



Weil

Litigation Trends 2017

Dear Friends and Colleagues:

We are pleased to introduce the 2017 edition of Weil's Litigation Trends Report, in which our practice group leaders have offered their expert assessments and predictions for the coming year.

Much of our focus this year, as in years' past, is on the potential ramifications of pending appellate decisions, as well as the evolution of trial court jurisprudence in the wake of recent appellate rulings. Notably, we repeat the maxim that "location is everything," with the Supreme Court ready to determine the interpretation of venue provisions for patent infringement litigation – which could dramatically change the geographic distribution of new cases – as well as review anew the fate of the Court's earlier *Daimler* decision and its use by companies to prevent plaintiffs from "forum shopping" for perceived plaintiff-friendly courts. We also re-assess the "big three" Supreme Court class action decisions from 2016 and their subsequent interpretation by lower courts, and discuss the appeal of inter partes review proceedings in light of potential changes to provisions governing the amendment of patent claims and the scope of estoppel.

We also look outside of the courtroom, as the change in presidential administrations can reshape government policy and priorities at the local, state, and federal levels. Our litigators explore the state of federal merger enforcement by the FTC and DOJ, the trajectory of global anti-corruption enforcement by the DOJ, SEC, and their

counterparts abroad, and the future of federal whistleblower protections established under Sarbanes-Oxley and Dodd-Frank. We also address significant legislative developments, from the ambitious Fairness in Class Action Litigation Act that is now before the U.S. Senate, to new state and municipal laws focusing on equal pay, minimum wages, and discrimination.

Finally, we remark upon coming or recently implemented structural changes to the U.S. judiciary and other triers of fact, such as the confirmation of a replacement for the late Justice Scalia on the U.S. Supreme Court, and the adoption of several new rules by arbitral institutions that aim to accelerate proceedings, enhance transparency, and maximize the integrity of the arbitration process.

If you would like further information on any of these topics, please do not hesitate to reach out to either of us or your usual contact at Weil. Contact information is enclosed on the back cover. We look forward to the opportunity to work with you this year.



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* We would like to offer thanks to all of our contributing practice group leaders, as well as partner David Singh and associate Jevetchius Bernardoni in our Silicon Valley office, for their immense efforts in drafting this report.

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Class Actions

Proposed Congressional Class Action Reform

A recently proposed bill, if passed as introduced, would dramatically alter the class-action landscape in 2017 and beyond. Representative Bob Goodlatte (R-VA) introduced H.R. 985, the Fairness in Class Action Litigation Act (the "Act"), on February 9. The purpose of the Act is to "amend the procedures used in federal court class actions and multidistrict litigation proceedings to assure fairer, more efficient outcomes for claimants and defendants." The Act, co-sponsored by Representatives Pete Sessions (R-TX) and Glenn Grothman (R-WI), would affect dramatic and wide-ranging changes to the law governing class actions under Rule 23 of the Federal Rules of Civil Procedure. The Act's significant changes to current class action law include, but are not limited to: (1) prohibiting a federal court from granting class certification unless each class member suffered "the same type and scope of injury" based on "a rigorous analysis of the evidence presented"; (2) heightening the standard for certifying "issues" classes; (3) prohibiting class certification unless the class is defined based on "reference to objective criteria," requiring class representatives to "affirmatively demonstrate[] that there is a reliable and administratively feasible mechanism" to identify class members and distribute monetary relief directly to a substantial majority of the class; (4) automatically staying discovery during the pendency of motions to transfer, dismiss, and strike class allegations unless "the particularized discovery is necessary to preserve evidence or prevent undue prejudice"; (5) prohibiting class counsel from representing a client in more than one class action, amongst other "conflicts" prohibitions; (6) mandating reporting of settlement data to the Federal Judicial Center; and (7) providing an automatic right to appeal an order certifying a class. Proponents of the Act support its wide-sweeping class-action reform, which they claim is much needed, while opponents claim the Act effectively "guts" class actions in an untargeted, unsophisticated manner. On March 9, the Act passed in the House without any substantive amendment on a 220-201 vote and it will be considered in the Senate in the coming months. Needless to say, if the Act becomes law, it will be a game-changer and courts will grapple with its impact in 2017 and for many years to come.

Continued Aftershocks of the "Big Three" Supreme Court Class Action Decisions

In 2017, we anticipate that parties to class action lawsuits will continue to litigate the meaning of and questions left unanswered by the three key Supreme Court class action decisions from the past year – the *Spokeo*, *Tyson Foods* and *Campbell-Ewald* cases. While initially it seemed like the Supreme Court's decision to grant *certiorari* in these three cases was a sign that the Court sought



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to clarify important aspects of class action law, the opinions in these cases will give lower courts a lot to interpret in 2017.

Spokeo v. Robins considered whether a plaintiff who alleges no concrete harm, but just a technical violation of a federal statute, has Article III standing to bring a class action in federal court. In a 6-2 decision, the Supreme Court held that allegations of a “bare procedural violation divorced from any concrete harm” is insufficient to establish Article III standing, which requires all matters in federal court be a “case or controversy.” In 2017, we anticipate continued litigation regarding the impact and meaning of *Spokeo*, which could have important implications for the class action bar because a number of federal statutes, including the Telephone Consumer Protection Act, the Video Protection Privacy Act, the Stored Communications Act, the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act, allow for the recovery of statutory damages even in the absence of actual damages. Because the Supreme Court left many questions unanswered (*e.g.*, when is an injury sufficiently concrete to satisfy Article III?), lower courts that have since interpreted and applied *Spokeo* have done so with highly variable results. Even nearly a year after the ruling, it is difficult to identify clear, overarching trends in the jurisprudence because how a court rules in a particular case seems to hinge on a number of case-specific factors including the type of statutory claim asserted, where the case is pending, and the specific facts of harm alleged. However, recent lower court decisions suggest that in 2017, defendants may be less likely to bring a *Spokeo* challenge at all when the plaintiff originally filed its case in state court. In recent decisions, including by the Ninth Circuit (*Medellin v. IKEA U.S.A. W., Inc.*, No. 15-55174, 2017 WL 128112 (9th Cir. Jan. 13, 2017)) and Northern District of Illinois (*Mocek v. Allsaints USA Ltd.*, No. 16 C 8484, 2016 WL 7116590 (N.D. Ill. Dec. 7, 2016)), courts have denied defendants’ motions to dismiss based on *Spokeo* as moot and granted plaintiffs’ motions to remand cases back to state court on the grounds that the plaintiffs’ ability to satisfy the *Spokeo* test had no impact on plaintiffs’ posture in state court (where Article III standing is not required). Given this new wrinkle in *Spokeo* jurisprudence, *Spokeo* could become a double-edged sword – defendants may refrain from bringing *Spokeo* challenges in the future out of fear of having their case remanded to state court and plaintiffs may raise *Spokeo* as a basis for defeating federal jurisdiction and litigating in state court.

In *Campbell-Ewald Co. v. Gomez*, the Supreme Court was presented with the issue of whether defendants could moot a proposed putative class action by offering the class representative full individual relief pursuant to Federal Rule of Civil Procedure 68. In a 6-3 decision, the Supreme Court concluded that an unaccepted Rule 68 offer did not moot the named plaintiff’s individual claim. Nevertheless, the Court, as it often does, teed up an important question for lower courts to consider in future cases: whether the result would be different if a defendant deposits the full amount of the named plaintiff’s individual claim with the court pursuant to Federal Rule of Civil Procedure 67. In 2016, Weil’s Litigation



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Trends Report predicted that many defendants would attempt to moot the named plaintiff's claim by tendering the relief sought (rather than just making an offer) in order to test the issue left open by the Supreme Court. Post-*Campbell-Ewald*, defendants have had varying success employing this strategy. However, the lower court decisions published to date seem to suggest that this strategy is unlikely to be viable in a majority of jurisdictions, as most courts have held that tendering full individual monetary relief to the court cannot moot a class action unless the proposed class has been certified. Nevertheless, defendants will likely continue to try to "pick off" named plaintiffs by tendering full individual relief to the court in 2017 until the Supreme Court is forced to clarify this area of law once and for all.

In *Tyson Foods, Inc. v. Bouaphakeo*, which presented the Court with an opportunity to revisit pro-defendant assertions made by Justice Scalia in *Wal-Mart v. Dukes*, suggesting that plaintiffs could not use representative proof to prove a defendant's liability (i.e., "trial by formula"), the Court held that workers in a food processing facility could rely on representative sampling regarding hours worked "to fill an evidentiary gap" created by Tyson's failure to keep adequate records to establish class-wide liability for alleged violations of the Fair Labor Standards Act. In so holding, the Supreme Court also declined to address the other issue raised by *Tyson Foods* – whether plaintiffs must demonstrate a mechanism for ensuring that uninjured class members do not receive damages. Importantly, in his *Tyson Foods* concurrence, Justice Roberts suggested that, on remand to the district court, plaintiffs needed to set forth a viable plan to allocate the jury's award to ensure that uninjured class members would not recover, and if plaintiffs could not set forth such a plan, the class should be decertified. In 2017, we anticipate that more defendants will invoke Justice Roberts' concurrence in *Tyson Foods* to request that the court require class action plaintiffs submit a trial plan early in the litigation. A trial plan may illustrate for the judge that the use of sampling evidence would prevent the defendant from raising individualized defenses and pose due process and manageability issues. Indeed, demanding plaintiffs produce a trial plan, including based on Justice Robert's concurrence in *Tyson Foods*, can be a powerful tool to bring to light arbitrary sampling evidence or practical manageability problems in adjudicating the claims on a class wide basis.

Courting Business: Impact of Justice Scalia's Death and Trump Administration on Class Action Rulings in 2017

A "conservative" replacement to Justice Scalia, such as Judge Gorsuch (who is likely to be confirmed), will likely maintain the Court's current pro-business approach to class action questions. However, until a replacement is confirmed, with the passing of Scalia – who authored several influential class action decisions including *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* – the newly-formed Court in 2017 will be short a strong class-action critic.



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The Supreme Court has accepted far fewer class action cases this term. In one of those cases, *Microsoft v. Baker*, the Court is considering whether United States Courts of Appeal have jurisdiction to review a motion denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice. The Ninth Circuit's holding – allowing plaintiffs to create *pseudo*-interlocutory appellate jurisdiction over class-certification denials by voluntarily dismissing their claims – conflicts with the law in the majority of the circuits. The Supreme Court heard oral arguments in *Microsoft* on March 21, during the midst of Judge Gorsuch's confirmation hearing, and is likely to be decided in 2017.



Securities & White Collar Litigation

Increasing Coordination of Global Anti-Corruption Enforcement

We expect the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) to continue their robust enforcement of the U.S. Foreign Corrupt Practices Act (FCPA). A related trend we will be watching is the increasing cooperation between U.S. and foreign anti-corruption enforcement agencies. In 2016, the DOJ obtained significant resolutions against major multinationals, resulting in criminal penalties, fines and forfeiture exceeding \$1.3 billion to the U.S. alone, and over \$7 billion when considering the amounts also collected by foreign authorities in cases involving cooperation with the DOJ. Much of this sum can be attributed to the \$4.5 billion, globally coordinated settlement involving the U.S., Brazil and Switzerland against Odebrecht S.A., a Brazilian construction company with operations across the globe, and Braskem, S.A., a Brazilian petrochemical company partially owned by Odebrecht, both of which were ensnared in the sprawling corruption investigation surrounding the Brazilian national oil company Petrobras. In the U.S., Odebrecht pleaded guilty to conspiracy to violate the FCPA for bribing foreign officials in Brazil, other countries in Latin America, and Africa, and agreed to the appointment of an independent compliance monitor, while settling a civil action brought against it by the SEC. Braskem agreed to plead guilty to conspiracy to violate the FCPA for bribing foreign officials in Brazil, to pay a \$632 million criminal penalty (the majority of which is to be paid to Brazilian authorities), and to the appointment of an independent compliance monitor. Braskem also settled related civil SEC charges, agreeing to disgorge \$325 million in profits to the SEC. The Petrobras investigation, known as Operation *Lava Jato* ("Car Wash") also has implicated other U.S. and foreign multi-nationals, and we expect that continued cooperation between U.S. and Brazilian authorities will lead to additional FCPA enforcement actions in 2017. We note that, notwithstanding the uncertainty that exists regarding DOJ enforcement priorities in the new administration, Attorney General Sessions confirmed during his confirmation hearing that he intends to continue to enforce the FCPA.

The U.K.'s Serious Fraud Office (SFO) is off to a strong start in its use of its recent authority under new U.K. legislation to enter into Deferred Prosecution Agreements (DPAs) with corporations to resolve criminal corporate liability under the U.K. Bribery Act. We expect that the use of DPAs will permit the SFO to more expeditiously settle corruption cases against corporations while



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obtaining fines that are on par with those that U.S. regulators obtain. For example, in January 2017, a British court approved a DPA between the SFO and Rolls Royce to resolve its liability for bribing government officials in various countries over many years. The DPA required that Rolls Royce pay a financial penalty of £239,082,645, disgorge profits of £258,170,000, and reimburse the SFO's legal costs in full (approximately £13 million). At the end of 2016, Rolls Royce entered a separate DPA with the DOJ, agreeing to pay another \$170,000,000 in criminal penalties to U.S. authorities to settle related FCPA charges. In announcing its resolution against Rolls Royce, the DOJ noted the cooperation not only of the SFO, but also of other law enforcement agencies in Austria, Germany, the Netherlands, Turkey, and Singapore.

Continued Focus on Corporate Healthcare Fraud

Healthcare fraud will continue to be an enforcement priority for the DOJ in 2017. In 2016, the DOJ established a Corporate Healthcare Fraud Strike Force, which, according to the DOJ, is pursuing active investigations. The first major resolution of the Strike Force was achieved in September 2016, when Tenet Healthcare Corporation, a national health services provider, agreed to pay over \$513 million as part of a criminal and civil resolution relating to a scheme to defraud the federal government in violation of the Anti-Kickback Statute. According to the DOJ, four Tenet hospitals in Georgia and South Carolina agreed to pay kickbacks to the owners of two clinics in exchange for referral of Medicaid neo-natal patients. The States of Georgia and South Carolina will share in the civil recovery. In addition, an independent compliance monitor was appointed.

Targeting Financial Institution Conduct in the Global Financial Markets

DOJ brought wire and bank fraud charges against two former Deutsche Bank senior traders in connection with their alleged role in the manipulation of LIBOR. In July 2016, the DOJ charged two HSBC employees with a wire fraud conspiracy for allegedly misusing client information to benefit the bank in connection with a \$3.5 billion foreign exchange transaction. And in early 2017, the DOJ's Antitrust Division charged three London-based traders from three different financial institutions over their alleged roles in conspiring to "rig" prices in the FOREX markets. Given the ongoing LIBOR and FOREX market investigations in the U.S., Western Europe and Japan, and the ongoing cooperation that regulators, including the DOJ, have secured from many major financial institutions, we think it is likely there will be more charges brought against executives and traders in 2017 in connection with conduct in the global financial markets.



Antitrust Litigation

More Permissive and Less-Burdensome Regulatory Review of Merger and Acquisitions

Notwithstanding the U.S. Federal Trade Commission's (FTC) and U.S. Department of Justice's (DOJ) successful run of federal court merger challenges, we anticipate a less aggressive merger enforcement climate as the Trump administration begins. Just how far the pendulum swings will depend on the identities of senior leaders ultimately taking positions at the agencies. In terms of substantive changes in merger enforcement policy, we expect senior agency officials to hold agency staff to a higher standard of proving-up likely anticompetitive effects (e.g., fewer divestitures required in "4-to-3" mergers), while merging parties may face somewhat lower hurdles than they have in the past with respect to efficiencies arguments offered in defense of transactions. What is less clear is whether the White House is likely to intervene in certain high-profile mergers, and relatedly whether non-traditional issues, such as maintaining U.S. jobs, may creep into the antitrust review process. And, speaking of process, we anticipate the agencies will quickly and intently focus on reducing the cost and time associated with navigating the regulatory review process (both of which are at an all-time high). Finally, we anticipate movement towards aligning the now-distinct litigation procedures and standards at the FTC and DOJ, most likely through the passage of the pending Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act.

Continued Aggressive Cartel Enforcement; Likely Less Non-Merger Civil Enforcement

Both Democrat and Republican administrations over the last two decades have taken a hard line against *per se* antitrust violations, such as price-fixing, dividing customers or markets, and bid rigging. The DOJ confirmed its broad view of the extraterritorial application of Section 1 of the Sherman Act to prosecuting international cartels in the January 13, 2017 update to the "Antitrust Guidelines for International Enforcement and Cooperation." We therefore expect the DOJ to continue to prosecute cartels aggressively, resulting in substantial fines for corporations and jail time for culpable individuals. As for civil non-merger enforcement targeting business practices as unreasonable restraints of trade under Section 1 of the Sherman Act or exclusionary conduct by firms with monopoly power under Section 2 of the Sherman Act, these investigations and cases are more difficult to establish (requiring demonstrable anticompetitive effects) and thus we expect will continue to be less frequent. As with cartel enforcement, the senior personnel ultimately managing the agencies will have a significant impact on the tenor of their civil enforcement. But all indications are



that the DOJ and FTC will have even more of a “hands off” approach here, forcing consumers and rivals to bring private antitrust actions in court to challenge allegedly anticompetitive business practices.

Pharma Industry: A Hotbed for Antitrust Litigation

The pharmaceutical industry will continue to be a top enforcement priority for the U.S. antitrust agencies in 2017, and sits high on the radar of private litigants. The FTC recently trained its sights on a new frontier of so-called “pay-for-delay” settlements by bringing its first challenge to an agreement among brand and generic drug companies not to market an authorized generic for a certain period of time. The action demonstrates the FTC's continued resolve in stopping agreements between brand and generic drug companies believed to inflate drug prices and harm competition, regardless of their form. In another recent first, the FTC charged a brand company with abusing the FDA's citizen petition process by submitting dozens of public filings and petitions allegedly lacking merit and designed to delay approval of generic versions of its blockbuster drug. The FTC also continues to stand watch over other activities that could potentially lead to competitive harm, such as alleged “product hopping” and the use of Risk Evaluation and Mitigation Strategy (REMS) programs. Finally, the FTC recently obtained a \$100M payout to settle charges against a company that acquired the U.S. rights to develop a pipeline drug alleged to be a close threat to a current drug in its portfolio. We expect the FTC to remain focused on the pharma industry and to aggressively challenge anticompetitive conduct it believes harms patients and leads to higher drug prices.

Similarly, the DOJ has active investigations into more than a dozen companies for suspected collusion relating to dozens of generic drugs. Charges of price-fixing, bid-rigging, and customer allocation conspiracies were recently brought against two former senior generic pharmaceutical executives, and more charges appear to be in store for 2017. These investigations and charges have led to a tidal wave of follow-on lawsuits by private plaintiffs on behalf of consumers, and we expect this trend to continue in 2017.

Litigation May Clarify Application of Antitrust to SEP Licensing

The application of antitrust to the licensing of standard essential patents (SEPs) remains unclear in certain respects. The January 2017 update to the “Antitrust Guidelines for the Licensing of Intellectual Property,” issued by the FTC and the DOJ, does not provide additional guidance. Recently filed suits by the FTC and a customer against Qualcomm challenge the terms under which Qualcomm licenses its technology for communicating over standardized cellular networks and may clarify how to evaluate SEP holders' licensing conduct. In particular, the cases against Qualcomm concern its practice of requiring customers purchasing its chips to also license its technology. In addition, Nokia has been sued for its



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practice of transferring patents to patent assertion entities while retaining a partial interest in the patents, so called “patent privateering.” The suit alleges that Nokia distributes its patents to patent assertion entities that then seek to license the patents on terms that do not comply with Nokia’s commitment to license standardized technology on fair, reasonable and non-discriminatory (FRAND) terms. A decision in this case may also provide direction as to the circumstances in which this practice will be permitted.



Products Litigation

Re-evaluating the *Daimler* Defense and Personal Jurisdiction

The Supreme Court's 2014 decision in *Daimler AG v. Bauman* held that a corporation could be subject to general personal jurisdiction (*i.e.*, hauled into a state's courts for claims unrelated to the corporation's activities in that state) only where a business is at home. The Supreme Court found that this would usually only be the state where the corporation is incorporated or where it has its principal place of business. This decision provided corporations a significant tool to use to prevent plaintiffs' attorneys from filing claims against them in perceived plaintiff-friendly courts when the facts giving rise to the claims had nothing to do with a corporation's activities in that jurisdiction.

Since the *Daimler* decision, though, plaintiffs' attorneys have sought to circumvent it, and recent decisions by the Montana and California Supreme Courts have given plaintiffs several avenues to do so. In *BNSF Railway Co. v. Tyrell*, the Montana Supreme Court held that *Daimler's* reasoning should be limited to cases involving only foreign parties in actions that occurred outside of the United States. In addition, it held that a federal statute's language regarding subject matter jurisdiction may also apply for personal jurisdiction. Additionally, in *Bristol-Meyers Squibb v. Superior Court*, the California Supreme Court held that, despite *Daimler's* holdings on general jurisdiction, out-of-state plaintiffs may use specific jurisdiction to bring cases in California where the in-state and out-of-state plaintiffs' claims are based on the same allegedly defective product and the same allegedly misleading marketing and promotion of the products as part of a common nationwide course of distribution.

Fortunately, the U.S. Supreme Court has granted *certiorari* in both of these cases to determine whether they are consistent with *Daimler*. Therefore, both of these cases should be closely watched by corporations that face mass and class actions targeting their products. If allowed to stand, both of these decisions would severely undercut the *Daimler* decision and the ability of corporations to prevent plaintiffs' counsel from massing their cases in perceived plaintiff-friendly courts. If, however, the U.S. Supreme Court reverses these two cases, then corporations should continue to be able to utilize *Daimler* as an effective defense.

Lincoln's Law in 2017: False Claims Act Litigation Continues To Be Robust

Litigation under the False Claims Act (FCA) continues to be a very hot area. In Fiscal Year 2016, the U.S. Department of Justice (DOJ) collected more than \$4.76 billion in settlements and judgments – an increase of almost \$1 billion from the prior fiscal year. In addition, in 2016, relators filed more than 700



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qui tam cases, a 10% increase from the prior year. Given the politically charged financial incentives of the FCA's automatic treble damages and penalty provisions for each false claim submitted, there is no reason to believe the new administration will do anything to rein in the DOJ's pursuit of FCA cases. Nor is there any reason to believe that the Relators' Bar will scale back its efforts to look for new ways to expand the reach of the FCA. This is particularly true given two new developments. First, the statutory amounts for penalties has increased to a range of \$10,781 to \$21,563 for each false claim – and it is likely these penalty amounts will be adjusted upward again in 2017. Second, in *Universal Health Services v. United States ex rel Escobar*, 136 S.Ct. 1989 (2016), the Supreme Court unanimously upheld the implied certification theory of liability. The *Escobar* decision held that where a defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose that the defendant has not complied with material statutory, regulatory or contractual requirements, then the defendant can be held liable under the FCA. This decision will not only encourage the DOJ and Relators to continue to file FCA cases, but will likely also create significant litigation over the meaning of materiality and whether a statutory, regulatory or contractual term is material. Therefore, companies doing business with the Government, or even doing business with companies doing business with the Government, should continue to implement and enforce internal compliance procedures to protect against FCA claims.



Employment Litigation

Expansion of Employee Protections In Various States and Municipalities

In recent years, there has been a growing trend of state and local laws expanding employee protections beyond those afforded by federal law. For example, in 2016, several states sought to bolster laws prohibiting sex-based pay differentials by amending state equal pay laws to increase employee remedies and/or to prohibit employers from requiring employees to keep compensation information secret, and otherwise lower the bar for bringing equal pay lawsuits. Some states and cities have enacted legislation prohibiting discrimination in employment on the basis of familial or caregiver status, neither of which is a protected category under federal anti-discrimination law, and a number of states and cities now require employers to provide paid sick leave to employees, as well as, in some states, paid family and medical leave. Additionally, more states and cities now restrict employers' ability to inquire about job applicants' compensation, credit or criminal history during the hiring process. Moreover, several states, such as New York and California, have implemented state minimum wage increases and have adopted some state version of the recently enjoined U.S. Department of Labor regulation increasing the minimum salary threshold required to qualify under available white collar exemptions. Thus, employers operating in those states either will have to reclassify certain employees or will have to increase their guaranteed pay to maintain the white collar exemptions.

Continued Focus on Addressing Sex-Based Disparities in Pay

Pay equity was a major priority of the Obama administration including, most recently, the Equal Employment Opportunity Commission's announcement last year that it will require employers to disclose aggregate pay data in their EEO-1 reports starting in 2018. Notwithstanding the change in administrations, we expect continued discussion in Congress of equal pay, as there has been some bipartisan support in the Senate for some form of legislation to address gender pay issues and because Ivanka Trump, who may have the president's ear on certain policy matters, identified gender pay equality as an important priority. Further, some states and municipalities have begun to address this issue through more aggressive state-level equal pay act legislation and laws barring employers from inquiring about an applicant's pay history, which is believed by some to perpetuate past gender-based wage discrimination. Finally, the plaintiffs' employment bar has vowed to maintain its recent focus on the vigorous pursuit of claims in this area.



Employment Litigation

Expanded Use of Class-Action Waiver Agreements or Alternative Class-Action Avoidance Measures

Employers have increasingly used arbitration to resolve employment disputes following a series of Supreme Court cases allowing arbitration of employment claims. Employers also have sought to minimize exposure to class actions by including class action waivers in their arbitration programs. A 2012 decision by the National Labor Relations Board (NLRB) in *D.R. Horton* impeded employers' ability to use class action waivers, because the NLRB determined that such waivers violated employees' rights to engage in protected, concerted activity under the National Labor Relations Act. The United States Courts of Appeal have split on the issue of whether such waivers are enforceable: The Seventh and Ninth Circuits deem such waivers to be unenforceable, while the Second, Fifth and Eleventh Circuit have upheld them. On January 13, 2017, the Supreme Court granted consolidated review in three Circuit Court cases in which the issue was presented, and resolution of the issue is anticipated in June 2017. If the employers prevail, we can expect employers to expand their use of such waivers; if the employers lose, we can expect to see the emergence of alternative strategies to combat potentially costly employment-related class action litigation.

Whistleblower Protections Under Federal Law May be Curtailed

The Obama administration significantly expanded the protections afforded to whistleblowers under federal law. For example, the Department of Labor issued new regulations under the Sarbanes-Oxley Act of 2002 expanding the scope of employees protected by the Act's whistleblower provisions, lowering barriers to whistleblowers asserting retaliation complaints, and increasing the remedies available to whistleblowers. Additionally, the Dodd-Frank Wall Street and Consumer Protection Act, signed into law in 2010 in response to the 2008 financial crisis, extended whistleblower protections to certain employees not covered under Sarbanes-Oxley, provided greater remedies to whistleblowers, and imposed less onerous procedures for asserting retaliation complaints than Sarbanes-Oxley, such as a longer statute of limitations and the option to proceed directly to federal court rather than having to first file a charge with an agency. This all may change under the Trump administration. During the campaign, President Trump vowed to dismantle Dodd-Frank and also criticized Sarbanes-Oxley as a hindrance to business. While it remains to be seen whether Congress will repeal the whistleblower protections under Dodd-Frank and Sarbanes-Oxley, in whole or in part, as advocated by the Trump administration, we reasonably expect reductions in the protections afforded to whistleblowers pursuant to federal regulatory actions.



Technology & Intellectual Property Litigation

Will The Eastern District Of Texas Remain A Major Patent Venue

For many years, more patent cases have been filed in the Eastern District of Texas than any other district court in the United States. Of the more than 4,500 patent cases filed in the United States in 2016, nearly 1,700 (roughly 37%) were filed in the Eastern District of Texas. The next closest venue was the District of Delaware, with just over 450 cases filed. That the Eastern District of Texas could attract this many cases, even though relatively few patent litigation defendants reside in the District, is at first blush surprising, given the language of the patent-specific venue statute, 28 U.S.C. section 1400(b). That statute provides that patent cases “may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” The answer to this riddle is found in the 1990 Federal Circuit Court of Appeals decision in *VE Holding*, which held that the broad definition of “residence” found in the general venue statute (28 U.S.C. 1391(c)) applies to the patent venue statute. The effect of *VE Holding* is that venue over a patent case is proper in any district in which the defendant has minimum contacts (*e.g.*, where it commits an act of infringement). This all may change in 2017. The Supreme Court granted *certiorari* in *TC Heartland v. Kraft Food Brands* (S. Ct. No. 16-341) to address whether the Federal Circuit has interpreted section 1400(b) correctly. Many commentators believe that the Supreme Court will decide that the current interpretation is incorrect and follow its 1957 *Fourco Glass* decision, which confirmed that section 1400(b) is the exclusive venue provision for patent cases and should not be modified by general venue provisions. If so, filings in the Eastern District of Texas are likely to fall dramatically, while filings in the District of Delaware (where many companies are incorporated) likely will rise. A decision from the Supreme Court is expected this term.

Will Inter Partes Review Continue To Be The Preferred Procedure For Challenging Patentability

For defendants accused of patent infringement, challenging the asserted claims through inter partes review (IPR) remains a popular option. In 2016, nearly 1,650 IPR petitions were filed, which is just shy of the number that were filed in 2015. But will these high filing rates continue, or will defendants be more cautious about challenging claims at the Patent Office? Several trends suggest some reason for caution. First, IPR institution rates have fallen over the last few years. At this point, roughly 65% of IPRs are instituted, which is down substantially from



the institution rate in 2013 and 2014. Second, for those IPRs that are instituted, the patent owner is increasingly coming out of the proceeding with some or all of the claims intact. Until 2015, most IPR trials resulted in all of the challenged claims being held unpatentable. In 2016, an increasing number of trials resulted in some or all of the claims being found patentable. Finally, the rules that govern patent owner amendments during IPR proceedings may be about to change. One facet of IPR practice that has contributed to its popularity among those challenging patentability is that it has been very difficult for patent owners to amend claims during IPR proceedings. The patent owner may make only one motion to amend, and by rule, the motion may not be granted unless the patent owner carries the burden of showing that the amended claims are patentable over the known prior art. This has been a huge advantage for IPR petitioners, because the claims are not a “moving target” (and are thus easier to attack), the burden on the patent owner is high, and new claims are not likely to issue from the PTAB. This may change, however, in 2017. The Federal Circuit Court of Appeals currently is considering en banc the issue of amendments during IPR proceedings in *In re Aqua Products* (Appeal No. 15-1177). The issues for en banc review focus on whether it is proper for the Patent Office to put the burden on the patent owner to prove that the proposed amended claims are patentable. The case was argued in December.

What Is The Scope Of Estoppel Arising From Inter Partes Review Proceedings

When Congress created the IPR procedure through the America Invents Act, one of the goals of the IPR procedure was to reduce the high costs of patent infringement litigation in district courts. One provision of the IPR statute that serves this goal is the so-called “estoppel” provision. It provides that upon final written decision by the PTAB, the petitioner (or its real party in interest or privies) may not assert in district court that the claims which it challenged through the IPR are “invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review.” 35 U.S.C. section 315(e)(2). Shortly after enactment, many practitioners believed this provision would be broadly applied to bar post-final written decision litigation of patent invalidity in district court based on patents or printed publications that either were the subject of the IPR or were known to the petitioner (such as prior art on the face of the challenged patent, prior art that was uncovered through a prior art search, and the like). Many district courts have been willing to stay cases pending IPR on the ground that the estoppel provision likely would simplify, if not eliminate, invalidity issues once the PTAB issues its decision. However, in *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293 (Fed. Cir. 2016), and several district court decisions interpreting *Shaw*, the courts have applied the estoppel more narrowly. By interpreting the phrase “during that inter partes review” in section 315(e)(2) to mean “after the IPR has been instituted,” some courts have limited the estoppel only to prior art that was part of the grounds on which the PTAB instituted the IPR. A number of challenges



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are being made to this interpretation. But if this interpretation persists, expect many district courts to refuse to grant stays pending IPRs on the theory that the statutory estoppel is too narrow to justify a stay.

Will Manufacturers Lose More Control Over Sales Of Patented Products

The doctrine of patent exhaustion, which also is called the “first sale” doctrine, generally provides that once a patentee sells a patented product, it loses its ability to use the patent laws to control how the product is used or sold downstream. Over the years, however, the Federal Circuit has carved out exceptions to this general rule. For one, the Federal Circuit has allowed the patent laws to be used to enforce “conditional sales,” that is, sales that expressly place a post-use restriction on the product. Another carve-out relates to overseas sales: sales by a U.S. patentee outside the United States have been held not to exhaust the patentee’s patent rights over those products in the United States. Much of this may change in 2017. In December 2016, the Supreme Court granted *certiorari* in *Impression Products v. Lexmark International* (No. 15-1189), a Federal Circuit decision which largely reaffirmed these exceptions to the patent exhaustion doctrine. Should the Supreme Court overturn the Federal Circuit’s decision, there could be broad ramifications in many industries. Medical device companies frequently make “conditional sales” to limit the use of their devices. For example, many medical devices are sold on the condition that they be used only once (think of syringes). Drug companies may rely on the “foreign sale” exception to protect the U.S. market from the importation or sale of patented products sold overseas. Under current law, a drug company can sell a drug at a lower price in a developing country and rely on the “foreign sale” exception to prevent a drug buyer in the developing country from turning around and selling the drug in a market where the drug is sold for a higher price.



International Arbitration

Measures Accelerating Award Issuance in International Arbitrations

In recent years there have been numerous complaints about the length of time it sometimes takes arbitral panels in international arbitrations to issue their awards following the conclusion of hearings and final written submissions. In response, several arbitral institutions have adopted rules that promote greater expedition in the issuance of the award.

For example, the International Arbitration Court of the International Chamber of Commerce (ICC) has adopted new Expedited Rules that will significantly accelerate the issuance of awards on a mandatory basis for all disputes under USD \$2 million and on an opt-in basis for higher value disputes. These Expedited Rules, which went into effect on March 1, 2017, mandate the issuance of an award in applicable cases within six months after the case management conference, with extensions limited to justified exceptions. Notably, the Expedited Rules provide for no Terms of Reference and give the tribunal the discretion, after consultation with the parties, to decide the dispute on the basis of documents alone, without either a hearing or any examination of witnesses. These rules also follow the ICC's earlier 2016 general policy direction regarding the prompt issuance of awards, under which a draft award for all cases registered after January 1, 2016 must be submitted within three months (two months for sole arbitrators) from either the last substantive hearing or the filing of the last substantive written submission, whichever is later. This policy also provides for the possible reduction of arbitrator fees by 5 to 20% or more for delay, with bonuses possible for arbitrators who conduct their proceedings expeditiously.

Finally, while not specifically providing strict deadlines for award issuance, the 2017 changes in the rules of the Stockholm Chamber of Commerce (SCC) promote expedition in the issuance of awards by providing that the determination of costs should take into account "the extent to which the tribunal has acted in an efficient and expeditious manner."

Increasing Transparency in International Arbitration

Recent changes in the rules of certain arbitral institutions as well as a recent arbitral case suggest an emerging trend in favor of greater transparency in international arbitration.

In a departure from prior practice, the ICC, which has traditionally published information about its arbitrations only in aggregate, statistical form, without specific references to arbitrator names, decided in 2016 to publish on its website



International Arbitration

the names of the arbitrators in its cases, as well as their nationality, status as chair or party-appointed, and whether it was the ICC Court, the parties, or co-arbitrators who appointed them. To maintain confidentiality, however, case numbers and the names of parties and counsel are still not published. Notably, parties may, by agreement, opt out of this disclosure or publish additional information. In addition, in 2017, the ICC amended its rules to allow the ICC Court to give reasons for its decisions on award challenges at the request of any party, without requiring that all parties consent to such disclosure, as was previously the rule.

Similarly, the SCC has recently published a Practice Note that summarizes the SCC Board's decisions on challenges from January 2013 to December 2015, excluding only those decisions in arbitrations that remain ongoing. The SCC Practice Note also discusses the IBA Guidelines on arbitrator impartiality and procedures for raising a challenge. In addition, in recognition of the fact that investor-state disputes often affect the interests of non-parties, the SCC has recently supplemented its rules for investor-state arbitrations to allow for written submissions by third parties either upon invitation by the tribunal or on their own initiative, without altering the SCC's or the tribunal's duty of confidentiality. Under the new rules, parties may comment on or request further details regarding any third-party submission, or request that the third party attend a hearing or be examined on its submission.

Finally, a recent ICSID case, *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016, reflects a new high-water mark in investor-state dispute transparency and third-party participation. In that case, the tribunal received amicus briefs and third-party submissions regarding the public interest and public international law, and not only made publicly available the disputing parties' and third parties' submissions and a large number of documents produced in the proceedings, but also live-streamed the oral hearings online.

Introduction of Summary Dismissal Procedures

Arbitration users have long bemoaned the absence of rules providing for the summary disposal of hopeless claims or defenses, without the need for a full trial.

In its 2016 arbitration rules, the Singapore International Arbitration Centre (SIAC) has introduced just such a procedure. Rule 29 gives the tribunal discretion to hear applications for early dismissal of claims and defenses where they are: (a) manifestly without legal merit; or (b) manifestly outside the jurisdiction of the tribunal. This is the first of its kind among the major international commercial arbitration institutions, which have previously resisted calls for a summary procedure amidst concerns over due process.



Under the new procedure, either party can request that a claim or defense is dismissed. If the tribunal allows the application, then a hearing will take place, following which an award will be rendered within 60 days from the date of the application. This means that, if used properly, Rule 29 could result in an award within around three months of commencement of arbitration.

Summary procedures have also been introduced as of January 1, 2017 by the SCC, and it is likely that other arbitral institutions may follow suit.

Improved Emergency Arbitration Procedures

There have long been criticisms in the arbitration community of: (i) a perceived lack of speed generally in the arbitral process, especially during the early stages of forming a tribunal; and (ii) the inability of arbitral proceedings to deal effectively with urgent issues, particularly in the preliminary phase of a dispute. In practice, parties have often found themselves with no alternative but to seek interim or protective relief (for example, to ensure that assets or documents are preserved) from relevant national courts.

In response to these concerns, most of the major arbitral institutions have now incorporated new or otherwise much-improved emergency arbitration provisions in their rules. The 2012 ICC Rules, 2013 SIAC Rules, 2014 LCIA Rules, and 2016 SIAC Rules all included new such provisions. Broadly, these provisions allow for the appointment of an arbitrator, on an expedited and interim basis, whose sole function is to resolve interim issues pending the formation of the main tribunal.

In theory, this provides parties with a genuine alternative to the need to seek interim relief from local courts, as well as maximizes the integrity and standalone nature of the arbitral process. While some of these provisions have now been in effect for some time, their impact is only now beginning to be felt in practice as an increasing number of parties seek emergency relief. This trend will only strengthen in the coming year. It will also give rise to increasingly complex issues as to the relationship between arbitral tribunals and national courts, as national arbitration laws need to develop to take account of the increase in tribunal-awarded interim measures.



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