multistate litigation against corporate defendants, effectively pushing those cases to the defendant's home jurisdiction. And in 2021, the Court held in *TransUnion LLC v. Ramirez* that all class members—not only the named plaintiffs—must have constitutional Article III standing and must show concrete harm.

To many observers, these decisions appeared to be part of a broader trend toward reining in class actions. "Some thought that these developments were a death knell for certain types of class actions," says April Ross, a partner in Crowell & Moring's Washington, D.C., office and vice chair of the firm's Mass Tort, Product, and Consumer Litigation Group. "But that's not so." Class action lawsuits, especially consumer class actions, continue to be a significant part of the litigation landscape as plaintiffs' lawyers adapt to changing legal realities.

Plaintiffs Work Around Arbitration Agreements

When the Supreme Court held in *Concepcion* that class action waivers in arbitration agreements are enforceable, many companies quickly considered whether they might benefit from this decision. In some industries, companies enter into contracts with each customer. They quickly updated their customer agreements to include arbitration provisions with enforceable class action waivers. Indeed, some companies that had frequently faced class action lawsuits from customers soon saw large numbers of suits dwindling to virtually none.

But that was not the end of the story for most companies. Plaintiffs' lawyers pivoted and began to focus their efforts on industries whose businesses were not subject to customer contracts and legal claims that fall outside of arbitration agreements. For example, "they started looking at false advertising claims against food and consumer products companies, business practices in the health care industry, and claims based on antitrust and environmental laws," says Jennifer Romano, a litigation partner in Crowell & Moring's Los Angeles office and co-chair of the firm's Litigation Group.

Since *Concepcion*, the courts have been fairly active in enforcing arbitration agreements and class action waivers when they cover the dispute at issue, and the Supreme Court recently affirmed that arbitration contracts should be treated and enforced like other contracts. As a result, some plaintiffs' attorneys have started filing hundreds or even thousands of individual arbitration demands against the same company when they cannot file a class action. "This is creating a bit of backlash and causing some companies to rethink whether it is better to go back to the courts," says Romano. As private neutral organizations ramp up to arbitrate an onslaught of small consumer cases filed in place of class actions litigated in court, the parties and their attorneys will assess which venue and which method is best for resolving these cases both fairly and efficiently.

Multistate Cases Shift to the Defendant's Home Turf

As plaintiffs' attorneys develop new class action cases they can file in court, they also have had to navigate *Bristol Myers Squibb*'s limitations on where they can file their multistate suits against corporate defendants. Plaintiffs can no longer file massive, nationwide class actions based on state laws in any forum they desire. Instead, their suit must be brought where the defendant is subject to jurisdiction on all claims, which is typically where a corporate defendant is "at

"Some litigation seems to be moving to where the Supreme Court said it should move—to the location where the corporate defendant is headquartered or incorporated."

APRIL ROSS

home." While this may not deter multistate class action filings, it is leading to a geographic shift in where class actions are litigated. "Some litigation seems to be moving to where the Supreme Court said it should move—to the location where the corporate defendant is headquartered or incorporated," says Ross.

This can have a significant impact where an industry is geographically concentrated, and its members frequently face similar lawsuits. For example, "multistate class actions against major U.S. automakers are on the rise in the Eastern District of Michigan, as opposed to places that plaintiffs have generally viewed as more favorable, such as California, Texas, or Florida," says Ross. Other concentrated industries, such as technology, pharmaceuticals, and oil and gas, may face similar onslaughts in their home courts, as will large consumer product companies that are frequent targets of class litigation.

This trend has not gone unnoticed by the judiciary, with some judges raising concerns about having insufficient resources to handle the influx of large cases and questioning why far-flung state law claims should be heard in their courts. On the other hand, geographically concentrating a specific type of class litigation may lead the judges in that district to gain deeper expertise in the technical and procedural complexities of multistate class action litigation. And some plaintiffs have argued that this shift gives corporate defendants some degree of home court advantage, which may make some defendants more willing to take cases to trial.

Certainly, plaintiffs have other options for working around these restrictions. They can bring single-state cases in the local federal or state courts. Or they might attempt to leverage the Judicial Panel on Multidistrict Litigation by filing several single-state cases and asking the panel to centralize them in an MDL in a preferred jurisdiction. But that is cumbersome, and the panel has become hesitant to create new MDL dockets. Thus, "we expect to continue to see more class actions being filed in corporations' home courts," says Ross, "because plaintiffs are unlikely to abandon the leverage of multistate class actions even if that means they must litigate in the defendant's backyard."

Concrete Injury Required

Last year, in *TransUnion*, the Supreme Court confirmed that all class members must have a concrete, actual injury in a class action seeking monetary damages and that a risk of future harm is not sufficiently concrete for Article III standing. Even where a federal or state statute creates an injury and right to statutory damages, that injury may still be insufficient to confer standing in federal court. And a class cannot include members who are not entitled to recover on their own, meaning all class members must individually have standing.

TransUnion's limits on standing in a class action should be making it harder for plaintiffs to certify or win these cases. At the same time, plaintiffs' attorneys are leveraging questions they claim were left open by the Supreme Court. These include when standing must be determined and the extent to which *TransUnion*'s holding extends beyond statutory claims.

Notably, the Supreme Court said that concrete harm and standing need to be determined before the final judgment stage, but it did not say when that should occur. "It left that open in an express footnote," says Martin Redish, senior counsel in Crowell & Moring's Litigation, Advertising & Media, and State Attorneys General practices. "It just has to happen before

there's a distribution of funds."

That raises the question of whether the named plaintiff must show actual injury for each class member before class certification or whether that showing can be made later, in the damages phase. Redish explains that the argument for doing it earlier is "if you have absent class members who are not in fact injured, they shouldn't be involved. They don't have standing." A big part of that, he adds, is the "intimidation impact of a large class on defendants, because the risks are so enormous—these can be bet-the-company cases. It increases the pressure on defendants to settle." A counterargument, he says, is "if you have to start showing standing for everybody, it generates an individualized litigation process, which is what you're trying to avoid with the class action."

However, he adds, "while the lower courts are split on the point, the 5th Circuit in late 2021, in *Early v. Boeing*, stated that 'standing is an inherent prerequisite to the class certification inquiry,' and that 'standing may—indeed, must—be addressed' at a relatively early point. Such a conclusion makes perfect sense. Otherwise, the *in terrorem* impact of an uncertified class action could force a defendant to settle, even though it would have ultimately been determined that the federal court lacked Article III jurisdiction."

A dispute also remains as to how broadly courts will apply *TransUnion* beyond class actions involving federal statutory claims. *TransUnion* involved claims under the Fair Credit Reporting Act, where the plaintiff alleged the same violation for all class members and sought the same statutory damages for all. How will the principles apply in other types of cases? "For example, in product liability class actions, there is the question of whether everyone in the class needs to have a product that actually malfunctioned," says Ross. "Courts have generally handled that through benefit-of-the-bargain damages, where consumers claim they would have paid less if they'd known of the risk of future malfunction. But now, courts are going to have to deal with the *TransUnion* requirement for concrete injury to each class member in product liability cases."

Similar questions may arise in data breach cases, which account for a significant number of class actions. Many courts have said that the future risk of identity theft stemming from stolen data is enough to be considered injury. In 2022, in the first post-*TransUnion* appellate decision in a data breach case (*Clemens v. ExecuPharm Inc.*), the 3rd Circuit maintained that a risk of harm was sufficient for actual injury under *TransUnion*. "The court said its decision was based on the specific facts of that data breach—the sensitive nature of the information, the fact that it was a cyberattack from a very sophisticated organization," says Romano. "What other data breach class actions will satisfy the injury requirement under *TransUnion*? Will it always depend on the facts? This makes it incredibly difficult for parties to assess the risks and potential exposure, which is particularly problematic when the amount of statutory damages could bankrupt a company."

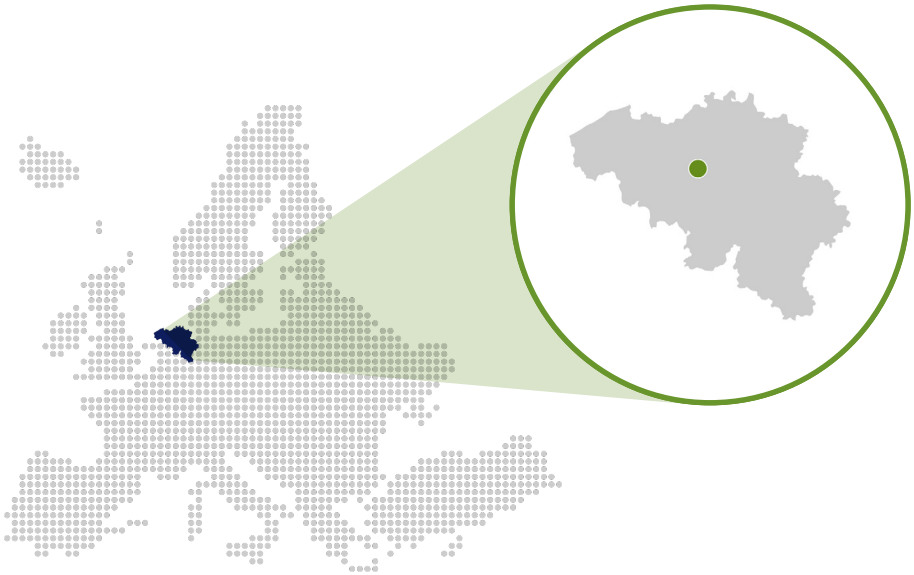
In spite of the apparent headwinds created over the past decade, plaintiffs and plaintiffs' attorneys continue to view class actions as fertile ground. But they are changing. Who files them and where and how they are litigated continue to evolve. That means companies will need to remain alert to new risks and new opportunities in these cases.

"This makes it incredibly difficult to assess the risks and potential exposure, which is particularly problematic when the amount of statutory damages could bankrupt a company."

JENNIFER ROMANO

Evolving Landscape for Representative Actions

An EU directive has set the stage for broader, more harmonized legal redress for consumers across member states



Group actions—the European equivalent of U.S. class actions, which the EU calls "representative actions"—historically have met with limited success due to stiff legal and cultural opposition. This could change soon, however, in response to an EU directive intended both to broaden legal redress for consumers and harmonize requirements and procedures across member states.

The European Parliament approved EU Directive 2020/1828, known as "Representative actions for the protection of the collective interests of consumers," late in 2020. The directive gave member states until December 2022 to incorporate its mandates into their national laws, plus six months for implementation.

Representative Actions Have Faced Built-in Obstacles

According to Werner Eyskens, a partner in Crowell & Moring's International Dispute Resolution Group, most European countries have made it difficult to bring representative actions. "Rightly or wrongly, representative actions have the connotation of ambulance chasing and attorney abuse," he says. "Also, European countries don't allow contingency fees. In certain jurisdictions they require that cases be brought by so-called qualified entities, or QEs, that engage attorneys, rather than by attorneys directly. They limit the applicability of representative actions to a handful of business scenarios, don't allow for discovery, have judges instead of juries deliver verdicts, and keep a lid on double, treble, and punitive damages. All of this means that attorneys in the EU are not economically incentivized to bring representative actions. Not only that, but procedural rules maintain strict evidentiary requirements as a precondition to a successful outcome."

While EU jurisdictions are generally strict about representative actions, the Netherlands has a reputation for being somewhat more welcoming. The Dutch have a legal structure known as a "stichting" that has no share capital and is organized to act on behalf of people with similar interests—much like a U.S. foundation.

For years, Dutch claimants have used stichtings to bring group actions and other mass tort cases that are analogous but not identical. Perhaps the best-known recent example is the 2021 case in which the Hague district court ruled that Royal Dutch Shell, the European oil giant and the largest Netherlands-based company, had to accelerate its efforts to reduce carbon dioxide emissions. The lead claimant was Milieudefensie, an environmental stichting and the Dutch wing of Friends of the Earth. Another well-known example is the European truck cartel case, for which certain private stichtings propose to represent prejudiced truck purchasers.

The Result: A Parallel Universe of Workarounds

Some European attorneys and non-QEs that want to bring group actions have developed workarounds known as fake group actions.

In those cases, attorneys or shareholder activist organizations may collect multiple individual claims that are objectively related, obtain each claimant's legal instruction, and then bundle the claims into one complaint. Attorneys can arrange to earn success fees from claimants in lieu of contingency-based compensation, and groups can earn the success fees themselves by hiring attorneys and paying them non-incentivized compensation.

Fake group actions are more burdensome to bring than traditional group actions, but they tend to attract media attention and can bring significant set-

"Rightly or wrongly, representative actions have the connotation of ambulance chasing and attorney abuse."

WERNER EYSKENS

tlements. The breakup of Belgium-based Fortis Bank as a result of the financial crisis, for instance, prompted shareholder activist groups to bring multiple actions in cases that involved the governments and courts of Belgium, the Netherlands, and Luxembourg. Fortis-related litigation remained prominent in headlines for years.

Eyskens expects the number of workarounds to increase as global economic conditions worsen, and he highlights debt defaults and securities claims as areas that could be especially active.

How the Directive Alters the Landscape

EU Directive 2020/1828 includes many provisions that should facilitate the bringing of representative actions. Eyskens cites these as most important:

- QEs can file cross-border complaints both individually and working together.
- The universe of eligible filing categories expands, notably by including data protection, product liability (including for medical devices), a broader range of financial services, tourism, energy, telecommunications, environment, health, and travel by air and rail. The number and scale of representative actions should rise accordingly.
- Member states can choose an opt-in or opt-out participation model. The ability to opt out would make bringing large volume representative actions easier.
- Claimants can seek at least two types of remedies: injunctive measures and redress. The latter covers remedies that do not include punitive damages.
- Member states can choose to finance representative actions, a provision that aims to reduce the potential for undue influence by other funding providers.
- Case losers must pay the costs of litigation, which should reduce the number of abusive actions.

Spotlight on Belgium

Brussels is not only the EU's seat for litigation, but it is also Belgium's capital and the home of the designated court that deals with representative actions. The Belgian law that would incorporate EU Directive 2020/1828's requirements is circulating in draft form as this is written and should be enacted in the first half of 2023.

The law is likely to revise current Belgian statutes in several key ways. First, it would extend the scope for representative actions to include claims related to securities offerings. Second, it would enable QEs based in other EU member states to initiate claims in Belgian courts, which could spark competition for cases among QEs on a continental scale. Finally, it would establish opt-out as Belgium's default participation model, allowing for larger groups to become recognized classes.

Action Steps

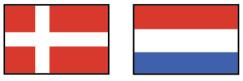
Potential defendants in European group actions should take a fresh look at their exposure and preparedness. Eyskens recommends several steps to take now.

"The first," he says, "is for companies to educate themselves about the directive if they haven't already done so. They should review the jurisdictions in which they do business, as some may offer more favorable legal regimes for bringing representative actions. They should also reassess contractual obligations and disclosure policies, evaluate the risk of injunctions, and establish the usefulness of effectively resolving a contingent exposure to a large, perhaps diffuse group of claimants."

Implementation Status of Directive 2020/1828 EU

(to the extent available)

Implemented



Implementation Ongoing

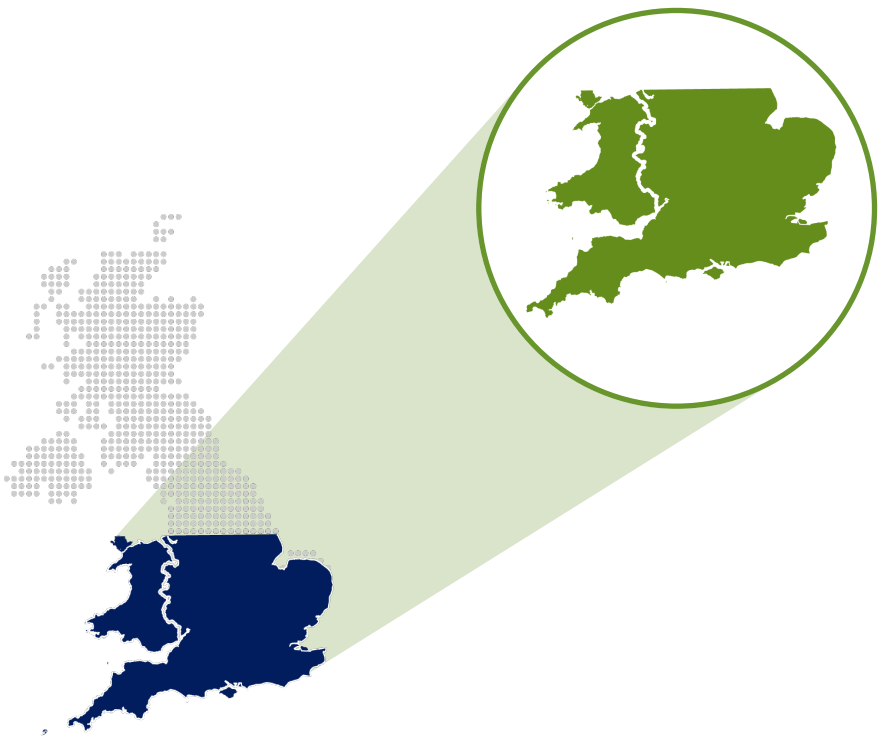
(official steps have been taken, but a final law has not been enacted)

Not Yet Implemented

SOURCE: PUBLICLY AVAILABLE SOURCES COMPILED BY CROWELL & MORING, BRUSSELS OFFICE. INFORMATION WAS NOT AVAILABLE FOR ALL COUNTRIES IN THE EU.

Class Actions: Getting Traction

Despite caution about creating a class action culture, recent case law has supported class or group actions as legal protections for consumers



In the United Kingdom, class or group actions have been relatively limited and very different from such actions in the United States. Recent case law has supported such actions as legal protections for consumers, but this has been countered with caution about creating a class action culture, explains Laurence Winston, a partner in Crowell & Moring's London office and co-head of the firm's International Dispute Resolution Group.

Class actions generally fall into one of two categories: opt-in actions, which require claimants to actively join the lawsuit, and opt-out actions, in which one party can bring a claim for an entire class without having to gain the permission of, or even identify, individual members of that class, which naturally tends to lead to a much larger number of claimants in a case.

In England and Wales, there are three main procedures for class actions: group litigation orders (GLOs), representative actions, and collective proceedings orders (CPOs), which relate only to competition claims. GLOs are opt-in, while representative actions and CPOs are opt-out.

GLOs allow claims with common or related issues of fact or law to be brought as a group, and judgments concerning common issues are binding on all claims in the group. There have been numerous GLOs since they were introduced in 1999, but because of its opt-in nature, this procedure has not resulted in the mass class action claims often seen in the U.S.

By contrast, representative actions are opt-out—they automatically include people in the class unless individuals expressly exclude themselves. A representative action is only available where the class of claimants has the same interest in a claim. If, for example, claimants have different monetary claims, a representative action cannot be brought.

Similarly, CPOs are opt-out, removing the need to individually identify each claimant—a result of the Consumer Rights Act of 2015 that is having a substantial effect on the class action landscape.

Courts Weigh In

Cyberattacks and data breaches pose an ever-increasing threat to businesses. Because breaches can affect a very large number of people, these are proving fertile ground for class action claims—particularly opt-out representative actions. A number of high-profile data-breach cases did emerge, involving companies such as Facebook and British Airways.

The prospect of wide-scale data breach representative actions came to a head late in 2021, with the UK Supreme Court's ruling in a case involving a search engine company. This was a representative action in which the claimant sued the company for alleged data breaches involving the tracking of data on iPhones. The claimant asked for compensation based on class members' loss of control over their personal data, and with more than 4 million class members, the company faced a potential liability of some £3 billion. However, the court ruled largely against the claimant, and in so doing took some of the sting out of the prospect of representative actions for data breach claims.

"Losing control of data was not in itself sufficient," says Winston, explaining that

"The difficulty with data breaches or misleading consumers is that many people are affected but the individual loss is small."

LAURENCE WINSTON

claimants need to show material damage and that the damages would not have differed across class members. "The court said there was not sufficient evidence to prove the harm caused to each individual from the unlawful use of their data." Overall, he adds, "the court recognized representative procedures as a tool for redress for data breach claims, but it was not prepared to accept uniform loss without proof of each member's loss."

That is not to say that data breach representative actions are going to disappear: they may well be used in bifurcated claims where common issues are claimed by a representative action but the quantification of individual claims is dealt with in follow-on claims. There is also a question of whether there would be the same outcome under the EU General Data Protection Regulation or the UK GDPR, both of which appear to recognize loss of control of data as a separate, recoverable loss. So the door may be open to representative actions for violations of the GDPR and the UK GDPR.

The other type of opt-out action, the CPO, was not affected by the ruling. But there have been significant developments in case law, including the August 2021 Supreme Court ruling in *Merricks v Mastercard*. Here, the claimant was acting on behalf of 46 million consumers over a 15-year period and claimed £14 billion in damages, saying the payments company had restricted competition between banks with its fees. CPOs need to be certified by the UK's Competition Appeal Tribunal, which initially ruled that the case was not suitable for a CPO.

However, the Supreme Court disagreed and sent the case back to the tribunal, along with guidance for certifying such cases. It then allowed the action to proceed, making *Merricks* the first certification of a CPO, and a landmark ruling for class actions in the UK.

"A flurry of CPO proceedings followed the *Merricks* decision, and it undoubtedly continues to encourage many claimants to bring opt-out proceedings in the CAT," says Winston. Traditionally, he says, private competition cases were filed on the heels of regulatory actions. "But with the increase in CPO filings, we're also seeing some stand-alone cases, where the claimants are trying to establish that there was a competition breach."

More on the Horizon

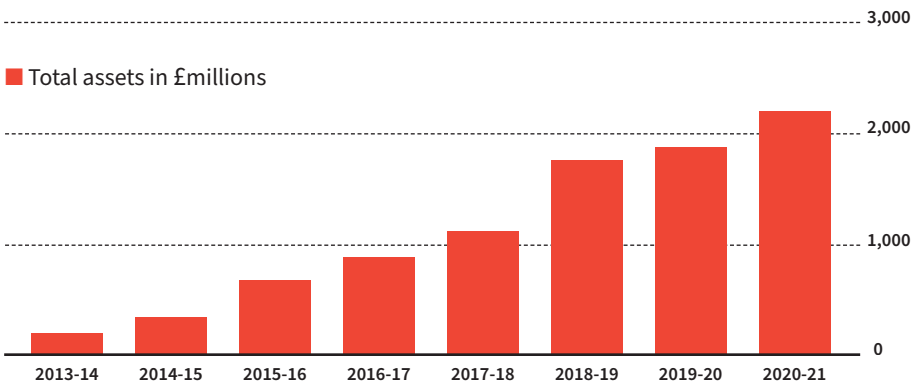
A variety of factors are likely to drive increases in class actions, as claimants bring opt-out litigation in more areas, such as shareholder disputes, financial services and product liability claims, and especially, environmental issues. "Cases may be brought by consumer classes affected by greenwashing, for example," says Winston. He also cites the growing importance of environmental, social, and governance compliance and reporting: "As of April 2022, UK companies are required to disclose climate-related financial information, meaning companies run the risk of misleading investors and consumers about the environmental impact of their activities, potentially leading to class actions."

Winston also points to the growing interest in the country in "access to justice" for consumers. "The difficulty with data breaches or misleading consumers is that many people are affected but the individual loss is small. The idea is that unless there is some sort of class action available, there is no practical way for claimants to get redress," he says.

Outside of the courts, opt-out group litigation is increasingly being fueled by third-party funding. The litigation funding industry in the UK reached £2.2 billion in 2021—an indication of the expected growth of cases and payouts in CPOs and representative actions. Such funding, says Winston, "is predicted to grow significantly over the next five years—along with the number and size of class actions."

UK Litigation Funders Reach Record Assets

Assets held on the balance sheets of the 15 largest UK litigation funders



SOURCE: BLOOMBERG

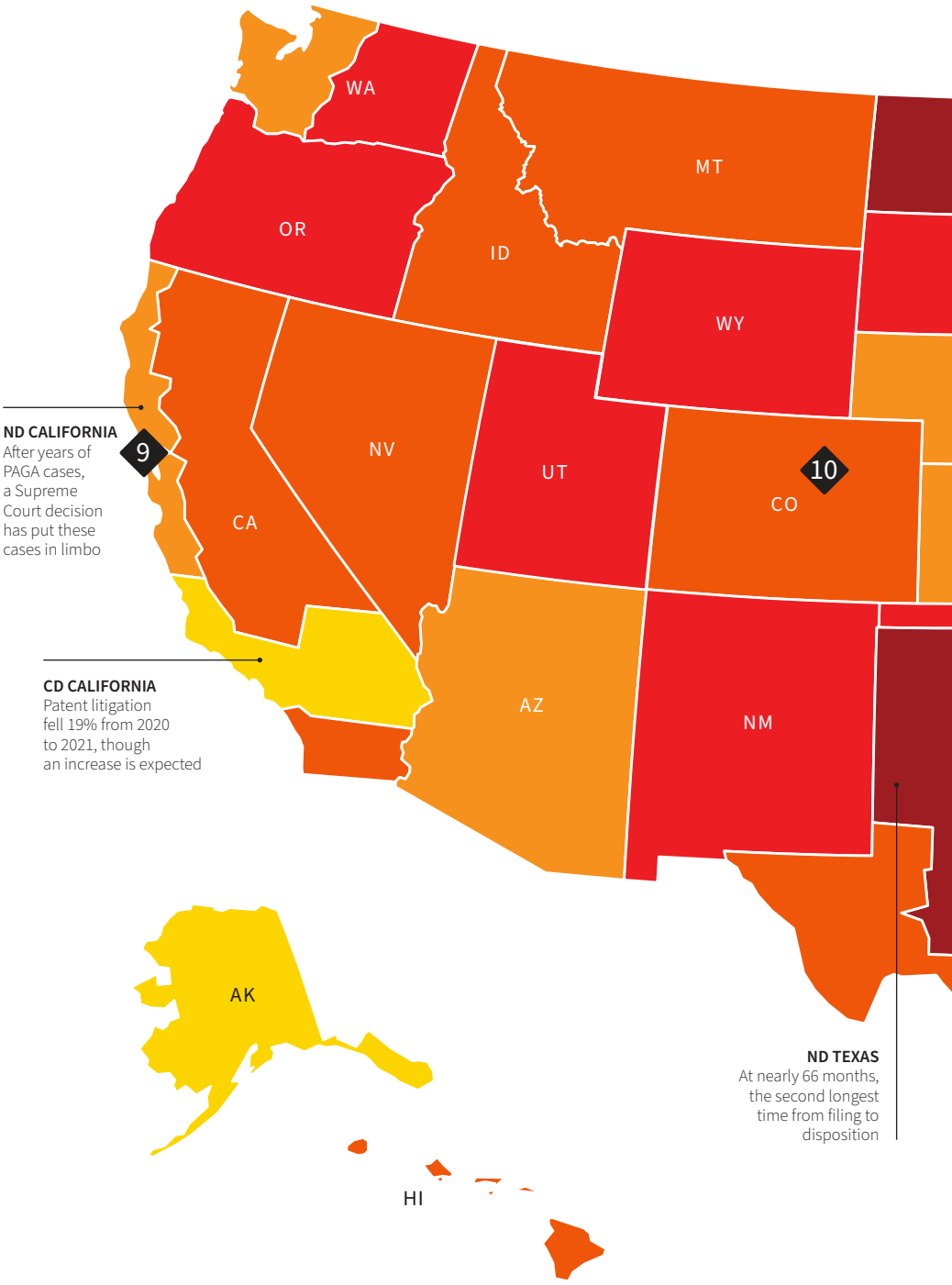
Rightsizing the Federal Bench: More Judges Handling Fewer Cases

In his first two years in office, President Joe Biden has appointed 95 federal judges to the bench—more than any president had appointed over this same time period since John F. Kennedy. These appointments came after another record-setting presidential term, with more than 200 appointments during President Donald Trump's four years in office. As of this writing, there are nearly 790 active federal judges serving on district and appellate courts throughout the U.S.

Those judges, on average, faced fewer federal case filings in 2022. In the first 11 months of 2021, litigants filed more than 245,000 cases in the district courts. But in the first 11 months of 2022, these courts have seen fewer than 185,000 new cases, representing a 24.7 percent year-over-year drop. Factoring into this decrease are stark drops in product liability case filings (59.1 percent drop year-over-year), securities case filings (25 percent), and civil rights case filings (17.5 percent).

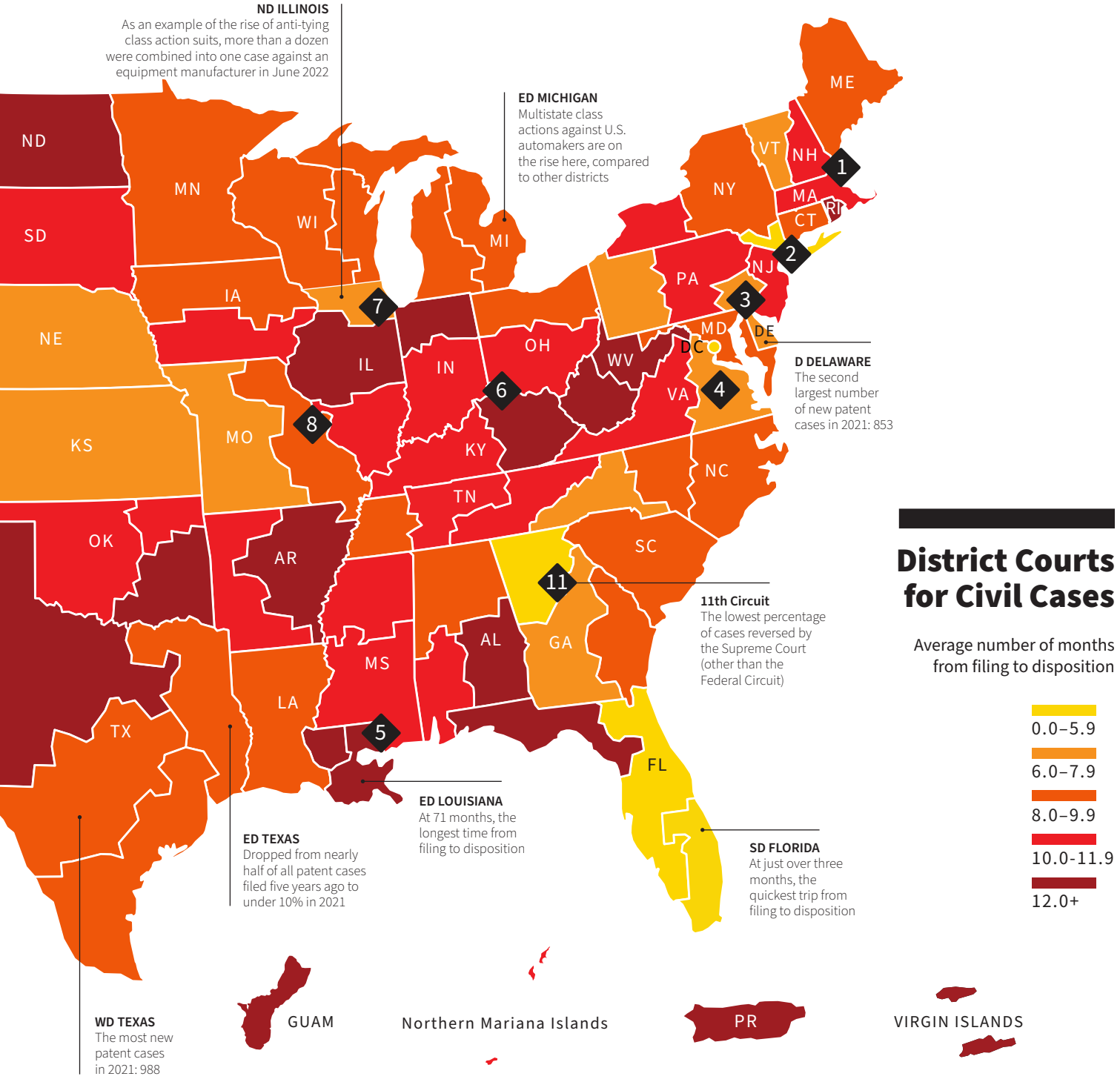
The federal appellate courts likewise saw a significant drop in year-over-year appellate filings. Only four circuit courts—the 2nd, 7th, D.C., and Federal Circuits—saw increases in case filings, while the number of filings in the other nine circuit courts dropped. Some circuits saw substantial drops, like the 6th Circuit (17.8 percent), the 8th Circuit (22.2 percent), the 9th Circuit (29.7 percent), and the 11th Circuit (18.2 percent).

JUSTIN KINGSOLVER



UNITED STATES COURTS OF APPEALS

Circuit	Notice of Appeal to Disposition (in Months)	S. Ct. Reversal Record
1st	10.3	5 of 5
2nd	7.5	5 of 5
3rd	6.1	1 of 1
4th	5.6	2 of 3
5th	7.2	7 of 8
6th	7.7	6 of 7
7th	6.4	1 of 3
8th	3.0	2 of 2
9th	14.1	12 of 12
10th	5.6	2 of 3
11th	8.7	1 of 4
DC	10.3	2 of 2
FED.	12.2	0 of 1



A Pro-Arbitration Approach Changes the Dynamic

While international parties doing business in MENA traditionally chose to seat their arbitrations in Europe, the landscape has changed

Jurisdictions in the Middle East and North Africa (MENA) are becoming more attractive arbitral seats for parties seeking to resolve their disputes through international arbitration. Over the past few years, the region has embraced a more arbitration-friendly approach, which experts say is likely to continue.

"The recent developments in the region are signaling a wind of change, and parties that do business there should take note," says Randa Adra, a partner in Crowell & Moring's International Dispute Resolution and Litigation groups. "Investors and stakeholders should feel more confident about the dispute resolution mechanisms that are available locally."

Shaking Up the Landscape

The arbitration world was stunned when Dubai—long recognized as a hub for MENA-based arbitration—faced an unexpected transformation of its arbitration framework in the fall of 2021. Decree No. 34 consolidated Dubai's two existing arbitral bodies into the Dubai International Arbitration Centre. The subsequent release of the DIAC Arbitration Rules 2022 provides optimism for the future, as the rules include many of the more modern features of international arbitration. The Saudi Center for Commercial Arbitration announced its expansion into Dubai in November 2022, evidence of its growth as a key regional player and signaling that Dubai remains a preferred regional seat for arbitration.

Other jurisdictions have also moved toward a pro-arbitration approach. Qatari courts recently issued a slew of judgments that limit the grounds for setting aside arbitral awards under the country's arbitration law. Such developments set the stage for a new era of international arbitration in Qatar. Similarly, Oman has established the Oman Commercial Arbitration Centre and published arbitration rules in line with international standards.

Why Arbitrate in MENA?

Historically, it was not uncommon that international parties doing business in MENA chose to seat their arbitrations in Europe, where arbitral bodies were more established and enforcement of an arbitral award was perceived as less risky. But Europe presents challenges including higher costs, crowded dockets, and cultural and language barriers.

The evolution toward a more arbitration-friendly approach could make MENA more appealing for international arbitration users. As parties gain confidence in arbitrating disputes there, they will likely realize other benefits. Stakeholders in dispute-intensive industries like construction, energy, and infrastructure may find it more convenient and efficient to seat those arbitrations closer to the site of disputes.

What to Think About Now

Adra encourages parties doing business or otherwise investing in MENA to review their dispute resolution strategies, especially provisions in existing business agreements or templates.

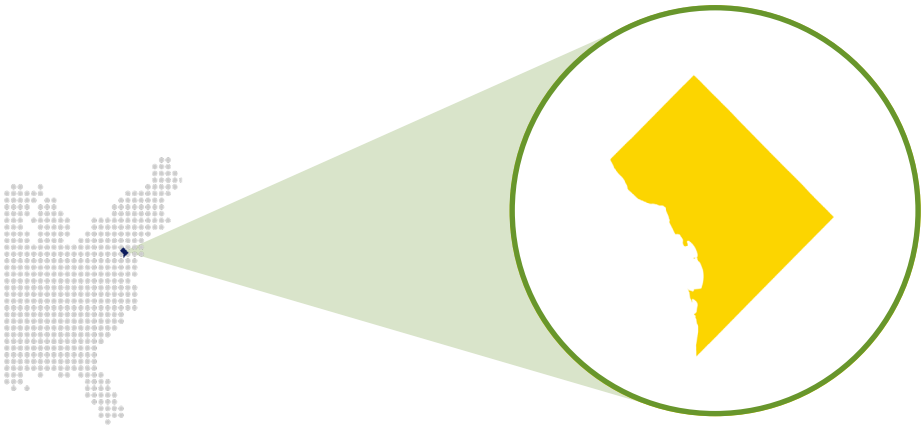
"While international arbitration is by no means new to the region," Adra says, "recent and ongoing developments have altered the arbitration landscape. Investors should rethink how they approach dispute resolution and develop a strategy that takes advantage of these changes. We're urging clients to take a fresh look and to be creative."

"Investors and stakeholders should feel more confident about the dispute resolution mechanisms that are available locally."

RANDA ADRA

Slow Flow in D.C. Courts

Between myriad delays and an increasingly activist approach, companies facing litigation in D.C. must expand their universe of potential risks



The D.C. courts are facing significant delays across the board. There are several reasons: a backlog of cases brought during the pandemic; a backlog of trials after pandemic delays; cases related to the events of January 6, 2021; an uptick in important criminal and national security cases of the type DDC typically hears; and an unprecedented degree of staff burnout and attrition as the D.C. U.S. attorney's office struggles to keep up with the caseload. To succeed, litigants will have to adjust to the slow pace of litigation.

A Harbinger of Things to Come

Add to this an increasingly activist approach from the D.C. AG's office to protecting the rights of its jurisdiction's residents, consumers, and employees. While part of a nationwide trend, the office has been leading the charge, filing cases in local and federal courts that are setting the pace for AGs elsewhere.

Karl A. Racine's two terms as D.C. AG ended on January 2, 2023. "Racine established several core priorities that drove his enforcement actions, one of which was consumer protection," says Toni Michelle Jackson, a partner in Crowell & Moring's Litigation and Labor & Employment groups. "We expect his successor, Brian Schwalb, to have similar priorities and to take an aggressive stance that will set a similar example for state AGs."

More Consumer Protection Cases

Jackson believes the D.C. AG and, indeed, state AGs will take the lead in bringing consumer protection cases. The catalyst is a 2021 Supreme Court ruling, *AMG Capital Management v. FTC*, that the Federal Trade Commission—which shares antitrust oversight with the Department of Justice—lacks power under its injunction authority to seek financial restitution for consumers injured by anticompetitive behavior. The ruling, she notes, "means that state AGs, who typically have the power to seek restitution under their state laws, will have to pick up the enforcement baton from federal regulators. It's likely that AGs of different states will collaborate, as they often do, to bring more consumer protection actions in federal courts such as DDC."

A notable example is a late-2022 case filed by Racine and the AGs of California and Illinois in DDC. The case, *District of Columbia et al. v. The Kroger Co. et al.,* challenges the proposed merger of supermarket giants Albertsons Companies and Kroger Co. The AGs want to prevent Albertsons from paying a special dividend to shareholders because they claim that the dividend's financial impact on Albertsons would result in significant anticompetitive harm to the company's customers and employees.

Third Leg of the Legal Risk Tripod

The upshot for companies facing litigation in D.C. is that they must expand their universe of potential risks. As Jackson explains, "The traditional view of corporate legal risk emphasizes civil litigation against private parties and federal regulatory risk. The rising aggressiveness of state AGs is the third leg of the risk tripod.

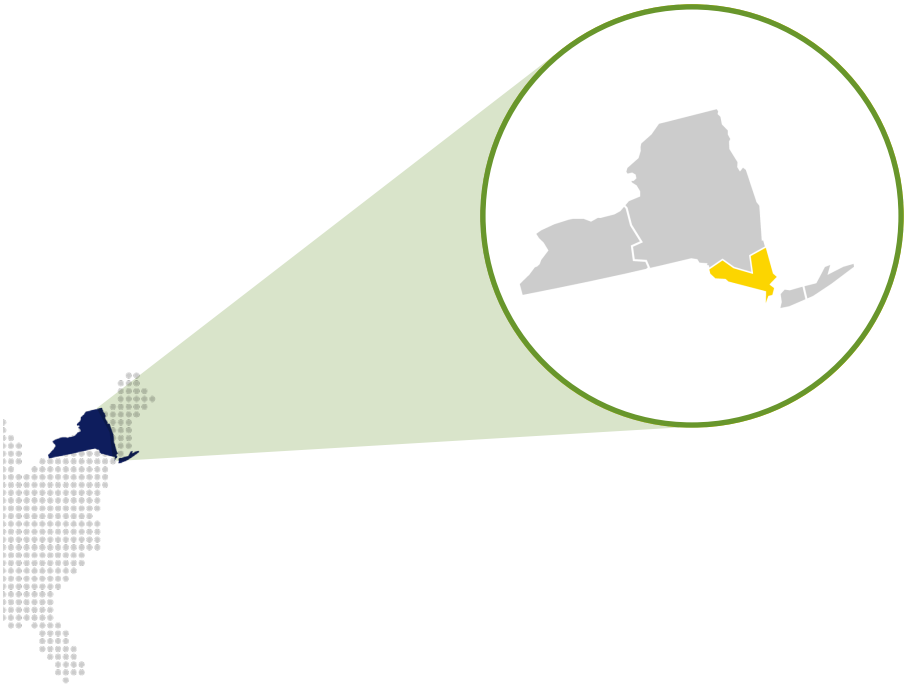
"State regulatory risk has been an afterthought for most in-house counsel," she continues. "But it should become a part of their first-level calculus of legal risk. To compete in this new landscape, companies must deepen their understanding of state antitrust laws in anticipation of more attention from state AGs."

"It's likely that AGs of different states will collaborate to bring more consumer protection actions in federal courts such as DDC."

TONI MICHELLE JACKSON

Consumer Class Actions Expand into New Sectors

With the number of class action suits quadrupling over the past five years, cases now include the advertising of any category of consumer goods



Crowell & Moring partner Sarah Gilbert says she expects the number of consumer class action suits filed in the Southern District of New York to continue to grow in the year ahead.

But she also says it is wise to expect the unexpected, as market volatility could give rise to new varieties of commercial disputes.

New York has been a magnet for class actions alleging deceptive practices or false advertising for the past five years, and during that time the number of such cases has more than quadrupled, according to a report published by the New York Civil Justice Institute. Targeting primarily food and drink makers, almost all of the hundreds of cases filed in the state since 2017 have resulted in settlements within months of filing.

That's because of the risk of reputational damage for big-name defendants, including brands such as Whole Foods and Coca-Cola, as well as the potential for a jury to award monumental damages in a class action suit, Gilbert says. New York's false advertising law provides for $500 in statutory damages per plaintiff, even if the actual harm suffered is much less than that.

Not only does Gilbert not see the consumer class action trend abating in the Southern District, she sees it spreading beyond the food and drink sector.

"To some extent the trend has played out in the food sector," she says. "But now all companies need to be aware because it is branching out into new areas—electronics, any advertising of consumer goods. We're going to continue to see new waves of this type of litigation."

New York federal court is an especially attractive forum for plaintiffs' law firms because of the U.S. Supreme Court's *Shady Grove v. Allstate* ruling in 2010. In that case, a divided court held class actions seeking statutory damages may be brought in New York federal court, even though procedural rules in New York state courts explicitly do not allow for statutory damages in class actions.

So, while New York state legislators may have intended the $500 award in the false advertising statute to apply to a single plaintiff, *Shady Grove* allows plaintiffs' attorneys to seek $500 per class member in federal court.

Growing Skepticism

While there does not appear to be momentum in the state legislature to amend the statute, some federal judges in the Southern District appear to be more skeptical of some claims in the early stages of litigation, Gilbert says.

For example, in November 2021, the court dismissed a suit against Bimbo Bakeries, agreeing that a reasonable consumer would not be misled by the phrase "All Butter" on its "All Butter Loaf Cake" label. (In March 2022, however, a judge in the Southern District of Illinois refused to dismiss a similar claim against Bimbo.)

Food and beverage companies have also become smarter about their labeling. For example, "slack fill" complaints—through which consumers asserted they were misled by the size of a box or bag about the amount of product that was inside—once represented more than 10 percent of New York's consumer class action cases. But they have largely dried up as makers of products that often settle when they are shipped—such as chips and candy—have become more explicit

"Some SDNY judges appear to be more skeptical of some claims in the early stages of litigation."

SARAH GILBERT

about net weight and serving sizes.

As a result, Gilbert says, plaintiffs' lawyers appear to have turned their attention to advertising for non-food products. In August, a New York federal judge refused to dismiss a false advertising case claiming that an exercise equipment company had misled consumers by touting its on-demand digital library of fitness classes as "growing," even as it was removing from its library some classes due to copyright infringement claims.

In June, a class action suit was filed against a major electronics manufacturer under the New York consumer protection statutes because it allegedly misled buyers through advertising to think a specific television had a higher "refresh rate" than it actually did. That same month, a large computer maker was hit with a class action suit claiming it had "fabricated a fictitious original price" in its advertising in order to appear to be offering consumers a discount.

"It's not going away; it's just moving to other territory," says Gilbert. "Any advertising involving a discount could especially be a target."

Volatility Means Increased Activity

Geopolitical and economic instability has historically led to increased litigation, and as the seat of the world's largest financial markets, the Southern District of New York is often where those lawsuits are filed.

In the wake of the dot-com bust in 2000 and the 9/11 terrorist attacks, a record number of securities class actions were filed in 2001, and most of them were heard in the Southern District of New York. Similarly, the subprime mortgage crisis brought a slew of litigation over mortgage-backed securities to the court in 2008.

Even in established markets like the secondary market for leveraged loans, volatility can lead to trade disputes and formal litigation because trades that would normally settle without incident instead break as the result of unexpected, drastic price movements or the inability of loan market participants to meet their contractual commitments due to internal liquidity concerns, Gilbert explains.

As with the global financial crisis in 2008, market dislocation can have an especially outsize impact on derivatives markets and other less liquid trading markets. As an example, Gilbert points to Winter Storm Uri in Texas in early 2021. The unexpectedly frigid temperatures crippled the state's electrical grid and resulted in as much as a 30,000 percent increase in energy prices. In addition to the devastating human impact, the spike in prices brought turmoil to various energy derivative transactions, usually governed by New York law, trading on the Texas energy market. The result: big financial losses and a slew of litigations in New York courts.

Looking ahead, Gilbert sees particular litigation risks in the trading markets for cryptocurrencies and other digital assets. Macro headwinds, market volatility, and fraud will likely continue to contribute to investor losses and subsequent litigation. The bankruptcy of FTX and other centralized exchanges, as well as customer and investor litigation relating to inadequate disclosures, mismanagement, and contract breaches will likely present novel legal issues for New York litigators.

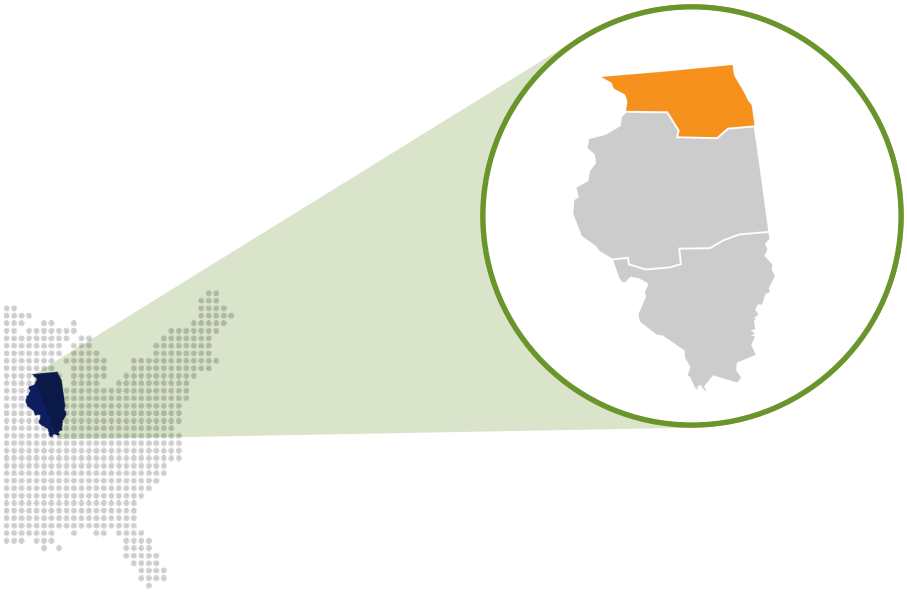
Cryptocurrency's Ups and Downs

(Crypto Volatility Index, January 2020 to November 2022)

Historically, market volatility has resulted in increased litigation. Many expect volatility in cryptocurrency and cryptocurrency derivatives markets to continue into 2023.

Biometric Litigation Looms Large

A massive class action award for plaintiffs in a BIPA case this past October is likely to encourage even more claims



In the wake of a $228 million jury verdict rendered in the Northern District of Illinois in October 2022, companies should expect the wave of litigation under the state's Biometric Information Privacy Act to continue throughout 2023, according to Chicago-based Crowell & Moring partner Jason Stiehl.

While there have been dozens of big BIPA settlements reported since 2019, the massive class action award in *Rogers v. BNSF Railway Co.* marks the first time such a dispute has gone to a jury. The decisive plaintiffs' victory will likely encourage even more claims, says Stiehl.

Though several states have laws that govern the way companies can collect biometric information from employees and customers, Illinois's statute is the only one that allows for a private right of action. Illinois saw its first class action filed under the law in 2015, and a 2019 state Supreme Court decision that allowed cases to proceed even without a showing of actual injury opened the floodgates to more than 1,000 BIPA class actions since.

Claims are heard in both Illinois state courts and in federal courts, with defendants generally preferring to have claims filed first in state court and then moved to federal court, says Stiehl, a member of Crowell & Moring's Technology & Brand Protection Group.

The act requires companies to obtain individual written consent before collecting or storing any kind of "biometric identifiers," such as retina scans, fingerprints, voiceprints, or facial geometry. The law allows for damages of $1,000 for each negligent violation and $5,000 for reckless or intentional violations.

In March 2021, Facebook was ordered to pay $650 million to settle claims it violated BIPA by using facial recognition technology in its photo-tagging feature without express consent. In July 2021, McDonald's was sued by a drive-thru customer claiming the fast-food chain violated BIPA by capturing without consent customer voiceprints, which McDonald's says it uses to "correctly interpret customer orders" and "identify repeat customers to provide a tailored experience."

In April 2022, Louis Vuitton was hit with a claim for collecting and storing customer facial geometry data through its "virtual try-on" tool for sunglasses. Major national retailers including The Home Depot and Lowe's have been accused of unlawfully scanning customers' facial geometry and using artificial intelligence to cross-reference those scans with data from other visits.

In the case of *Rogers v. BNSF,* the jury took just a few hours to decide the freight company had violated BIPA by collecting fingerprints from 45,000 truck drivers without proper consent and disclosure. After a five-day trial, the jury found BNSF's violation was reckless or intentional, subjecting it to the maximum penalty of $5,000 per violation.

Several attempts have been made to limit BIPA's application, with limited success. In February 2022, the Illinois Supreme Court rejected the argument that the Illinois Workers' Compensation Act preempted BIPA injury claims by employees, as in the *BNSF* case.

The state Supreme Court is expected to issue a decision in early 2023 regarding the act's statute of limitations. But even if the court rules in favor of the defendants, the impact on the pace of BIPA class action filings will likely be marginal. The most recent attempt at BIPA reform in the Illinois legislature, in 2021, has stalled.

Stiehl says all companies doing business in Illinois need to take steps to mitigate their risk. First, it's important to confirm whether they are collecting any

> **"Technology is outpacing the law, so we see claims crammed under statutes written with different technology in mind."**
>
> JASON STIEHL

kind of biometric data, either for employees or customers. If they are, they need to obtain written consent prior to collection, adopt publicly available policies and procedures, and disclose details about how the data is being used and stored.

Other Digital Danger

Even the most careful companies can be tripped up, however, when the law fails to adjust to rapid changes in technology, says Stiehl. For example, the federal Video Privacy Protection Act was enacted in 1988 to keep the purchase history of video rental store customers from being made public. But in September 2022, a plaintiff filed suit in the Northern District of Illinois, claiming NFL.com violated the act when it shared his personal data with Facebook. Hundreds of thousands of subscribers could be included in the class action.

"I call these 'gotcha statute' cases," says Stiehl. "Technology is outpacing the law, so the result is we see lots of claims being crammed under statutes that were written with different technology in mind."

Warranty Class Actions on the Uptick, Too

Stiehl says the Northern District of Illinois saw several cases filed in 2022 under the Magnuson-Moss Warranty Act, mirroring a similar trend seen in California, Arkansas, and Pennsylvania. The increase comes after a yearlong effort by the Federal Trade Commission to promote consumer awareness of the "right to repair" under the act's "anti-tying" provision, which limits manufacturers' ability to require consumers to use affiliated repair shops for warranty repairs.

The FTC launched high-profile enforcement actions against motorcycle manufacturer Harley-Davidson and Westinghouse's generator manufacturer, MWE. Both resulted in settlements in 2022.

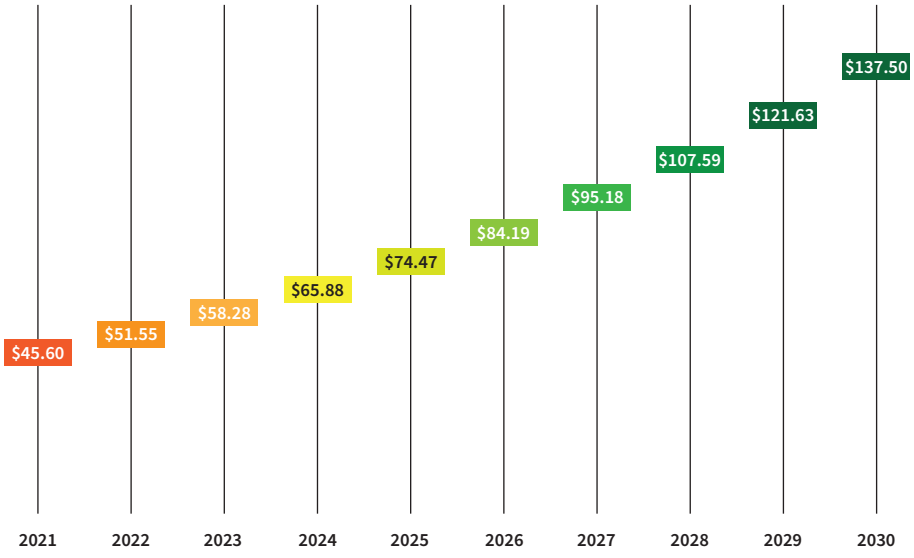
Now anti-tying class action suits are on the rise, including one major case against an equipment manufacturer over the right to repair farm equipment. In June, more than a dozen class action suits from around the country were consolidated into one case to be heard in the Northern District of Illinois. Farmers have claimed that because the company will not allow them access to software needed to diagnose problems with tractors and other farm equipment, they are forced to use the company's dealers, who diagnose problems and then order needed parts and make the repairs.

Stiehl says retailers that sell products under warranty also need to be aware of their obligations under the Magnuson-Moss Warranty Act, which requires them to provide consumers with access to written warranties for any products over $15. Costco, Jo-Ann fabric stores, and several other companies were all hit with such class action suits in 2022.

Class action claims for false labeling under the act and the Illinois Consumer Fraud and Deceptive Business Practices Act are also on the rise, Stiehl adds. For example, in September, an Illinois man filed suit against 7-Eleven, alleging he was misled by pictures of fresh jalapeños on the label of the chain's spicy jalapeño-flavored jumbo peanuts into thinking the peanuts were flavored with real jalapeños rather than artificial ingredients.

Biometric Technology Market Size 2021-2030 (in billions)

The use of biometric technology is increasing rapidly, but Illinois's BIPA poses legal risks for companies that use it.



SOURCE: PRECEDENCE RESEARCH

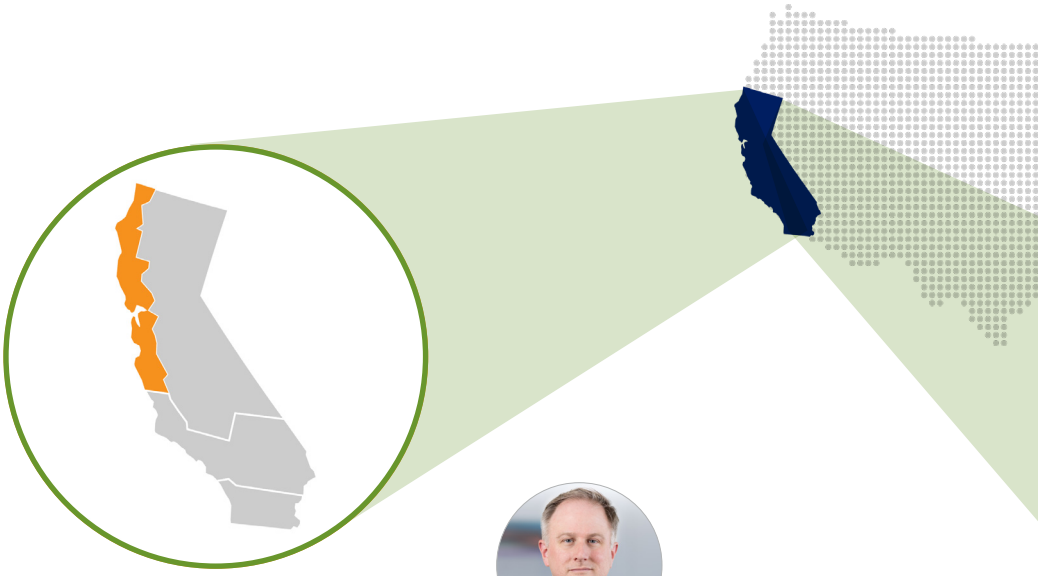
Will the Door to Mass Claims Close?

A series of recent California Supreme Court decisions has led to an explosion of PAGA claims in state and federal courts

A recent NDCA court decision left the door open to future mass claims under the state's Private Attorneys General Act, despite a June decision by the U.S. Supreme Court that some hoped would spell the end of this burgeoning area of litigation, says Crowell & Moring partner Christopher Banks.

PAGA, enacted in 2004, allows workers to act as state labor code enforcers, in a sense "deputizing" them to bring claims on behalf of themselves along with other employees. The law imposes penalties of up to $100 for each initial violation and up to $200 for each subsequent violation, and plaintiffs routinely ask for tens to hundreds of millions of dollars in penalties in PAGA cases. Defendants may also have to cover plaintiffs' attorneys' fees.

A series of California Supreme Court decisions in recent years has led to an explosion of PAGA claims in state and federal courts, says Banks, a San Francisco-based member of Crowell & Moring's Litigation & Trial and Labor & Employment groups. In 2014, for example, the court ruled that employees who had signed agreements to arbitrate disputes with their employer had not waived their right to bring PAGA claims. The number of PAGA lawsuit notices received by the state's Labor and Workforce Development Agency has topped 4,000 every year since, according to the California Chamber of Commerce.



"Because PAGA is state law, the state Supreme Court ultimately will have a say in how it is interpreted."

CHRISTOPHER BANKS

PAGA Cases in Limbo

While PAGA's one-year statute of limitations has served to limit the size of awards and settlements, the average settlement is $1.1 million, with an average award per employee of about $1,200. However, some hoped that the litigation wave would ebb after the U.S. Supreme Court in June 2022 ruled in *Viking River Cruises v. Moriana* that the Federal Arbitration Act preempts California law and that a PAGA plaintiff could be required to arbitrate its labor code claim after all.

The Supreme Court majority in *Viking River Cruises* also opined that, as a result, a PAGA plaintiff would no longer have standing to bring a case for the entire group of aggrieved employees. That part of the ruling, however, is being challenged in another case, *Adolph v. Uber Technologies*, says Banks, which is pending before the California Supreme Court.

The upshot is that PAGA cases in the Northern District of California are in limbo. In October, the federal district court judge in *Martinez-Gonzalez v. Elkhorn Packing* stayed the plaintiffs' group PAGA claim, awaiting the direction of the California Supreme Court.

The state Supreme Court is expected to decide *Adolph* sometime in 2023. If it agrees with the U.S. Supreme Court regarding PAGA standing, employers will largely be able to shield themselves from liability with arbitration agreements. If the state Supreme Court disagrees, then PAGA litigation will be revived—at least for now.

"Because PAGA is state law, the state Supreme Court ultimately will have a say in how it is interpreted," says Banks. "The future of PAGA litigation now hinges on what they say."

A Faster Docket with Patent and Privacy Cases

The pace of cases in CDCA will pick up as part of a concerted effort to reduce the backlog caused by the pandemic

"With Texas courts now less attractive, plaintiffs will seek out other districts whose judges have expertise in patent litigation."

EMILY KUWAHARA

Litigants can expect several significant trends in the Central District of California during 2023. Most notably, cases should move more quickly and the number involving patent and privacy issues should increase.

According to Emily Kuwahara, a partner in Crowell & Moring's Litigation Group, the pace of the CDCA docket will pick up as part of a concerted effort to reduce the backlog of pandemic-era cases. "The district paused jury trials in much of 2020 through early 2022 due to COVID outbreaks," she says. "Judges, plaintiffs, and defendants all want to restore the caseload to a more reasonable level, and we expect judges to grant fewer continuances and hold parties to their schedules." Adding to that, CDCA has eight new judges confirmed since 2020, filling some long-open vacancies.

An Attractive Venue for Patent Litigation

Patent litigation has been on the decline in CDCA. In 2021, for example, judges heard 214 patent cases, down 19 percent from 263 cases in 2020.

Kuwahara believes that two key factors will cause this number to rise. The first is CDCA's success with the Patent Pilot Program, a 10-year project intended to raise patent-related expertise among district judges. The nationwide program, which ended in 2021, helped CDCA build a core of judges with experience and proficiency in hearing patent cases—so much so that the district made the program permanent.

The second factor is greater difficulty in keeping patent cases in Texas courts that have been viewed as favorable to patent holders. Cases that would have been filed or maintained in Texas may instead go to venues where technology companies reside, such as CDCA.

"This change should prompt plaintiffs to look elsewhere to file patent cases," Kuwahara notes. "With Texas courts now less attractive, plaintiffs will almost certainly seek out other districts whose judges have expertise in patent litigation. Central Cal is among the leading districts for patent cases and should benefit from this development."

CIPA Filings Should Increase

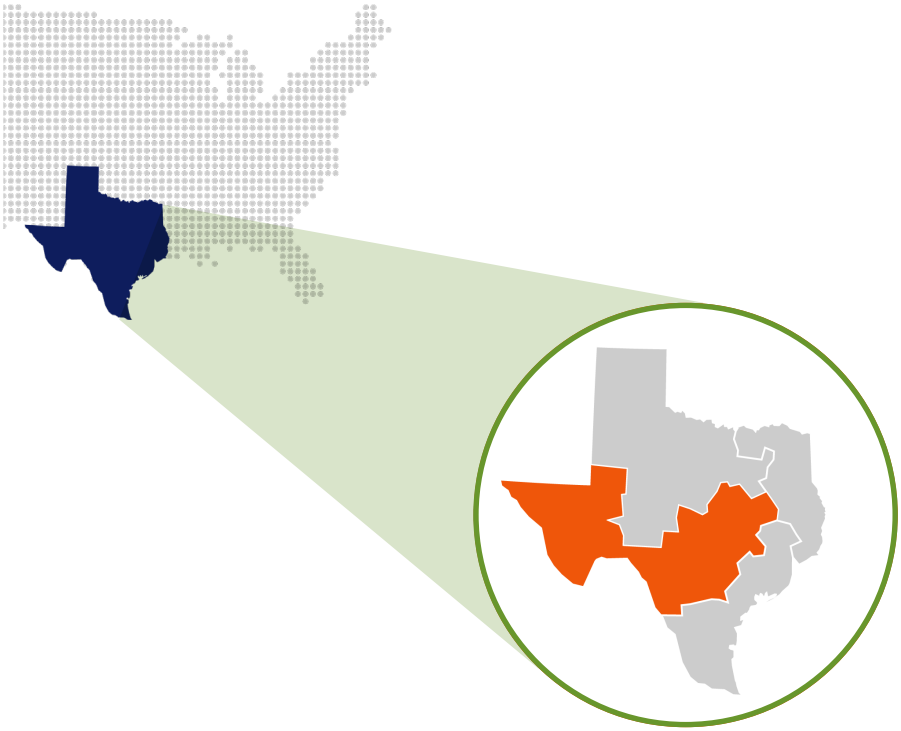
Filings of complaints under the California Invasion of Privacy Act appear set to rise in California's state and federal courts. Often referred to as the state's "wiretap act," CIPA, which originally focused on phone lines, aims to protect consumers' personal data from the use of, unauthorized reading of, or attempted reading of any message, report, or communication that is in transit or passing over any wire, line, or cable. Its new usage takes the definition further, applying it to the internet and implicating chat features, message boards, and online requests for information.

In May 2022, the 9th Circuit ruled in *Javier v. Assurance IQ LLC et al.* that the defendant, an insurance company, violated CIPA by not asking for the plaintiff's consent prior to collection of his personal data when he requested an online policy price quote. The case originated in federal district court as a diversity action under the Class Action Fairness Act.

Kuwahara sees the *Javier* decision as a catalyst for increased CIPA-based activity. She also recommends that companies review their online consent and privacy policies for CIPA exposure. "As large districts where many potential plaintiffs and defendants are located, it's reasonable to expect Central Cal and the other California districts to experience an uptick in CIPA filings on the back of *Javier.* Companies should assess their vulnerability and update their online policies accordingly," she says.

Can an Infringement Claim Magnet Be Deactivated?

While steps have been taken to break one WDTX judge's grip on the nation's patent docket, his influence remains strong



While several recent developments have curbed the number of patent cases filed in the Western District of Texas, it will likely remain a popular venue for patent owners' complaints at least through this year, says Chicago-based Crowell & Moring partner Yuezhong Feng.

The Western District of Texas has been an infringement claim magnet since the appointment of Judge Alan Albright to its bench by President Donald Trump in 2018. Albright, a longtime intellectual property lawyer, immediately made it known that he welcomed patent cases in his Waco, Texas, courtroom, and he adopted rules similar to those that made the Eastern District of Texas popular with patent plaintiffs in the preceding decade.

While Albright and other judges say their rules are intended to promote expediency, predictability, and fairness, they are seen by many as being generally favorable to patent holders.

The Road to Waco

After Albright's appointment, patent plaintiffs began flocking to Waco, and by 2020, a shocking 20 percent of all patent complaints in the U.S. were filed in Albright's court. By 2021, the number had risen to 25 percent.

Several steps have been taken to break Albright's grip on the nation's patent docket, says Feng. Beginning in 2020, the Federal Circuit Court of Appeals issued more than a dozen orders overturning Albright's decisions in which he denied defendants' motions to move their case to a different federal district.

In November 2021, Senators Patrick Leahy (D-VT) and Thom Tillis (R-NC), who led the Senate Judiciary Subcommittee on Intellectual Property, wrote to U.S. Supreme Court Chief Justice John Roberts, expressing their alarm about the "extreme concentration of patent litigation in one district" and asking him to commission a study on how to remedy the situation.

Senators Leahy, Tillis, and John Cornyn (R-TX) also introduced legislation in June 2022 that would reform the Patent Trial and Appeal Board, which hears petitions challenging the validity of patents. Such challenges, also known as *inter partes* review, or IPR, are often made by defendants in patent infringement cases hoping to have the patent in question deemed invalid before their district court case can go to trial.

Faster than the PTAB

But the PTAB has denied several such petitions for IPR on the grounds that validity will be determined by the district court before IPR can be completed. The issue has been especially relevant with regard to cases before Albright, who has stated publicly that he can adjudicate issues of validity more quickly than the PTAB, in response to motions to stay litigation pending IPR.

The proposed legislation would, in part, prohibit the PTAB from denying IPR petitions based solely on parallel civil litigation timelines. Shortly after the introduction of that bill, the U.S. Patent and Trademark Office issued interim guidance also narrowing the circumstances under which the PTAB can deny IPR petitions in such cases, says Feng.

“The courts are very inconsistent, and they will stay inconsistent without some other more comprehensive reforms.”

YUEZHONG FENG

The combined efforts by the Federal Circuit, Congress, and the USPTO met with some success, as news reports have noted several subsequent instances of Albright granting motions to transfer cases to another district or to stay a case pending PTAB review.

But many believed that the end to Albright’s dominance over the patent docket would finally come in July, after WDTX Chief Judge Orlando Garcia declared that patent cases filed in Waco federal court would not automatically be heard by Albright, but would instead be randomly assigned to one of 12 judges within the district.

Case Numbers Rise in Delaware

To some extent, that extraordinary measure worked, says Feng, a member of Crowell & Moring’s Patent and ITC Litigation Group. According to one news report, patent infringement case filings in the Western District fell by 19.3 percent in August (compared to August 2021), while patent filings nationwide fell just 7.9 percent for the same time period. Statistics showed a corresponding increase in the number of patent cases being filed in DDEL, which is considered less plaintiff-friendly but has many more judges experienced in patent law.

The Eastern District of Texas saw a similar drop in its patent caseload after a 2017 U.S. Supreme Court decision that imposed limitations on where patent plaintiffs could file their infringement suits. However, Feng points out that together, the Western and Eastern Districts of Texas still received a lopsided share—nearly a third—of patent infringement claims nationwide.

Texas district courts could retain their outsize influence on patent litigation for the near term due to several factors, Feng says. First, Albright is still presiding over more than 850 pending patent cases, and the plaintiffs in those cases could add new claims that would still be heard by him. In addition, other judges in the district could transfer their cases to Albright, citing their lack of experience in the specialized field of patent litigation as well as the burden of traveling to Waco to hear cases filed there.

Judge Shopping Persists

Finally, Garcia rotated out of the chief judge position in November, and some have speculated that the new chief judge could alter Garcia’s July order, which has been criticized as bad precedent by some because it targets one judge and one kind of case, rather than randomly assigning all cases.

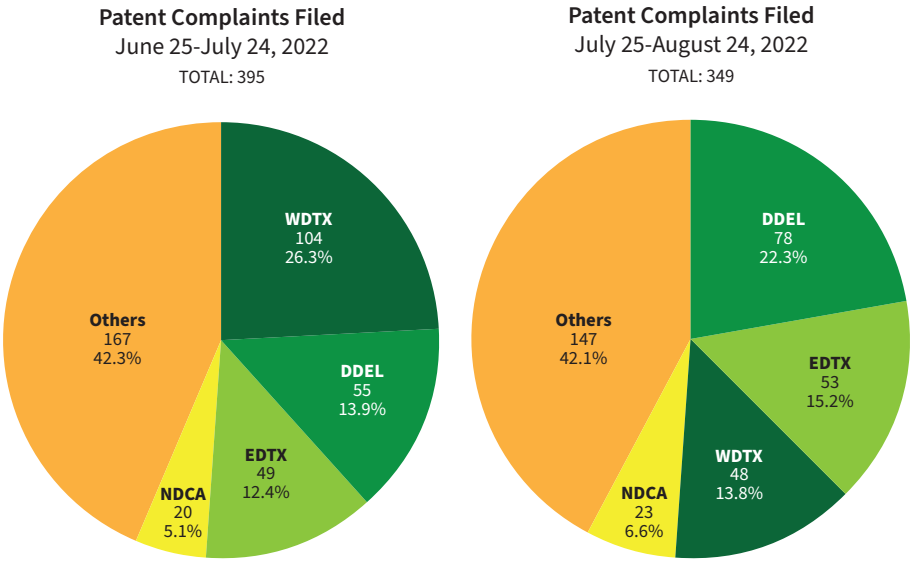
Feng adds that even if Albright’s patent caseload is significantly curtailed, that does not solve the underlying problem of rampant judge shopping. Patent defendants will continue to prefer the Northern District of California and Delaware, and there’s nothing to stop other judges in other districts from moving to become more friendly for plaintiffs, like the Western and Eastern Districts of Texas.

“Ultimately, the issue is that the courts are very inconsistent,” Feng says. “And they will stay inconsistent without some other more comprehensive reforms.”

Delaware Moves into First Place After Chief Judge Garcia’s Ruling

Once patent cases no longer automatically flowed into Judge Alan Albright’s courtroom, plaintiffs immediately looked to other venues, notably Delaware.

SOURCE: HTTPS://PORTAL.UNIFIEDPATENTS.COM



Crowell

For more information, contact:
Mark Klapow
mklapow@crowell.com
Phone: +1.202.624.2975
1001 Pennsylvania Avenue NW
Washington, DC 20004-2595

To access an electronic version
of this publication, go to
crowell.com/litigationforecast