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Weil

Litigation Trends 2016

Litigation Trends

David Lender and Jonathan Polkes

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General Litigation Trends

1. **Fewer Cases, Increased Spend:** According to a recent survey of corporate legal departments by BTI Consulting Group, 2016 will see a fewer number of pending cases as a result of continued emphasis on early case resolution. Companies continue to look to settle faster and earlier, focusing on early case assessment and proactive settlement strategies. However, despite the projected decrease in the overall number of cases, litigation spend by corporate legal departments is projected to increase for the first time since 2011 due to an increase in the number of high-stakes cases. Indeed, such “bet-the-company” litigation tripled year-over-year from 2014 to 2015 and is projected to be even higher for 2016.

2. **Litigating Fallout From the FRCP Amendments:** We have already started to see and anticipate a tidal wave of further litigation regarding the recent amendments to the Federal Rules of Civil Procedure (“Rules”), which became effective on December 1, 2015. The amendments to Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 37 and 55 and the abrogation of Rule 84 (the “Amendments”) are the culmination of a six-year examination of the state of civil litigation in federal courts to make sure that the Rules remain consistent with the overarching goal set forth in Rule 1 of achieving a “just, speedy, and inexpensive determination of every action.” (Weil’s client presentation regarding the Amendments is available upon request.) Until there is a more well-settled body of precedent, we anticipate recurring disputes regarding, among other things, the new requirements in Rule 26 that discovery be “proportional to the needs of the case...”; in Rule 34 that a party objecting to a document request state whether any responsive material is being withheld on the basis of the objection; and in Rule 37(e) that a party seeking severe spoliation sanctions prove an intent to deprive.

3. **Watching the High Court Balancing Act:** Whether the Republican-controlled Senate approves President Obama’s eventual nominee or not, Justice Antonin Scalia’s death in early 2016 may alter the balance of the Supreme Court in a way not seen for decades. Justice Scalia’s absence on the bench could lead to significant legal changes in a broad range of issues relevant to corporate America, including with respect to class actions and arbitration, issues on which a narrow majority of the Supreme Court has taken pro-business stances in recent years.

Class Actions

1. **The Viability of Justiciability Defenses in Class Actions Will Be Impacted By Recent and Pending Supreme Court Decisions:** In 2016, parties to class action lawsuits will litigate the meaning and impact of recent and pending Supreme Court decisions concerning threshold justiciability defenses that can be brought at the outset of putative class actions:

- In *Spokeo, Inc. v. Robins*, the Supreme Court is considering whether a plaintiff who alleges no concrete harm, but just a technical violation of a federal statute, has Article III standing. Regardless of how the Court rules, this decision may significantly alter the class action landscape. On the one hand, if the Court holds that a mere technical violation of a federal statute is sufficient to confer standing, that may embolden plaintiffs and prompt a wave of "no injury" class actions. In particular, it may encourage claims under federal statutes arguably providing a private cause of action for invasions of privacy, such as 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. In contrast, a holding by the Court that a plaintiff must allege a concrete harm and not merely a technical violation of a federal statute would impede a major growth industry in class actions, and motions to dismiss for lack of standing pursuant to Rule 12(b)(1) would become a more prevalent and potent weapon in the defense of class actions. Of course, Justice Scalia's death may have an immediate impact on the outcome of this case, as he was an outspoken critic of class actions and part of a slim majority in many cases reining in class actions.

- In *Campbell-Ewald Co. v. Gomez*, the Supreme Court considered whether a complete offer of relief to the named plaintiff in a class action moots the individual's claim. The case was closely watched by class action practitioners because, if a complete offer of relief to the named plaintiff could moot their claims, defendants in class actions could "pick off" the named plaintiff and moot the case before a ruling on a class certification motion. On January 20, 2016, in a 5-4 decision, the Court held that an unaccepted Rule 68 offer of judgment made before class certification does not moot the named plaintiff's claim. However, in the final two sentences of its analysis, the Court expressly left open the question of whether a case becomes moot "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." Given this caveat, we anticipate that many defendants will attempt to moot the named plaintiff's claim by tendering the relief sought (rather than just making an offer) and that the lower courts will be divided on whether such a tender moots the named plaintiff's claim until the Court addresses that separate issue.

2. **"Trial By Formula" May Be Limited:** We anticipate that there will be significant litigation in 2016 regarding the meaning and impact of the Supreme Court's forthcoming decision in *Tyson Foods, Inc. v. Bouaphakeo*. In *Tyson Foods*, the Court is considering whether (1) a class can be certified based on statistical techniques that assume all class members are identical (*i.e.,* "trial by formula") and (2) a class can be certified if some of the class members are not injured and have no legal right to recovery. A holding by the Court that plaintiffs must show, at the class certification stage, that the requirements of Rule 23 have been satisfied without the use of statistics or averages would create a high hurdle for class certification in many cases. Similarly, a holding that a class cannot be certified if not all of the class members have been injured and have a legal right to recovery could provide a powerful tool for defendants to defeat class certification in many cases. Again, Justice Scalia's absence from the Supreme Court may alter the outcome of this pending case.

3. **Continued Split Among Federal Courts Spurs Litigation on the Ascertainability Requirement:** In 2014, Weil's Litigation Trends Report predicted that that the outcome of class actions will increasingly turn on whether membership in the class is ascertainable. A continuing circuit split in this area of the law has caused confusion and uncertainty, resulting in additional litigation to

determine whether the class is ascertainable under the applicable law. For example, the Third and Eleventh Circuits have adopted a rigorous and strict inquiry into the existence of an ascertainable class, requiring a plaintiff to demonstrate by a preponderance of the evidence that (1) the class is "defined with reference to objective criteria;" and (2) there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Carrera v. Bayer Corp.,* 727 F.3d 300 (3d Cir. 2013); *see also Karhu v. Vital Pharmaceuticals, Inc.,* 2015 U.S. App. Lexis 9576 (11th Cir. 2015). In contrast, the Seventh Circuit has adopted a more plaintiff-friendly approach pursuant to which proposed classes fail to satisfy the ascertainability requirement only if they are (1) vague and lack a "clear definition" (that is one that "identif[ies] a particular group, harmed during a particular time frame, in a particular location, in a particular way"); (2) defined by subjective criteria; or (3) defined based on the merits of the claims (also known as a "fail-safe" class). *See, e.g., Mullins v. Direct Digital, LLC*, 795 F. 3d 654 (7th Cir. 2015). Thus, depending on the jurisdiction, the ascertainability requirement may preclude class certification or may have no impact at all. We predict continued litigation and division among the circuit and lower courts regarding the ascertainability requirement unless and until the Supreme Court addresses the issue.

Products Litigation

1. **Supply Chain Liability Theories Undergird Consumer Fraud Class Actions:** There has been an increasing use of supply chain liability theories to bring consumer fraud class actions. These actions allege that corporations are making misrepresentations to consumers by failing to inform them that the company's products or raw materials have been made or prepared in countries using unlawful labor practices. For example, in *Sud v. Costco Wholesale Corp.,* a class of California consumers sued Costco alleging that it knowingly sold Thai prawns that had been caught by boats manned by slave labor. The risks of such lawsuits will likely increase because of supply chain disclosure laws being enacted in a number of jurisdictions. For example, California enacted the Transparency in Supply Chain Act in 2012. This law requires companies to disclose their efforts to eradicate human slavery and human trafficking from their supply chains, and to disclose, among other things, whether they audit their suppliers and whether they require their suppliers to certify that their products do not implicate human rights abuses. The U.K. has enacted a similar supply chain disclosure law. Plaintiffs clearly will be reviewing these disclosures and companies' statements for use in supply chain liability lawsuits.

2. **False Claims Act Litigation Continues to Be Robust:** There is a continuing trend of extensive litigation under the federal False Claims Act (FCA). In Fiscal Year 2015, the U.S. Department of Justice (DOJ) collected more than $3.5 billion in settlements and judgments. And the DOJ recently announced that its Civil Division would work closely with its Criminal Division to investigate potential FCA violations, and also focus on individuals within a company who may have been responsible for the company's actions. With its automatic treble damages and penalty provisions for each false claim submitted, the DOJ and Relators' Bar continue to look for ways to expand the reach of the FCA. This is particularly true in cases of defective products or simple breach of warranties regarding the products. The DOJ and Relators' Bar have attempted to convert these claims to FCA cases by arguing that the warranties were promises of future performance that were false because the manufacturers knew the products would not last the length of their warranties. Moreover, the DOJ and Relators' Bar have tried to bring these FCA claims against not only the manufacturer of the product, but also the component part and raw material suppliers. In addition, certain states and even local municipalities have enacted their own FCA statutes and are beginning to enforce them aggressively. Therefore, any company that is selling products to any governmental entity, or selling components or materials that are being used in products sold to the Government, should develop and enforce effective compliance procedures to protect against potential FCA claims.

Securities & White Collar Litigation

1. **Disclosure-Only Settlements Under Heightened Review:** Following a recent decision from the Delaware Court of Chancery in *In re Trulia, Inc. Stockholder Litigation,* --- A.3d ---, 2016 WL 325008 (Del. Ch. Jan. 22, 2016), we predict that the Delaware Court of Chancery will closely scrutinize "disclosure-only settlements" – *i.e.,* the plaintiff's agreement to drop its challenge to the transaction in exchange for additional disclosure to the target's stockholders, a broad release of any and all known and unknown claims that the plaintiff (and the class of stockholders the plaintiff purports to represent) might have, and an agreement by the target to pay a relatively modest (compared to the size of the transaction) attorneys' fee award. Under the Delaware Court of Chancery's heightened analysis, settlement disclosures must address "plainly material" misrepresentations or omissions, meaning "that it should not be a close call that the supplemental information is material." Moreover, any proposed release of claims – the greatest incentive for defendants to enter into these settlements – should be "narrowly circumscribed" to include only disclosure claims and fiduciary duty claims regarding the sale process to the extent that the latter have been sufficiently vetted. As has been the case in recent years, in the short term, we expect that plaintiffs may continue to seek forums other than Delaware for M&A lawsuits in the hopes that they will be more favorable. In time, given the significant influence of the Delaware Court of Chancery on corporate litigation, we anticipate that *Trulia* will drive a decline in abusive M&A litigation nationwide.

2. **SEC Enforcement Continues to Increase, With a Greater Focus on Administrative Proceedings:** Focusing on disclosure and Foreign Corrupt Practices Act violations as to public companies, we expect U.S. Securities and Exchange Commission (SEC) enforcement actions to continue on an upward trajectory. However, as demonstrated by the SEC's recent actions, the SEC is obtaining lower amounts of penalties and disgorgement in the proceedings it does initiate. Moreover, over the past few years, the SEC has demonstrated a strong preference for administrative proceedings rather than federal court actions, a trend that does not have an end in sight.

Antitrust Litigation

1. **DOJ and FTC Continue Enforcement Agenda:** We expect the DOJ and U.S. Federal Trade Commission (FTC) to continue their aggressive enforcement agendas in the final year of the Obama Administration. These federal agencies have pursued significant global cartel activity in the financial services and auto parts industries. Their enforcement efforts have resulted in higher fines, prison sentences, and civil recoveries. In light of the increased investigative coordination between the U.S. and European antitrust agencies, companies that are the subjects of criminal antitrust investigations are more likely to face litigation in the U.S. and Europe. Despite the presidential election year, criminal cartel enforcement has remained the top priority by the Antitrust Division of the DOJ under Democrat and Republican administrations, and we expect this to continue in 2016.

2. **Mergers and Acquisitions Receive Increased Scrutiny By Federal Agencies:** The DOJ and FTC have also demonstrated an increased willingness to exercise their civil investigative and enforcement powers in the merger and acquisition sphere, with actions filed in the proposed mergers of Staples-Office Depot, Sysco-US Foods, Steris-Synergy Health, and Electrolux-General Electric's appliance unit. The FTC was successful in obtaining a preliminary injunction to block the Sysco-US Foods merger and challenged the Electrolux-General Electric merger to the point where the deal was abandoned. While some of these other matters are still pending, FTC action on the antitrust merger enforcement stage has not been uniformly successful, as demonstrated by an Ohio federal court's refusal to stop the $1.9 billion Steris-Synergy Health merger. But the recent filings by the FTC and DOJ demonstrate that there is no crest in sight and in-depth merger investigations and enforcement action will continue, especially as a number of large, strategic transactions among competitors have been signed in 2015 and 2016 so far.

Employment Litigation

1. **DOJ Mandates Modification of Websites Under ADA:** The DOJ and various private plaintiffs have brought actions against a number of companies asserting that they failed to "reasonably accommodate" disabled consumers in violation of the Americans With Disabilities Act of 1990 (ADA). Courts have reached varying conclusions regarding whether companies engaged in e-commerce must make their websites accessible to the disabled based on differing views on whether the internet is a "public accommodation" under the ADA. While companies may debate Congress' intent in enacting the ADA, they may nevertheless wish to modify their websites prophylactically in order to reduce the risk of litigation. For example, companies may consider (1) providing text alternatives for any non-text content on their websites so that such content can be converted into braille or speech by assistive programs, (2) ensuring all functions can be performed with a keyboard, (3) providing headings for content so that users can navigate directly to their area of interest, and (4) providing resources for consumers if they have difficulty accessing certain content.

2. **Dodd-Frank Promotes Greater Transparency About Diversity Efforts:** In a little discussed provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress mandated that the agencies charged with enforcing the Act create Offices of Minority and Women Inclusion. The Act further mandates that these Offices develop standards for "assessing the diversity policies and practices of entities regulated by the agency." In 2013, these federal agencies jointly proposed standards to govern their own internal diversity efforts, with a focus on promoting voluntary self-assessments and public awareness of their diversity policies. Since that time, these federal agencies have published reports regarding their diversity efforts, reflecting varying views as to how the objectives of diversity should be defined and how diversity policies should be implemented. Although these pronouncements do not yet include specific mandates applying to companies subject to Dodd-Frank, we expect government agencies and plaintiffs will focus on whether regulated entities comply with the standards adopted by the federal agencies. Accordingly, companies subject to Dodd-Frank would be wise to re-examine their diversity policies, including how they define the objectives of diversity and the standards for measurement of the success of these policies.

3. **Growing Recognition of LGBT Rights in the Workplace:** Although federal employment discrimination law does not expressly protect individuals based on their sexual orientation and transgender status, the U.S. Equal Employment Opportunity Commission (EEOC) and the federal courts have recently taken a more expansive view of discrimination based upon gender status to include discrimination based upon sexual orientation and transgender status. Further, some states and localities have amended their employment discrimination laws expressly to prohibit discrimination based upon sexual orientation and transgender status. Certain high-profile cases, such as the recent Supreme Court same-sex marriage case, and well-known transgender individuals, such as Caitlin Jenner, have increased the general public's attention to such matters. This growing awareness has led to more assertive behavior on the part of aggrieved employees and administrative agencies seeking to enforce LGBT employee rights. Thus, we have seen increased litigation over access to shared bathrooms, access to healthcare related to sex reassignment and general disparate treatment related to sexual orientation and transgender status. We expect to see more in the future as the EEOC has announced its commitment to eradicating this form of discrimination (read the EEOC's Strategic Enforcement Plan, Section III (B)(3)), and state and local governments expand their laws to expressly outlaw such discrimination. (*See* for example, New York City's recent guidelines, available here.) Employers should examine their personnel policies and seek counsel to ensure that they do not get caught behind the curve on this rapidly evolving workplace issue.

4. **Growing Uncertainty Over Employer and Employee Status in the New Demand Economy:** The questions of who is an employer and who is an employee seem to be getting less clear as our service economy continues to evolve and the growth of the demand sector continues to explode. Thus, we see Uber drivers, who Uber asserts to be independent contractors, prosecuting wage and hour claims and even going on strike – actions traditionally limited to employees. We see government agencies, such as the U.S. National Labor Relations Board (NLRB) in its continuing quest to stay relevant and expand its jurisdiction in the face of economic trends that threaten its status, eager to expand the definitions of employer and employee to make the classic franchisor, such as McDonald's, legally responsible as a joint employer of its franchisees' employees. (*See* NLRB/ McDonald's consolidated cases at https://www.nlrb.gov/case/02-CA-093893.) While the economy transforms, the law struggles to keep up. We expect to see more litigation, more legislation, and more regulation seeking to expand the traditional definitions of employer and employee to catch up with these revolutionary changes in the workplace.

5. **Emergence of Credit and Background Check Litigation as a New Wave of Class Action:** In the aftermath of the financial crisis in 2008, with employment hirings at all-time lows and a sharp increase in workers with vulnerable financial profiles and/or other background issues, the federal, state, and local governments began enacting legislation to protect those populations in the workplace. Dozens of states and municipalities have now enacted far more restrictive background and credit check laws impacting virtually all public and private employers. These legislative developments, combined with the difficulty of certifying class actions in the wake of the Supreme Court's seminal *Walmart v. Dukes* decision, have caused a significant spike in the filing of putative class actions under the Fair Credit Reporting Act (FCRA) and various state and local statutes, particularly in California, as these claims are often easier to certify than, for example, discrimination cases. Unlike plaintiffs who bring claims under other employment statutes, plaintiffs who bring claims under FCRA and state and local credit check statutes do not necessarily need to establish any adverse action resulting from the alleged credit check violation. Thus, under the FCRA, and many state analogues, plaintiffs can recover merely by establishing employer noncompliance with the often technical statutory requirements. Moreover, many employers have been a step behind in keeping pace with these legislative developments, a lag that has been exploited by plaintiffs. Credit and criminal background lawsuits are now at an all-time high, and are likely to increase in the coming years.

6. **Significant Expansion of Protections Based on Sex and Familial Status:** Beginning with the Obama administration's Equity Pay Task Force, designed to study and remediate gender disparities in pay, there has recently been a groundswell of legislative and case law developments in the gender-related areas of pregnancy accommodation, equal pay, and caregiver bias. Moreover, in January 2016, the EEOC proposed to revise its annual EEO-1 reporting requirements to require most employers to submit aggregate pay data annually by gender, race, and ethnicity. (*See* the proposed rule.) In addition, various states, including New York, have recently amended their equal pay laws to enhance protections for women and require greater transparency in pay in the workplace. (*See* New York's signed bill.) Similarly, several states, including New York, have created an entirely new protected classification in the workplace based on familial status, where both men and women who have caregiving responsibilities will be protected against adverse action. (*See* New York's law protecting caregivers.) As a result of these developments, plaintiffs' class action firms are now bringing gender discrimination cases involving many of these newer claims and theories.

7. **Whistleblower Retaliation Litigation Continues to Proliferate:** Whistleblower retaliation claims have risen steadily over the past several years, and this trend is likely to continue in 2016. The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), which enforces 22

separate federal whistleblower statutes, received 6% more whistleblower complaints in 2015 than in 2014, and has requested a 23% increase in whistleblower funding for 2016 to handle the rising number of whistleblower cases being filed. The DOJ likewise recovered more than $2.8 billion in settlements and judgments under the whistleblower provisions of the federal False Claims Act in 2015 alone, with 638 new whistleblower suits being filed under the False Claims Act in the past year. With a growing range of laws – at both the federal and state levels – and rules that prohibit retaliation against employee-whistleblowers, the increase in whistleblower litigation by employees shows no signs of dissipating.

8. **Federal Agencies Target Employment Agreements that Might Chill Reporting of Violations by Employees:** Employment and separation agreements are likely to result in more litigation in 2016, as several federal agencies increase their scrutiny of agreements that might chill employees' willingness to report infractions or participate in government investigations. In recent years, the NLRB has taken the position that certain confidentiality and non-disparagement provisions violate the National Labor Relations Act by interfering with employees' rights to engage in concerted activities, such as discussing their wages with other employees or criticizing their employer. Consistent with the EEOC's 2012-16 Strategic Enforcement Plan, which calls for the agency to "target... practices that discourage... individuals from exercising their rights under employment discrimination statutes," the EEOC has stepped up its scrutiny of employee separation agreements, including by filing a highly publicized lawsuit against CVS Pharmacy alleging that several clauses found in many employees' standard separation agreements – non-disclosure, non-disparagement, and cooperation provisions, as well as a general release of all claims and a covenant not to sue – may cause employees to believe that they were signing away their right to file discrimination claims or cooperate with EEOC investigations. The SEC recently joined the NLRB and the EEOC in targeting agreements that might discourage employees from cooperating with the government, announcing in 2015 the SEC's first enforcement action against a company for including "improperly restrictive language in confidentiality agreements" with employees, which, the SEC asserted, discouraged employees from reporting possible violations of the securities laws to the government. (*See* the SEC's press release.) Each of these agencies can be expected to continue to challenge employee agreements that they argue may lead employees to believe that they are prohibited from reporting violations, participating in government investigations, or otherwise exercising non-waivable rights.

Technology & Intellectual Property Litigation

1. **Patent Venue Laws May Change:** Patent lawsuits in 2015 reached near-record levels, with nearly 5,800 lawsuits filed during the year. Of those, two-thirds were brought by "non practicing entities" (NPEs), or patent "trolls," and the vast majority of NPE lawsuits were filed against companies in the high-tech sector. Remarkably, 44% (2,536) of all patent lawsuits in 2015 were filed in a **single** district court – the Eastern District of Texas. By comparison, the second-most popular venue was the District of Delaware, with 537 new cases. The disproportionate number of lawsuits brought in the Eastern District of Texas has been the subject of much debate over the past decade, but little has been done to address the issue. That may finally change in 2016. First, the House Judiciary Committee passed a proposed amendment to patent reform legislation that seeks to prevent patent forum shopping by limiting patentees to filing lawsuits in districts that have a reasonable connection to the dispute. Second, the Court of Appeals for the Federal Circuit is set to take another look at the Court's interpretation of the patent venue statute, 28 U.S.C. § 1400(b). The case, *In re TC Heartland, LLC,* 16-105 (Fed. Cir.) is fully briefed and oral argument will be heard on March 11, 2016. If the Federal Circuit adopts the petitioner's position, it would effectively result in limiting the forums in which a patent lawsuit could

be filed to (1) the judicial district where the defendant resides, or (2) where the defendant has committed acts of infringement and has a regular and established place of business. Because relatively few companies have a “regular and established place of business” in the Eastern District of Texas, the Federal Circuit’s decision in *TC Heartland* could significantly impact the ability of NPEs to file lawsuits there.

2. ***Inter Partes* Review Remains, But With Hurdles:** The popularity of using *inter partes* review (IPR) and covered business method review (CBMR) proceedings to challenge the validity of patents before the U.S. Patent and Trademark Office Appeals Board (PTAB) continued in 2015. Nearly 1,800 petitions for review were filed in 2015, up 7% from 2014. But recently published statistics show that PTAB reviews are far from a sure thing for patent challengers. Statistically, it is getting more difficult to get past the initial hurdle of convincing the PTAB to institute review. A report published by *Lex Machina* showed that while 493 terminated petitions ended with a finding that all claims petitioned were unpatentable, 543 petitions were denied institution. A petition is not instituted when the PTAB judges determine that the petitioner failed to show in its petition that there was a reasonable likelihood of success in invalidating the patent claims. The takeaway is that parties planning on challenging a patent before the PTAB need to make sure they have carefully crafted the petition and not cut any corners with respect to evidence and expert declarations. Even taking into account the statistics, PTAB proceedings are anticipated to remain a powerful weapon for patent challengers in 2016.

3. **Continued Supreme Court Oversight of Patent Laws:** The Supreme Court continues to show interest in interpreting the patent laws. This term, the Court will hear arguments in two consolidated cases (*Halo Electronics, Inc. v. Pulse Electronics, Inc.* and *Stryker Corp. v. Zimmer, Inc.*) as to whether the Federal Circuit’s two-part test for determining whether a party willfully infringed a patent is too restrictive. This is an important case because a finding of willful infringement frequently is the basis for a district court awarding attorney fees to the patentee. The current two-part test enacted by the Federal Circuit in 2007 requires a patentee to show, by clear and convincing evidence, that: (1) the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent; and (2) that the objectively defined risk was either known or so obvious that it should have been known to the accused infringer. The patentees in the consolidated cases are asking the Court to reject the current test and replace it with a more flexible standard that would make it easier for district courts to award enhanced damages. A decision is expected by June. In addition, the Supreme Court recently granted *certiorari* in *Cuozzo Speed Technologies v. Lee*, in which the Court will consider two issues specific to IPR proceedings. The first issue is whether the PTAB may construe claims in an issued patent according to their broadest reasonable interpretation (as it currently does) rather than their plain and ordinary meaning (as is the standard used in district court). If the Supreme Court holds that the PTAB should apply the plain and ordinary meaning, it will in some instances make it more difficult to challenge patents in IPR proceedings because the claims will be subject to a narrower scope (and prior art will accordingly be harder to apply). The second issue is whether PTAB decisions to institute IPR proceeding are judicially unreviewable, as the Federal Circuit held. If the Court disagrees with the Federal Circuit, it will open the door for patentees to file appeals challenging the PTAB’s decisions to institute *inter partes* review. That is, the patentee will be able to seek judicial review of the PTAB’s decision that the petitioner showed a “reasonable likelihood of success” in invalidating the challenged claims in its Petition.

4. **Trade Secret Litigation Continues with Potentially New Federal Standards:** We expect to see an increase in trade secret litigation in 2016. Technical opportunities for cyber-theft and trade secret misappropriation continue to proliferate as businesses shift to cloud computing and web-enabled devices. Moreover, the trade secret misappropriation cases that arise in the new interconnected environment will present complex, multi-jurisdictional issues rarely

seen in the analog world in which existing trade secret laws were formed. In response to these new realities, in July 2015, bipartisan sponsors in both houses of Congress introduced the Defend Trade Secrets Act (DTSA), which would create a federal civil cause of action for trade secret misappropriation. *See* H.R. 3326, S. 1890, 114th Cong. (2015). On January 28, 2016, the Senate bill passed the Senate Judiciary Committee and is now headed to the chamber's floor. Given the growing concerns over cybersecurity threats and theft of electronic data, the DTSA stands a greater chance of success than prior similar legislation, and a final bill could reach President Obama's desk this year. Supporters anticipate that the DTSA would provide the uniformity currently lacking under the varying legal standards adopted by states and allow for better protection of trade secrets in federal court. *See, e.g., Protecting Trade Secrets: the Impact of Trade Secret Theft on American Competitiveness and Potential Solutions to Remedy This Harm:* Hearing on S. 1890 before the S. Comm. on the Judiciary, 114th Cong. 5 (2015). As proposed, the language of the DTSA would not seek to preempt current state trade secret law and would place limitations on jurisdiction. Thus, critics complain that the DTSA will not further its stated objectives of providing uniformity and may actually increase litigation costs and have anticompetitive effects. *See, e.g., id.* Although there are some concerns with how the DTSA could be interpreted if and when it is passed, the passage of federal laws governing this form of intellectual property should be welcomed by most companies as another weapon to protect their most precious assets.

International Arbitration

1. **More Frequent Challenges Against Arbitrators in International Arbitration:** The number of challenges against arbitrators in international arbitration has risen noticeably in the past 10 years. Such challenges have been largely unsuccessful. However, in the last five years, a few challenges have succeeded.

- Notably, in 2014, the Paris Court of Appeals held a partial award rendered by a sole arbitrator to be unenforceable in France, because the arbitrator had failed to disclose his law firm's ongoing representation of one of the claimant's parents; in late 2015, the French *Cour de Cassation* affirmed the appellate court's judgment. An attempt to disqualify the arbitrator had been unsuccessful in the original arbitration between subsidiaries of the Barbadian telecom company Columbus International and Caribbean Fiber Holding (a U.S. company), on the one hand, and Auto Guadeloupe Investissement, on the other.

- However, in U.S. arbitration, the relevant standard under section 10 of the Federal Arbitration Act remains "evident partiality." In 2013, in *Ometto v. ASA Bioenergy Holding*, the U.S. District Court for the Southern District of New York (Rakof, J.) declined to vacate an arbitral award even after it came to light that the presiding arbitrator's law firm had represented affiliates of one of the parties. The court found that the arbitrator in question had not been aware of the alleged conflict and that there was an absence of "evident partiality." In 2014, the Second Circuit affirmed.

2. **International Class Arbitration Is Becoming More Prevalent, But Companies May Limit U.S. Class Arbitrations Through Contract:** Although class arbitrations have been common in commercial disputes in the United States for a long time, class claims are a very recent development in international arbitration. In 2011, the tribunal in *Abaclat v. Argentina* allowed 60,000 holders of Argentine bonds to file a joint arbitration claim against Argentina under the Argentina-Italy Bilateral Investment Treaty. More recently, in September 2015, 676 Greek investors submitted a collective arbitration claim against Cyprus for the recovery of hundreds of millions of euros allegedly confiscated as part of Cyprus's 2013 financial bailout. We anticipate more class filings in international arbitrations in 2016. In contrast to these high-profile class arbitrations, in the United States, some companies have sought to require consumers to waive the right to pursue arbitration as a class. Based on recent Supreme Court precedent, these waivers are likely to be held enforceable. *See AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333 (2011); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). Therefore, in the United States, we anticipate a continued decline in consumer class action filings, particularly in the e-commerce space where class action waivers are commonly included in user agreements.

3. **Innovations in Investment Treaty Arbitration Will Result in More Limitations on Investor Suits Against Government Under Investment Treaties:** Over the last decade, there has been a proliferation of international treaties allowing an investor of one country to sue the government of another country over breach of treaty-based, investment-related obligations. Such "investor-state dispute settlement" (ISDS) has come under increasing public scrutiny, and this has led certain major negotiators of investment treaties, including the United States and the European Union, to modify the ISDS provisions in their investment treaty templates. The recently concluded Trans-Pacific Partnership (TPP) agreement between the United States and 11 other Pacific Rim countries reflects certain ISDS innovations. In a U.S.-EU Trans-Atlantic Trade and Investment Partnership agreement, the EU proposes to go even farther, by establishing a full-time investment court and investment appellate body (replacing the *ad hoc* tribunals that currently hear ISDS claims). The concerns about ISDS that these trends reflect suggest that in 2016 and beyond, the proliferation of ISDS mechanisms in investment treaties will slow, and such mechanisms will come with increasing conditions and limitations on an investor's right to sue a foreign government.

As always, we would be delighted to discuss with you in more detail any of the issues raised here. Do not hesitate to contact us with any questions.

David Lender and Jonathan Polkes

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Litigation Department and Practice Group Leaders

Department Co-Chairs

David Lender (NY)	Bio Page	david.lender@weil.com	+1 212 310 8153
Jonathan Polkes (NY)	Bio Page	jonathan.polkes@weil.com	+1 212 310 8881

Practice Group Leaders

Antitrust

Steven Newborn (DC)	Bio Page	steven.newborn@weil.com	+1 202 682 7005

Complex Commercial Litigation

Edward Soto (MIA)	Bio Page	edward.soto@weil.com	+1 305 577 3177
David Yohai (NY)	Bio Page	david.yohai@weil.com	+1 212 310 8275

Employment Litigation

Jeffrey Klein (NY)	Bio Page	jeffrey.klein@weil.com	+1 212 310 8790

International Arbitration & Trade

Jamie Maples (LON)	Bio Page	jamie.maples@weil.com	+44 20 7903 1179

Patent

Jared Bobrow (SVO)	Bio Page	jared.bobrow@weil.com	+1 650 802 3034
Brian Ferguson (DC)	Bio Page	brian.ferguson@weil.com	+1 202 682 7516

Product Liability

Arvin Maskin (NY)	Bio Page	arvin.maskin@weil.com	+1 212 310 8098

Securities Litigation

Joseph Allerhand (NY)	Bio Page	joseph.allerhand@weil.com	+1 212 310 8725
John Neuwirth (NY)	Bio Page	john.neuwirth@weil.com	+1 212 310 8297

White Collar Defense & Investigations

Steven Tyrrell (DC)	Bio Page	steven.tyrrell@weil.com	+1 202 682 7213

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