



**Weil**

# **Litigation** Trends 2018

### Dear esteemed colleagues and friends:

We are pleased to introduce the 2018 edition of Weil's Litigation Trends Report, which offers our cross-practice expert assessments and predictions for the coming year.

In almost every aspect of our practice, we expect to feel the impact of recent Supreme Court and Appellate Court decisions. For example, we discuss the continued impact of notable 2017 Supreme Court decisions regarding venue and jurisdiction, both in the context of patent litigation (as interpreted in *TC Heartland*) and mass tort cases (as held in *Bristol-Myers Squibb Co.*), with an eye on the plaintiff bar's response in both areas. We also assess brewing circuit splits on other fundamental issues: one that has developed in the wake of the Supreme Court's *Spokeo* decision, regarding the concrete injury requirement for Article III standing; and another that may precipitate Supreme Court review in *Fourth Estate Public Benefit Corp.*, regarding when exactly a copyright plaintiff may commence an infringement lawsuit. At the state court level, we review a December 2017 New York Court of Appeals decision that could prompt class action plaintiffs to favor New York's federal courts over its state courts, and we revisit several recent Delaware Supreme Court decisions that have encouraged shareholders to file pre-closing merger challenges in other jurisdictions, and given them reason to reconsider the allure of appraisal litigation. Looking forward, we also discuss coming Supreme Court decisions that will address the constitutionality and scope of the *inter partes* review process (in *Oil States* and *SAS Institute*, respectively), and the future of class action waivers in employment agreements (in *Murphy Oil*).

Though we love to try cases, we also exit the courtroom to investigate topical developments that will likely first have an impact in the boardroom, at the negotiating table, or in discussions with regulators. We evaluate the expected effects of the #MeToo movement on corporate

culture, the reporting of workplace harassment, and training and promotion of inclusive management and leadership. We explore a possible expansion of the U.S. Department of Justice's (DOJ) focus on prosecuting health care fraud to encompass criminal or civil enforcement actions against pharmaceutical companies in connection with the ongoing national opioid crisis. We also examine the impact of the new Administration's oversight of the U.S. Federal Trade Commission and DOJ on merger enforcement activity and philosophy.

Lastly, we examine a number of important legislative and policy developments, including: proposed Congressional bills that could dramatically change the class action and copyright arenas; state and municipal laws that aim to enhance equal pay statutes and support paid family leave; the DOJ's new FCPA Corporate Enforcement Policy, which further incentivizes self-disclosure and formalizes the possibility of a declination of prosecution; and modifications to several international arbitration regimes that should engender greater transparency, legitimacy, and efficiency.

As always, please do not hesitate to reach out to either of us or your usual Weil contact if you would like further information on any of the enclosed topics. Contact information for our practice group leaders is listed on the back cover. We look forward to the opportunity to work with you this year.



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# Antitrust

## **Trump Administration Nominees Finally Arrive, But No Major Changes in Merger Enforcement Expected in the Near Term**

With the confirmation of Makan Delrahim to head the U.S. Department of Justice's (DOJ) Antitrust Division in September 2017 and the recent nomination of 4 out of 5 Commissioners to the U.S. Federal Trade Commission (FTC) (with a 5th to come), the Trump Administration appointees will finally take hold at both agencies. Notably, this is the first time in history a President has been in a position to nominate an entire slate of FTC Commissioners at one time. More than a year into the new Administration, however, there have been no obvious signs of a slowdown in merger enforcement activity at either agency, even with a number of Republicans already taking positions at senior managerial levels. In fact, both agencies already have shown a clear willingness to take aggressive stances in certain matters, including vertical mergers and consummated mergers, and to challenge deals in litigation. In particular, all eyes are on the AT&T/Time Warner litigation, not only to see the outcome, but to interpret whether the DOJ's action signals a broader trend of unwillingness to accept non-structural relief to resolve vertical merger concerns.

The length of the review period for deals raising antitrust issues also continues to increase and push new all-time highs, although senior DOJ and FTC officials have made statements indicating a focus on reversing this trend. At present, we do not expect a major sea change or decline in overall enforcement levels in the near term. Nevertheless, with the new appointees at both agencies now getting started, there remains a possibility for some welcome changes at the margins, including, potentially, a greater willingness to consider efficiencies and other benefits of a transaction in the agencies' competitive effects analysis, and a streamlining of certain aspects of the merger review process.

## **DOJ Expected to Continue Aggressive Cartel Enforcement**

There does not appear to be any noticeable change in criminal enforcement under the first year of the Trump Administration, and in the coming year, the DOJ is expected to continue its vigorous criminal enforcement of the antitrust laws. The DOJ stated recently that it will soon be announcing criminal charges against companies entering into employee no-poaching or wage-fixing agreements. In October 2016, the DOJ issued guidelines for human resources professionals indicating that such agreements would be subject to criminal prosecution, and it now appears that the DOJ has been preparing charges against specific targets. The DOJ has stated that not all such cases would be prosecuted criminally, as



some would be more appropriate for civil litigation, but it nevertheless serves as a warning to human resources professionals to be vigilant about communications and agreements with competing employers regarding employment matters.

Practitioners also are wondering: what will be the DOJ's next major international cartel investigation? After back-to-back years of record-high fines, in 2016 the DOJ's fines dropped substantially, and in 2017 they were significantly diminished. This was due to the wind-down of several major cartel investigations, including a sprawling investigation of the auto-parts industry that yielded \$3 billion in fines from more than 50 parts suppliers. Investigations into certain electronic components and the financial services industries appear to have entered their final stages, as well. It can be difficult to predict the next target of the DOJ's efforts, but a recent statement by a senior DOJ official that more than half of reported cartels come out of the Leniency Plus program suggests that current leniency applicants are likely to be the source of the DOJ's next major investigation.

Finally, one year in to the DOJ's updated policy statement on granting immunity to individuals, it is not clear whether the agency has increased its practice of "carving out" certain employees from the protection of their employer's leniency status. A senior DOJ official said recently of the employees of companies seeking so-called "Type B" leniency (for a cartel already under investigation): "typically, they are given leniency if they are fully cooperative." This suggests that individuals who cooperate fully with the DOJ are likely, but not certain, to enjoy immunity from criminal prosecution in the same manner as employees of applicants seeking so-called "Type A" leniency (for a cartel not yet known to the DOJ). However, such employees should continue to carefully weigh the pros and cons of cooperating with the government, since the DOJ continues to value prosecutions of the most senior and most culpable individuals in a company.

### **Private Antitrust Civil Litigation: Conspiracy, Exclusive Dealing, and Licensing Cases at the Forefront in 2018**

More than a decade later, district and circuit courts around the country continue to take varying approaches to the U.S. Supreme Court's seminal decision in *Bell Atlantic v. Twombly* and whether plaintiffs alleging a conspiracy in violation of Section 1 of the Sherman Act have alleged enough facts (if true) to "nudge their claims across the line from the conceivable to the plausible." The plaintiff class action bar continues to bring lawsuits challenging industry-wide behavior, ranging from the airline to the restaurant industries, in which it claims massive conspiracies can be inferred based on alleged circumstantial conduct, such as so-called "parallel pricing" plus other factors, such as meetings of competitors at trade association meetings. In 2017, we saw a number of rulings in various sectors of the economy, and in 2018 we expect further decisions attempting to draw the line between conduct that is "merely consistent" with a supposed agreement – and properly dismissed at the pleading stage – versus conduct that



plausibly suggests an allegedly unlawful agreement. Based on the divergent approach of the lower courts to date, and the significant discovery costs of allowing industry-wide complaints to move beyond the pleading stage, we anticipate that the Supreme Court will be asked to clarify and re-affirm its decision in *Twombly*.

In terms of single-firm conduct, a wave of exclusive dealing cases involving blockbuster drugs has hit the pharmaceutical industry. Competitors and consumers are challenging commercial practices that block access to key portions of the marketplace. Courts have been and will be clarifying what allegations are sufficient to state a plausible claim for monopolization or an unreasonable restraint of trade under Sections 1 or 2 of the Sherman Act. The outcome of these cases will provide guidance to the pharmaceutical industry as to when, and under what circumstances, exclusive dealing can be pro-competitive or anti-competitive. Similarly, the FTC and consumer class action lawsuits against Qualcomm may clarify how to evaluate standard essential patent holders' licensing conduct. These cases challenge the terms under which Qualcomm licenses its technology for communicating over standardized cellular networks. The cases have moved into the discovery stage, and the industry will await a ruling on the merits to see if a court imposes a "duty to deal or license" on a standard essential patent holder and, if so, on "fair reasonable and non-discriminatory" terms.



# Complex Commercial Litigation

## Pre-Class Certification Settlement Notifications In New York State Court May Prompt Increased Federal Court Filings

In a December 2017 decision, *Desrosiers v. Perry Ellis Menswear, LLC* and *Vasquez v. Nat'l Sec. Corp.*, the New York Court of Appeals resolved an ambiguity in New York's procedural rules that may make litigating class actions in New York state court less appealing to the plaintiff bar. New York Civil Practice Law and Rule (CPLR) 908 states that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court" and that "notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The Court of Appeals ruled that CPLR 908 applies to both certified and uncertified classes, meaning that all putative class members must receive notice of proposed dismissals, discontinuances, or compromises regardless of whether a class has been certified.

This decision makes New York state court less attractive to the plaintiff bar for at least two reasons. First, providing notice to a class can be costly, and now the parties are unable to reach any settlement, even on an individual basis, without incurring that cost. Second, because now even individual settlements with the named plaintiff(s) only require notice to the putative class, brokering a quick and quiet settlement agreement will be more difficult. We have yet to see the full effects of the Court of Appeals' recent decision. However, we predict that it will prompt the plaintiff bar to file more cases in New York federal court.

## Lower Courts Are Still Wrestling With *Spokeo*

A year and a half after the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), federal courts are still struggling to define the concrete injury required for Article III standing. As such, whether a plaintiff has Article III standing is jurisdiction-dependent.

In *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), on remand from the Supreme Court, the Ninth Circuit held that a procedural violation of a statute can by itself manifest concrete injury "where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a risk of real harm to that concrete interest." *Id.* at 1113. The three-judge panel determined that the Fair Credit Reporting Act (FCRA) provisions at issue were created to protect consumers, the threat to consumers was "real" as opposed to "purely legal creations," and that the alleged inaccuracies in the plaintiff's report "are substantially more likely to harm his concrete interests



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than the Supreme Court's example of an incorrect zip code." *Id.* at 1113-14, 1117. Thus, even though the plaintiff's job prospects were not actually harmed by credit report inaccuracies, the Ninth Circuit determined that he suffered sufficiently concrete injury for standing purposes. *See also In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625, 630, 637-38 (3d Cir. 2017) (breaching the plaintiffs' data by leaving their unencrypted personal information exposed in the theft of two laptops was sufficiently strong to confer standing).

Unlike the Ninth Circuit, the Second Circuit requires a showing of injury apart from the statutory violation. In *Katz v. Donna Karan Company, L.L.C.*, 872 F.3d 114 (2d Cir. 2017), the Second Circuit held that a consumer did not have a sufficient concrete injury to sue a merchant *even though* the merchant violated the Fair and Accurate Credit Transactions Act by printing the first six numbers of a consumer's credit card number on a receipt. The Second Circuit considers the critical *Spokeo* inquiry to be whether bare procedural violations entail a sufficient degree of risk to be concrete, which turns on "whether the particular bare procedural violation may present a material risk of harm to the underlying concrete interest Congress sought to protect" in enacting the statutory requirement. *Id.* at 118 (internal quotation marks and citation omitted). The Second Circuit ruled that this procedural violation did not cause or create a material risk of harm to the consumer. *See id.* at 120 (noting that the first six digits identified only the card issuer and did not disclose personal information about the consumer); *see also Crupar-Weinmann v. Paris Baguette America, Inc.*, 861 F.3d 76 (2d Cir. 2017) (same; finding no injury-in-fact).

### Proposed Congressional Class Action Reform Now Before the Senate

As we reported in last year's [Litigation Trends](#), the Fairness in Class Action Litigation Act (the Act) passed in the House of Representatives on March 9, 2017, and the Act now is being considered by the Senate Committee on the Judiciary. If passed, the Act 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 include: (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



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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.

**At Last – Some Clarity For TCPA Actions**

On March 16, 2018, in a long-awaited and highly anticipated decision, the D.C. Circuit provided some much-needed guidance on the enforceability of a U.S. Federal Communication Commission (FCC) order interpreting the Telephone Consumer Protection Act (TCPA). In June 2015, the FCC issued an order, among other things, adopting an expansive definition of “autodialer,” setting strict conditions on calling reassigned numbers, and allowing consumers wide latitude to revoke consent to receiving calls or texts. The D.C. Circuit’s March 16, 2018 decision struck down two key portions of the FCC order. First, the D.C. Circuit reversed the FCC’s expansive definition of “autodialer,” observing that the FCC’s interpretation would mean that any modern smartphone is an “autodialer” which could subject its user to TCPA liability. Second, the D.C. Circuit agreed with the FCC that parties could be liable for calling reassigned numbers, but also held that the FCC’s “one strike” safe harbor (*i.e.*, a caller would not be liable for a first call to a new subscriber, but could be liable for each subsequent call) was unreasonable. The D.C. Circuit did, however, uphold the FCC order’s instruction that a called party may revoke consent at any time and through any reasonable means. Overall, the D.C. Circuit’s decision is a victory for the defense bar and will provide additional ammunition to seek dismissal of, or pare, many TCPA class actions.



# Employment

Due to a range of high-impact legislative, judicial, and social developments, employers should proactively address and plan for a variety of complex employment law matters over the course of 2018 and beyond.

## Sexual Harassment

As a result of the sexual harassment claims brought against Fox News in 2016 and the subsequent revelations about Harvey Weinstein and dozens of other high-profile figures in various industries in 2017 and 2018, workplace harassment issues remain at the forefront of the minds of all employers. There they will likely stay. Social media has facilitated powerful campaigns such as the #MeToo movement, and amplified the fervor surrounding this issue – which has existed in some form since the Clarence Thomas hearings in the early 1990s – to appreciably higher levels, where women (and men) will be more emboldened to report workplace harassment as either a victim or a bystander. Companies will be embarking on more frequent and more probing internal investigations, even where such misconduct may not be facially evident, but based on the mere hint or rumor of inappropriate workplace conduct. Moreover, sexual harassment training will now have an entirely different color and hue, and will include topics that ordinarily receive short shrift, such as what to do as a “bystander” and how to create a more “civil” (and not just harassment-free) work environment. Senior management and boards of directors also need to reemphasize and reinforce their roles in emphasizing adherence to written statements of core values, and consider additional steps to train and promote leaders who will work to create a more inclusive and trusting culture.

## Equal Pay

Closing the pay disparity between men and women remained a policy priority at the state and local level throughout 2017. Several states have sought to expand the scope of existing equal pay laws by, for example, requiring employers to pay men and women equally not only for “equal” work, but also for “comparable” or “substantially similar” work. Some of these laws also have narrowed the exceptions on which employers may rely, including by effectively removing geographic distinctions. In 2017, Oregon and Puerto Rico joined Massachusetts, California, Delaware, and Maryland in making these sorts of changes. In an effort to avoid perpetuating prior gender-based wage discrimination, several states and municipalities – including California, Delaware, Maine, Oregon, Puerto Rico, New York City, Philadelphia, San Francisco, and Albany County in New York state – have introduced salary history bans, which prohibit employers from inquiring



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about applicants' pay history. Several states, including California, Colorado, Maryland, Massachusetts, Nevada, and New York, also have expanded their pay transparency laws, which, among other things, protect the open discussion of wages among employees. At the federal level, the Equal Employment Opportunity Commission (EEOC) has included "Ensuring equal pay protections for all workers" as one of its top priorities for 2017-2021. While the Office of Management and Budget (OMB) stayed the effective date of the EEOC's new requirement that employers report wages and hours worked by race, ethnicity, and sex in EEO-1 forms, the EEOC has stated that it "remains committed to strong enforcement" of federal equal pay laws and the OMB's stay "does not alter the EEOC's enforcement efforts." Going forward, employers should continue to evaluate their pay practices and seek to identify and, where appropriate, address any disparities, as the legislative and enforcement momentum in the equal pay area is likely to continue.

**Paid Leave Laws**

New York has joined California, New Jersey, Rhode Island, and Washington in recently passing legislation granting eligible employees paid family medical leave. New York's law became effective on January 1, 2018. In addition, various localities have passed legislation requiring employers to provide paid family medical leave. Relatedly, numerous jurisdictions have enacted legislation requiring employers to provide paid short-term sick leave. State and local paid leave laws fill a void left by the federal Family Medical Leave Act, which requires employers, under certain circumstances, to provide employees with up to 12 weeks of leave, but does not require that employees be paid during the leave period. Indeed, the U.S. remains the only developed country in the world with no federal laws guaranteeing paid parental leave. Significantly, the recently enacted state leave laws have created funding mechanisms requiring employees, not employers, to pay for the paid leave benefits under taxing schemes related to state workers' compensation and disability laws. Such laws have garnered support across the political spectrum under a growing recognition that more family friendly measures are needed not only to ensure equal opportunity in the workplace, but also to avoid creating economic pressure on employees to work while ill, and the associated adverse public health effects. There are efforts currently underway in more than 18 additional states to pass paid family medical leave legislation, so employers can expect to see additional jurisdictions adopting such paid family medical and sick leave laws in 2018. Finally, employers should be mindful that their existing leave policies are gender-neutral in light of a lawsuit recently commenced by the federal EEOC in which an employer has been accused of violating Title VII of the Civil Rights Act and the Equal Pay Act by providing unequal parental leave benefits based upon sex.



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### Confidentiality Requirements

Employers should update the provisions requiring confidentiality contained in their codes of conduct and other employment agreements and policies. In response to the greater attention the public has given to claims of sexual harassment, Congress included in the tax legislation enacted in December 2017 a provision denying a tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney's fees related to such a settlement or payment." It remains to be seen what Congress intended by "a payment related to sexual harassment or sexual abuse," and how settlements involving only allegations rather than actual findings or evidence of sexual harassment or abuse would be addressed under this law. For example, the law also does not specify whether employers may include confidentiality provisions in agreements where sexual harassment or abuse is only one of several claims being settled. Employers also should update confidentiality policies and agreements to address regulatory requirements first raised during the Obama administration by the Securities and Exchange Commission (SEC), EEOC and National Labor Relations Board (NLRB). These agencies brought multiple enforcement actions challenging confidentiality provisions in employment policies and agreements claiming that such provisions violated public policy by deterring whistleblower activities. While the federal government enforcement actions appear to have subsided with the change in administrations, the securities litigation plaintiff bar has continued to leverage the SEC's precedents under SEC Rule 21F-17, 17 C.F.R. § 240.21F-17, by sending letters to a number of publicly traded companies demanding, upon threat of shareholder litigation, that the company amend its employment agreements and policies. In 2018, we expect the securities litigation plaintiff bar to continue to assert such claims.

### Trade Secrets and Restrictive Covenants

It now has been approximately two years since the enactment of the Defend Trade Secrets Act (DTSA), and the number of trade secrets and other restrictive covenant cases has spiked sharply during that time. A robust economy has created greater movement by groups and individuals to industry competitors, and employers are taking advantage of the easier access to federal court and the broader panoply of remedies provided under the DTSA to bring such actions. Moreover, employers seeking to enforce restrictive covenants and protect trade secrets have been including the Computer Fraud and Abuse Act (CFAA) in their arsenal of claims in those circuits that continue to apply the CFAA to misappropriation of trade secrets cases, rather than limiting its use to computer hacking cases. Furthermore, as more jurisdictions have started enacting legislation limiting the applicability of non-competes, employers have sought to protect their core business interests and human capital through enforcement of employee and customer non-solicitation provisions. In that regard, courts in certain jurisdictions are beginning to sharpen the distinction between



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non-competes and non-solicits, particularly in the absence of meaningful “bad leaver evidence” and, as a result, many employers are devoting more resources to protecting the latter interest through litigation and other methods.

#### Class Action Waivers in Arbitration Agreements

On October 2, 2017, the U.S. Supreme Court heard oral argument in *National Labor Relations Board v. Murphy Oil USA, Inc.* (No. 16-307). The question presented in *Murphy Oil* is “[w]hether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees’ right under the National Labor Relations Act to engage in ‘concerted activities’ in pursuit of their ‘mutual aid or protection,’ 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2.” If the NLRB prevails in *Murphy Oil*, employers that wish to maintain broad arbitration programs may wish to consider allowing employees to opt out of a mandatory arbitration program after a dispute has arisen. This alternative may comply with the requirements of the National Labor Relations Act, but would potentially allow individuals to elect resolution of their own cases via arbitration rather than class action litigation. On the other hand, if the employer prevails in *Murphy Oil*, employers that do not include class action waivers in their arbitration programs should certainly include them.



# International Arbitration

## Increased Focus on the Role and Responsibilities of Tribunal Secretaries

In response to the growing scope and complexity of international arbitration, arbitrators are increasingly using tribunal secretaries as a means of managing their workloads. By lessening the tribunal's administrative burden, this development has the potential to make arbitral proceedings faster and cheaper to the benefit of all parties. However, the use of tribunal secretaries for non-administrative functions is a tool which some users of arbitration consider wholly inappropriate, and a perceived over-reliance of tribunals upon their secretaries has led to a number of court challenges to arbitrations in the last year.

In *P v Q (EWHC, 2017)*, for example, a party applied to the English court for the removal of two co-arbitrators from their positions in an ongoing London Court of International Arbitration (LCIA) arbitration on the basis that the arbitrators had:

- (1) improperly delegated their role by systematically entrusting the tribunal secretary with a number of tasks beyond that permissible under the LCIA Rules;
- (2) breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration; and
- (3) misrepresented the position as to the delegation of their roles to the secretary.

Although the court recognized the anxiety that a tribunal secretary may effectively become a fourth, unappointed arbitrator, this application was dismissed on the basis that arbitrators had wide powers to delegate their roles under the LCIA rules, and that soliciting or receiving views from a tribunal secretary would not of itself demonstrate a failure to discharge the arbitrator's personal duty. In his judgment, Popplewell J also emphasized the court's supervisory and non-interventionist role in arbitrations, noting that *"this court should be very slow to differ from the view of the LCIA Division."*

The reluctance of the courts to intervene in the arbitration process should not, however, be interpreted as giving arbitrators unfettered discretion as to how tribunal secretaries should be used. Popplewell J's judgment confirmed that arbitrators must not abrogate or impair their non-delegable and personal decision-making function, and arbitral institutions are increasingly conscious of the need for parties to consent to the use of tribunal secretaries. The LCIA's updated notes to arbitrators, for example, require the parties' written agreement



for the appointment of a tribunal secretary, who is required to complete a Statement of Independence and Consent to Appointments. Going forward, such reforms are crucial to retaining faith in the arbitral process, which remains premised upon the consent of the parties.

### **Increased Scrutiny of Possible Corruption and the Development of Anti-Corruption Procedures in Arbitration**

In recent years, allegations of procedural impropriety have threatened the integrity of arbitral institutions and the credibility of the awards that they produce. This purported proliferation of corrupt practices ranges from the application of certain institutional rules which reduce arbitration's effectiveness and undermine public trust, to the allegedly widespread falsification and manipulation of evidence and witness testimony in arbitration proceedings. More alarmingly, the independence and impartiality of arbitrators also is a concern, with nearly half of practitioners present at the 2017 International Arbitration Summit signaling that they suspected colleagues to have been unduly influenced in past arbitrations.

Certain structural factors make arbitration particularly vulnerable to charges of corruption. It commonly involves state-affiliated parties with access to resources which could be used to influence witnesses or arbitral panels. Furthermore, many of the regions and industries in which arbitration is commonly used – for example, oil and gas in the developing world – remain plagued by accusations of impropriety and consistently rank highest in international corruption indices. The confidentiality offered by arbitration also reduces its transparency and fosters a potentially malignant culture of secrecy.

In recognition of this threat, many arbitral institutions have sought to balance the commercial imperative for confidentiality with a need to improve the transparency and predictability of proceedings. In 2016, the International Criminal Court (ICC) announced that it will publish the names and appointees of arbitrators and provide reasons for administrative decisions. The LCIA also has been justifying its decisions in respect of challenges to arbitrators since 2014, and its updated rules provide better oversight by the institutional court over arbitral panels.

Additional reforms could, however, help minimize the risk of corruption in arbitration. Parties could be prohibited from repeatedly appointing the same arbitrator in successive disputes, and it has been suggested that the removal of potentially compromised arbitrators from panels should no longer require the approval of both other arbitrators. Proposals have also been made for an expansion in the panel's powers to penalize non-compliant parties or exclude evidence which has been submitted unlawfully or in bad faith, and existing powers to charge fraudulent witnesses with perjury could be more commonly used.



## International Arbitration

For a variety of enduring reasons, arbitration remains the dispute resolution mechanism of choice for many international counterparties. However, in a time of increased scrutiny, arbitrators and institutions alike must resist placing too much trust in the integrity of the system, and continue supporting reform towards increased openness and accountability.

### **Solving the Consolidation Problem in Multi-Contract Disputes: the Singapore International Arbitration Centre (SIAC) Proposal**

The consolidation problem refers to the inability of cases arising out of the same factual scenario to be heard together because the parties have entered into multiple contracts prescribing different arbitral rules. This creates serious inefficiencies in international arbitration because one principal dispute may need to be resolved over multiple arbitral hearings.

SIAC has proposed a solution, namely that the major international arbitration bodies incorporate a new, joint protocol into their existing rules. The proposal is commendable because it addresses the two key consolidation questions: (1) how should the decision to consolidate be made; and (2) what arbitral rules should be applied to consolidated cases?

As to the first of these, SIAC proposes creating a new, stand-alone mechanism featuring a joint committee of members from the arbitral institutions mentioned in the contracts. It will consider whether cases are sufficiently similar to be consolidated. The fact that the committee will feature representatives from the parties' choice of tribunal should assuage concerns that they lose contractual autonomy. In relation to the second question, SIAC proposes to use objective criteria to determine which of the concerned arbitral institutions should hear the dispute. The criteria would include, among other things, the number of cases to be heard between each tribunal; if there is an odd number, the tribunal with the larger number of arbitrations will retain authority.

The SIAC proposal represents a welcome development in international arbitration. In an increasingly complex and global business environment, the likelihood of the consolidation problem arising will only increase. For international arbitration to remain appealing to its users, it must be able to handle multi-contract scenarios effectively and efficiently.

### **International Centre for Settlement of Investment Disputes (ICSID) Amendments and Investor-State Dispute Settlement (ISDS) Reforms**

ISDS has attracted criticism for a perceived lack of legitimacy, efficiency and transparency; the consensus emerging from the debate over the future of ISDS is that there is a clear need for reform. The nature and scope of this reform may become clearer as ICSID moves forward with its project to amend its rules and regulations following last year's public consultation.



From the responses to the consultation, ICSID has distilled 16 areas of potential reform with a view to producing a “*strong, rule-based system that works well, fairly and efficiently.*” The areas share common themes of transparency, legitimacy and efficiency.

For example, as to the legitimacy of arbitrators, the current rules require only a declaration that an arbitrator meets certain qualifications in the convention. ICSID have suggested incorporating a more elaborate code of conduct into the rules, which would outline expectations on arbitrators. Moreover, a number of ISDS commentators identified a lack of coherence in the case law. ICSID will consider how to amend the current rules on case consolidation to ensure that it handles cases arising from the same or related situations with clarity and efficiency.

As to transparency, the rules currently require that only arbitral awards are published, and even this is subject to the parties consenting to the full award being published. Going forward, ICSID have suggested publishing the decisions and orders of tribunals, not just awards or their excerpts, acknowledging that they include “*important procedural or substantive determinations.*” Furthermore, ICSID will consider including rules on the disclosure of third party funding for conflict checking and/or for the purposes of security for costs.

At the time of writing, ICSID is preparing background papers on the 16 topics. These will: (1) explain the basis for a proposed change; (2) note relevant considerations; and (3) suggest the potential wording or structure of amendments.

ICSID aims to distribute the background papers to member states in early 2018, and they will be considered at a meeting of state experts in May. The papers will then be published for feedback. The ICSID project is the most concrete development in the ISDS debate so far, and the reforms that it generates could be a useful blueprint for ISDS reforms more broadly.



## Will Congress Effectively Put an End to Two High-Profile Copyright and Music Licensing Disputes?

The past four years have witnessed high-profile litigation against some of the biggest businesses in the music industry. Those cases have centered around two issues: (1) whether broadcasters and music streamers need to pay royalties when they play recordings fixed before February 15, 1972 – so-called “pre-72” recordings that are not protected under federal copyright law; and (2) whether on-demand streaming services like Spotify, Rhapsody, and Amazon Unlimited properly cleared “mechanical” (reproduction and distribution) rights in the music compositions offered on their services. Starting in 2013, Sirius XM, Pandora and broadcasters iHeartMedia and CBS were sued by the recording industry in various states around the country for their unlicensed performances of pre-72 recordings. Because those recordings are not covered by federal copyrights, the record labels claimed instead that they enjoyed performance rights under state law. After years of litigation, those claims have largely faltered, with the highest courts of both New York and Florida ruling (on behalf of Sirius XM) that the laws of their states did not afford such performance rights. Only California has yet to rule on the issue, with a decision in a case involving Pandora expected in 2018. A separate raft of suits – several styled as class actions – has been filed by music publishers alleging that Spotify, Amazon, and Pandora failed to obtain so-called “mechanical” licenses for tracks distributed to users through their on-demand streaming services. While almost all of those cases have settled, a significant number of publishers has opted out of the class settlements, raising the specter of continued copycat cases by the opt-outs in jurisdictions around the country.

Two bills recently introduced in Congress would change the legal landscape underlying these disputes, in some cases effectively reversing their results. The first, the CLASSICS Act (H.R. 3301), would provide a digital public performance right for pre-72 recordings requiring satellite and online streaming services to pay royalties for those performances no different than their payments for newer, federally copyrighted recordings. In other words, it would provide the right – and accompanying royalty obligation – that state courts around the country have found missing under current law. The Act also would confirm that pre-72 recordings are subject to two important protections available to copyright defendants: the Section 107 fair-use defense, and the Section 512 safe-harbor that in certain circumstances protects online platforms (social media services and the like) from infringing activities by their users. Because pre-72 recordings are not federally copyrighted, there had been some question in the courts as to whether defendants could rely on these Copyright Act provisions to protect them.



The second, the Music Modernization Act (H.R. 4607), would provide on-demand streaming services with a blanket license covering mechanical rights in all compositions used on their services; that blanket coverage would put an end to the services' need to clear such rights on a song-by-song basis and the resultant exposure to statutory damage liability for songs that inevitably fell through the cracks – the very problem that led to the suits against Spotify and its fellow streamers. Notably, the Music Modernization Act also precludes any new suits against such services for past infringements – effectively blocking those publishers that opted out of prior class settlements from filing new suits against streaming services willing to pay past royalties for any songs they may have overlooked, and willing to share the costs of the new mechanical licensing collective created by the Act to collect and distribute mechanical license royalties. The fees for that collective will be shouldered by the digital services licensees and set in adversarial proceedings before the Copyright Royalty Board, thus opening a new avenue for of litigation even as it closes others.

### Will the Supreme Court Settle a Circuit Split Over When Copyright Plaintiffs Can Sue?

Section 411(a) of the Copyright Act (Title 17) states that “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” That apparently clear command has given rise to a dispute between the federal circuits: can a copyright owner file suit once he or she has made application for registration by filing the proper paperwork with the Copyright Office (the so-called “application approach”), or only once the Copyright Office has actually processed and approved the registration (the “registration approach”)? How one answers this fairly technical question can have meaningful effects on a copyright suit. Many copyright owners do not register their works as a matter of course, choosing to wait to do so only if and when a work has been infringed and they wish to file suit. Once they do so, it can take months for the Copyright Office to process a registration and issue a registration certificate, introducing significant delays to any planned litigation and even potentially placing some infringements outside the Copyright Act’s three-year statute of limitations.

The Fifth, Eighth and Ninth Circuits follow the application approach, while the Tenth Circuit follows the registration approach. The First, Second, Third, Sixth, and Seventh Circuits have not yet explicitly adopted a particular approach, either avoiding the issue or taking differing approaches in different decisions. In May 2017, in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, the Eleventh Circuit joined the Tenth, adopting the registration approach and further exacerbating the circuit split. That split could be resolved in 2018. The plaintiff in *Fourth Estate* has sought *certiorari* from the U.S. Supreme Court, which recently invited briefing on the issue from the Solicitor General, suggesting the High Court is considering taking up the case. If it does, its ultimate decision will have a



significant impact on copyright litigation – and registration practices – going forward, and will overturn the law in two or more federal circuits.

### **Continued Consolidation in the Media Industry Will Drive Post-Merger Licensing Disputes**

Recent years have seen a spate of consolidation in the media industry among major cable and satellite distributors – including Charter’s acquisition of Time Warner Cable, AT&T’s merger with DirecTV, and Altice’s takeover of Cablevision. We expect this type of merger activity to continue in 2018. With increased size and scale post-merger, the consolidated entity often seeks lower programming costs from content providers, which typically have separate license agreements with each company that predate the combination. While these types of disputes can sometimes be resolved at the bargaining table, we have seen several content providers turn to the courts to resolve the meaning and application of their contracts. As distributors continue to explore merger possibilities, this type of post-merger litigation will likely continue to proliferate.

Not to be undone, multiple major content providers have also now sought to combine with one another – including AT&T and Time Warner, Discovery Communications and Scripps, and The Walt Disney Company and 21st Century Fox. We expect this trend to continue, if not increase, in 2018 as programmers and content-producing companies likewise seek additional bargaining leverage, synergies, and institutional scale. Antitrust and regulatory review of these mergers – most notably, the Department of Justice’s high-profile suit to block the \$85 billion AT&T/Time Warner merger, which we also address in our [Antitrust assessment](#) – will be closely followed in 2018 as a key indicator of the Trump Administration’s stance towards media consolidation. Recent measures taken by the U.S. Federal Communications Commission to deregulate media ownership rules may also lead to further consolidation among broadcasters and local stations. In the wake of these mergers, we may also see the same type of contractual disputes discussed above emerge between distributors and the newly combined content providers.



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## **Will *Inter Partes* Review (IPR) Continue To Be Available To Challenge Patents?**

*Inter partes* review continues to be a preferred option to challenge the validity of patent claims for defendants accused of patent infringement. In 2017, more than 1,700 IPR petitions were filed, a slight increase from the number that was filed in each of the previous two years. IPRs are favored by defendants because petitioners have achieved high success rates in canceling patent claims through a venue that is faster and less expensive than district court. In 65% of final written decisions in IPR, all of the challenged patent claims are canceled. By contrast, all of the challenged patent claims survive in less than 20% of final written decisions. In addition, district courts frequently stay patent suits pending the outcome of IPR if the majority of asserted patent claims are instituted, and cancellation of the asserted claims in IPR can resolve district court patent suits. But all of this may change because the U.S. Supreme Court is reviewing the constitutionality of the IPR process.

On November 27, 2017, the Court heard oral arguments in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* (No. 16-712), where it will decide whether the IPR process is constitutional. The patent owner in *Oil States* argues that IPR violates Article III and the Seventh Amendment of the Constitution because it extinguishes private property rights through a non-Article III forum without a jury. The respondent counters that patent validity may be adjudicated by an administrative agency without a jury because patents are "public rights" that exist only by Congressional statute, not common law. As such, Congress has the power to designate public rights for adjudication in non-Article III forums as part of administering a public-right scheme. While most commentators believe that it is unlikely that IPR will be found unconstitutional in its entirety, the Justices appeared to be divided at oral argument, and the outcome is difficult to predict. It also is possible that the Court may decide to treat patents that existed prior to the enactment of IPR in 2012 differently from later-issued patents based on due process concerns. The Court's highly anticipated decision would have a dramatic impact on the overall state of patent litigation if it eliminates or substantially changes IPR.

## **Will The Supreme Court Change *Inter Partes* Review By Requiring The Patent Trial and Appeal Board's (PTAB) Final Written Decisions To Cover All Challenged Claims?**

The patent statute provides that the PTAB "shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner"



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during an IPR. 35 U.S.C. § 318(a). Since IPR was enacted in 2012, the PTAB has regularly decided to institute IPR proceedings on less than all of the patent claims that are challenged in a petition. The PTAB typically chooses to institute IPR only on those patent claims for which it finds that there is a "reasonable likelihood" that the petitioner would prevail, which many times is only a subset of the challenged claims. This has important consequences because it can require a petitioner to adjudicate the remaining, uninstituted claims in a different venue such as district court. It also can impact the scope of IPR "estoppel," which prevents a petitioner, upon a final written decision by the PTAB, from asserting in district court that the claims it challenged in IPR are invalid "on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review." 35 U.S.C. § 315(e)(2). In *Shaw Indus. Grp., Inc. v. Automated Creel Sys., Inc.*, 817 F.3d 1293, 1300 (Fed. Cir. 2016), the Federal Circuit held that estoppel does not apply to patent claims that were challenged in a petition but were not instituted.

The PTAB's practice of partial institutions in IPR, however, may soon change. On November 27, 2017, the Supreme Court heard oral arguments in *SAS Institute, Inc. v. Matal* (No. 16-969), where it will decide whether the PTAB may continue to use its discretion to institute on some but not all of the claims raised in a petition (as the Federal Circuit held), or whether the statute mandates that a final written decision cover all claims raised in the petition. If the Court reverses the Federal Circuit and changes existing PTAB practice, then petitioners will be assured that all claims raised in any instituted petition will be adjudicated by the PTAB, but they also will face greater risk of estoppel because the PTAB will be forced to address patent claims in final written decisions that previously would have been left uninstituted without any estoppel. Because the PTAB typically leaves claims uninstituted when it does not find that the petitioner is likely to prevail on them, these claims would be more likely to be found patentable in a final written decision, creating estoppel against the petitioner. This would raise the stakes in IPR proceedings and could significantly lower the percentage of claims canceled in final written decisions.

### How Will Patent Venue Law Continue To Evolve?

For almost three decades, Federal Circuit precedent held that venue in a patent infringement suit was proper in any district where a defendant had minimum contacts (*e.g.*, where it had committed an act of infringement). For defendants that sold their products nationally, this rule meant that plaintiff patent owners could sue defendants in forums that were perceived as being advantageous to plaintiffs, such as the Eastern District of Texas. In 2016, for example, 37% of all patent cases were filed in East Texas. This has now changed as a result of the Supreme Court's decision last year in *TC Heartland LLC v. Kraft Food Brands LLC*, 137 S.Ct. 1514 (2017). In *TC Heartland*, the Court held that, for patent cases involving a domestic-company defendant, venue is only proper (1) where the defendant is incorporated, or (2) where the defendant has committed acts of



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infringement and has a regular and established place of business. The number of patent cases filed in East Texas has since dropped substantially, but various unresolved questions about patent venue remain.

One question that was not considered in *TC Heartland* is what constitutes a “regular and established place of business” under the patent venue statute, 28 U.S.C. § 1400(b). The Federal Circuit recently provided a framework in *In re Cray*, 871 F.3d 1355, 1359 (Fed. Cir. 2017) where it held that a district court abused its discretion by finding venue based on business conducted by two of the defendant’s employees from their homes in the Eastern District of Texas. In *Cray*, the court set forth three requirements for “a regular and established place of business”: (1) it must be “a physical, geographical location in the district”; (2) the defendant’s business must be carried out there regularly, not sporadically; and (3) “the defendant [not merely the employee on his own] must establish or ratify the place of business.” After *Cray*, patent plaintiffs will continue to test the boundaries of what constitutes “a regular and established place of business.” For example, one district court is currently considering whether venue can be established by the activities of a defendant’s affiliates and subsidiaries in the district.

Even after *TC Heartland* and *Cray*, the Eastern District of Texas continues to attract more patent suits than almost any other district. Since the Court decided *TC Heartland* in May of 2017, only Delaware has seen more patent suits than East Texas. Given that the time to trial in Delaware is expected to increase with this spike in workload, it remains to be seen whether patent plaintiffs will favor other districts more in the future. Another important unresolved issue for multidistrict states such as Texas is whether venue can be found in each district of the state where the defendant is incorporated. It is also noteworthy that *TC Heartland* did not affect foreign defendants for which venue may be proper in any judicial district under current law.

### Can Patent Holders Recover Damages On Foreign Activities Under 35 U.S.C. § 271(f)?

It is well established that there is a presumption against extraterritorial application of U.S. patent law. The Federal Circuit relied on this presumption to limit recovery of patent damages in *Power Integrations, Inc. v. Fairchild Semiconductor, Int’l, Inc.*, 711 F.3d 1348, 1371-72 (Fed. Cir. 2013), where it held that a patentee cannot recover damages based on lost sales in foreign markets even if they were a foreseeable result of infringing conduct in the U.S. Whether patent holders are categorically denied from recovering patent damages based on foreign activities is still an open issue. On January 12, 2018, the Supreme Court granted certiorari in *WesternGeco LLC v. ION Geophysical Corp.* (No. 16-1011) to decide whether patent holders can recover lost-profit damages based on foreign use of an invention under 35 U.S.C. § 271(f). Congress enacted Section 271(f) to close a loophole in the patent statute that allowed manufacturers of infringing products to avoid infringement liability by making unassembled components of a patented invention



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in the U.S. and then shipping them overseas for assembly. Specifically, Section 271(f)(2) creates liability for one who supplies a component of a patented invention from the U.S. with no substantial non-infringing uses while "intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States" (among other requirements). The damages at issue in *WesternGeco* involves lost contracts for performing services overseas using a system that was found to infringe under Section 271(f)(2). One issue that the Court is expected to address that may have consequences reaching beyond patent law is whether the presumption against extraterritorial application of U.S. law applies to remedies, rather than just liability issues. Oral argument in *WesternGeco* is expected to occur in April of 2018.



# Product Liability

## Supreme Court's Personal Jurisdiction Decision Shakes Up the Mass Tort World

Plaintiffs in mass product liability litigation have historically filed their lawsuits in a handful of plaintiff-friendly jurisdictions, regardless of where the individual plaintiffs live, used the product, or allegedly sustained injuries. No more. This past year the U.S. Supreme Court effectively put an end to this decades-long practice in its landmark decision on personal jurisdiction – *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1773 (2017).

In *Bristol-Myers Squibb Co.*, 86 California residents and 592 residents from 33 other states filed eight separate complaints in California Superior Court, asserting personal injuries claims against Bristol-Myers Squibb (BMS) arising from their use of the prescription drug, Plavix. None of the nonresident plaintiffs alleged use or injury in California. BMS, which is incorporated in Delaware and headquartered in New York, did not develop, manufacture, package, or label Plavix in California. Nevertheless, the California Supreme Court found that BMS' extensive contacts with California permitted the exercise of specific jurisdiction based on a "less direct connection" than might otherwise be required. This "attenuated requirement" was met, according to the California Court, because the claims of the nonresident plaintiffs were sufficiently similar to those of the California plaintiffs.

The U.S. Supreme Court disagreed, invoking "settled principles" of specific personal jurisdiction to reverse the California decision. The Court held that a corporation's continuous activity within a state is not enough to permit the exercise of specific jurisdiction over suits *unrelated* to that activity. Therefore, the mere fact that some plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – could not allow *all* plaintiffs to sue BMS in California. Rather, there must be "a connection between the forum and the specific claims at issue."

*Bristol-Myers Squibb Co.* marks the end of an era. Plaintiffs are now facing a wave of motions to dismiss product-liability actions brought by non-resident plaintiffs in jurisdictions in which defendants are not incorporated and do not maintain a principle place of business. Be prepared for creative moves by the plaintiff bar to establish case-specific facts that would allow them to remain in their preferred jurisdictions.



## Product Liability

### No Clear Guidance on Article III Standing

While it was the Supreme Court's action in the area of personal jurisdiction that created waves in the mass tort world, it was the High Court's inaction in the area of Article III standing that has left class action defendants without clear guidance. The Supreme Court recently declined to hear an appeal from a Ninth Circuit decision finding Article III standing based on alleged violations of the Fair Credit Reporting Act (FCRA). As such, for now, the Court will not provide any further direction on how to evaluate standing under its landmark decision in *Spokeo, Inc. v. Robins*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1540 (2016).

Recall that in *Spokeo*, the Supreme Court held that a plaintiff cannot rely solely on statutory violations to establish Article III standing, but instead must allege a concrete and particularized injury in fact. As we discussed in our [Complex Commercial Litigation](#) assessment, decisions applying *Spokeo* have been somewhat inconsistent, creating confusion about whether "information injuries" from statutory violations are sufficient to satisfy Article III. The Ninth Circuit was confronted with such a case in *Sarmad Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017).

Like *Spokeo*, *Syed v. M-I* also arose from allegations under the FCRA. However, unlike *Spokeo*, the Ninth Circuit found that plaintiff's allegation of a violation of the FCRA was sufficient to establish Article III standing. The Court reasoned that because the alleged FCRA violation denied plaintiff a right to privacy, plaintiff had alleged a concrete harm. In their petition for certiorari, Defendants argued the Ninth Circuit decision was a blatant disregard of *Spokeo*. In the absence of additional guidance from the Supreme Court, circuit courts continue to grapple with the line between a bare procedural violation and a violation that creates a concrete harm. While the Supreme Court denied certiorari in *Syed*, we expect to see action from the Supreme Court in this area in the near future.



# Securities

## Heightened Risk Of Securities Litigation Following Record Securities Class Action Filings in 2017

According to Cornerstone Research's "Securities Class Action Filings: 2017 Year in Review," "plaintiffs filed more federal securities fraud class actions [in 2017] than in any previous year since the enactment of the Private Securities Litigation Reform Act of 1995." The record number of filings was attributable primarily to a significant increase in federal court merger-related securities class actions filings (discussed below), but also a continued year-over-year increase in non-merger-related securities fraud class actions. The filing data indicates that, even in the current (relatively) stable market environment, public companies face a heightened risk of securities litigation as stockholders (and their counsel) scrutinize financial and other public statements for potential violations of the federal securities laws.

## Public Company Merger Transactions Continue To Face Nuisance Litigation In Federal Courts

In the last several years, at least three developments in Delaware law have led to a decline in the filing of lawsuits challenging public company merger transactions in the Delaware Court of Chancery: (1) *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015) (holding that a fully-informed and uncoerced vote in favor of a merger by a majority of a corporation's stockholders invokes the business judgment rule standard of review); (2) *In re Trulia Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016) (condemning the practice of "disclosure-only" settlements to resolve merger litigation); and (3) amendment of the Delaware General Corporation Law to permit Delaware corporations to adopt forum selection bylaws to drive lawsuits concerning their internal affairs to Delaware. But while the volume of merger litigation has been on the decline in Delaware, there has been a corresponding increase in litigation in other jurisdictions, particularly in federal courts, where there has been a significant increase in securities class actions asserting disclosure claims relating to merger proxy statements and tender offer recommendations under Section 14 of the Securities Exchange Act of 1934 (and related regulations promulgated by the U.S. Securities and Exchange Commission). We expect that a significant number of public company merger transactions will continue to face pre-closing litigation in federal courts and state courts outside of Delaware.



### Dissenting Stockholders Face Appraisal Headwinds In Delaware

As merger-related fiduciary duty litigation has waned in Delaware over the last several years, there has been a marked increase in appraisal litigation – stockholders dissenting from a merger and petitioning the Delaware Court of Chancery to determine the “fair value” of their stock under Section 262 of the Delaware General Corporation Law. Available data indicates that the number of appraisal actions filed in Delaware increased from 16 in 2012 to 62 in 2016. This trend has been driven largely by appraisal arbitrageurs – often sophisticated and well-capitalized hedge funds – who buy into a substantial position in the target company stock after a transaction is announced in order to dissent and assert statutory appraisal rights. A pair of decisions by the Delaware Supreme Court in 2017, however, should serve to make appraisal litigation more challenging for dissenting stockholders, particularly where the target company has been subjected to a competitive sale process. In *DFC Global Corporation v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017), and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017), the Delaware Supreme Court emphasized that “market-based indicators of value” – both a target company’s stock price and the merger price – have “substantial probative value” in determining “fair value” under Delaware’s appraisal statute. As stated by the Delaware Supreme Court in *Dell*, “[f]air value entails at a minimum a price some buyer is willing to pay – not a price at which no class of buyers in the market would pay.” In addition, on February 15, 2018, in *Verition Partners Master Fund v. Aruba Networks, Inc.*, 2018 WL 922139 (Del. Ch. Feb. 15, 2018), the Delaware Court of Chancery concluded that a target company’s unaffected stock price – a nearly 31% discount to the deal price – was the best evidence of fair value in an appraisal action because the deal price incorporated value from synergies and reduced agency costs, which are “not part of the going concern value of the firm.” The court was careful to state that “[b]y awarding fair value based on the unaffected market price, this decision is not interpreting *Dell* and *DFC* to hold that market price is now the standard for fair value” and that “[t]he governing standard for fair value under the appraisal statute remains the entity’s value as a going concern,” but the decision represents the strongest indication yet that market evidence – in appropriate cases – will be given primacy in Delaware appraisal proceedings going forward.



# White Collar

## International Anti-Corruption Enforcement Coordination

Two trends dominated anti-corruption enforcement in 2017: increased coordination between foreign prosecutors and the U.S. Department of Justice (DOJ), and the DOJ's determination to hold individual corporate executives accountable under the Foreign Corrupt Practices Act (FCPA) for their role in international bribery schemes.

Four companies in cross-border cases resolved FCPA and related foreign anti-corruption charges in 2017 for near-record setting amounts:

- Telia Company AB paid \$965 million as part of its settlement, which was shared between authorities in the U.S. (\$274.6 million in criminal penalties to the DOJ and \$417.1 million in disgorgement to the Securities and Exchange Commission (SEC)) and the Netherlands (\$274 million). The DOJ alleged that Telia and its subsidiaries paid more than \$331 million in bribes to a high-ranking government official from 2007 through 2010 to enter the Uzbek telecommunications market and that Telia executives were involved in negotiating and authorizing the bribes. Although the U.S. did not charge any individuals in this case, Telia executives were prosecuted by the Swedish Prosecution Authority.
- Rolls-Royce plc agreed to pay \$800 million to settle anti-corruption related charges shared among enforcement authorities in the U.K. (\$605.8 million), U.S. (\$170 million), and Brazil (\$25.5 million). The DOJ charged that, from 2000 through 2013, Rolls-Royce and its U.S. subsidiary made over \$35 million in commission payments to intermediaries in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, Iraq, and elsewhere to bribe foreign officials to secure business for the company. The DOJ indicted five individuals who participated in the scheme, including a former senior executive of Rolls-Royce responsible for global sales in the company's energy division.
- SBM Offshore N.V. agreed to pay more than \$475 million to resolve anti-corruption charges, including \$238 million in criminal penalties to the DOJ, \$240 million to the authorities in the Netherlands, and an anticipated penalty of approximately \$342 million to the authorities in Brazil. According to the DOJ, SBM paid more than \$180 million in commissions to intermediaries, knowing those funds would be used to pay bribes to win contracts worth \$2.8 billion with state-owned oil companies. Recipients of



### White Collar

the bribes included at least three Petrobras officials in Brazil and officials in Angola, Equatorial Guinea, Kazakhstan, and Iraq. The DOJ also filed charges against the former SBM CEO and against the former sales and marketing director of SBM's U.S. subsidiary.

- Keppel Offshore & Marine Ltd. paid \$422.2 million to resolve anti-corruption related charges, shared among the authorities in the U.S. (\$105.5 million), Brazil (\$211.1 million), and Singapore (\$105.5 million). The DOJ charged that executives at Keppel and its U.S. subsidiary agreed to pay approximately \$55 million to employees at Petrobras and a political party official to obtain contracts with Petrobras, the Brazilian state-controlled oil company, and Sete Brazil, a private firm, and realized approximately \$352 million in profits from those contracts. The DOJ also charged a former senior member of Keppel's legal department, who created and executed false agreements with consulting companies.

These cases reflect the results of increasing international cooperation in recent years in global anti-corruption investigations, as more regulators in Europe, Latin America, and elsewhere are enforcing existing or new anti-corruption laws and finding that cooperation with the DOJ and SEC helps facilitate their own investigations. In the DOJ press release announcing the Telia enforcement action, for example, the DOJ acknowledged the assistance it received from its law enforcement counterparts in Sweden, the Netherlands, Switzerland, Austria, Belgium, Cyprus, France, Ireland, the Isle of Man, Latvia, Luxembourg, Norway, and the United Kingdom. We are also seeing increasing cooperation from countries whose financial institutions were viewed as facilitators of corruption in the past but now are attempting to impose more transparency on their financial institutions.

These global settlements raise a concern about "piling on," as companies are required to pay penalties to enforcement agencies in different jurisdictions to resolve the same conduct. Relatedly, the DOJ does not appear reluctant to impose FCPA liability in cases where other agencies with arguably greater jurisdictional interest have already imposed significant penalties. For example, SBM agreed to pay \$240 million to the authorities in the Netherlands, its home country, and \$342 million to the authorities in Brazil over conduct involving bribes paid to Petrobras officials. Nevertheless, the DOJ still extracted an additional \$238 million from SBM to settle FCPA charges related to the same conduct because of the role of one or more of its Houston-based employees in the scheme.

### New DOJ Guidance Provides Insight for Future Corporate Enforcement

In November 2017, the DOJ formally amended its Principles of Federal Prosecution of Business Organizations to address FCPA corporate cases. The



new FCPA Corporate Enforcement Policy (the “Corporate Enforcement Policy”) now provides companies the possibility of greater leniency in matters involving alleged FCPA violations in exchange for voluntary self-disclosure, full cooperation, and appropriate remediation.

### **DOJ Encourages Corporate Self-Disclosures**

Like the DOJ’s 2016 FCPA Pilot Program, the Corporate Enforcement Policy places a premium on timely, voluntary self-disclosure of potential FCPA violations, setting meaningful incentives for companies to come to the table. The Corporate Enforcement Policy, however, goes a step further than the Pilot Program by providing a “presumption” that it will not prosecute a company that voluntarily self-discloses a potential FCPA violation, fully cooperates in the ensuing investigation, and timely and appropriately remediates the issues that contributed to the violation. However, that “presumption” is not available if certain aggravating factors exist in a particular case, such as the involvement of “executive management” in the misconduct, significant profit to the company from the misconduct, pervasiveness of the misconduct throughout the company, or recidivism. Even if a company is not eligible for a declination, it can still receive a 50% reduction in the penalty, based on the low-end of the U.S. Sentencing Guidelines range, as long as it is not a recidivist and satisfies the other stated criteria of self-disclosure, cooperation, and remediation. Companies that fail to satisfy the self-disclosure requirement may still be eligible for up to a 25% reduction in the penalty for their cooperation.

### **Open Issues under the Corporate Enforcement Policy Warrant Caution**

The new Corporate Enforcement Policy might be attractive to companies considering self-disclosure, because it formalizes the benefits of early self-disclosure and cooperation, including the possibility of a declination. What remains to be seen is whether the new policy also will result in more declinations by the DOJ, a data point that likely will not become available until 2019, at the earliest. Moreover, there are significant open issues under the policy that may cause some companies to hesitate when considering whether to self-disclose, including the following:

- **Recidivism:** Companies that are considered “recidivist” offenders may not qualify for full cooperation credit, but the Policy does not clearly define what constitutes disqualifying “recidivist” behavior.
- **Disgorgement:** The Policy also requires disgorgement of illicit gains to receive a declination, but it does not provide any guidelines for how the DOJ will calculate the amount of disgorgement. The DOJ has indicated that it will publish guidance concerning declinations with disgorgement, and the details of the early cases resolved pursuant the new Policy may provide further insight on this murky issue.
- **Voluntary self-disclosure:** Under the Policy, a significant portion of the



discount off the penalty turns on whether a company made a “voluntary” self-disclosure, but this criterion still lacks clarity. To be considered “voluntary,” a disclosure must be made before the threat of disclosure or investigation *and* must provide all relevant facts known to the company, including about individuals’ roles. Recent precedent suggests that the DOJ takes a narrow view of what qualifies as “voluntary” disclosure, and delayed self-disclosure, or self-disclosure prompted by a whistleblower, may not qualify. Furthermore, the content of what is disclosed matters as much as the timing of the disclosure. For example, in the SBM case, the company self-reported significant misconduct it had investigated but received no credit for its disclosure because the DOJ, after initially declining to prosecute SBM, later *independently* learned of *new* information involving a U.S. nexus. The DOJ said the new information was not uncovered during SBM’s own initial investigation and caused the DOJ to reopen its investigation.

### **Greater Importance of Corporate Compliance Programs**

Another trend that will certainly continue in 2018 is the focus of the DOJ and SEC on corporate compliance programs. The new Corporate Enforcement Policy expressly requires prosecutors to assess the quality of compliance personnel, their compensation, resources given to the compliance department, its independence, the board’s compliance oversight role, and the efficacy of the company’s risk assessment program, among other factors. This follows earlier, more informal DOJ guidance released in February 2017 identifying factors the DOJ uses to assess corporate compliance programs. One of the more noteworthy take-aways from that guidance was the DOJ’s focus on evaluating the effectiveness of a company’s board in monitoring the company’s compliance program, including the board’s response to the type of misconduct giving rise to liability that may have been flagged in audit reports or by other internal control functions.

### **A Shift Away from Independent Monitors?**

The Corporate Enforcement Policy states that the DOJ “generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.” As has been the case in the past, the DOJ retains discretion to evaluate what constitutes “an effective compliance program.” The policy appears to give companies the opportunity to improve their compliance program up until resolution of a matter to avoid imposition of a monitor. It remains to be seen whether this signals a shift away from the recent uptick in the number of FCPA cases where the DOJ has required that a monitor be engaged. Of note, the DOJ did not require that the company engage a monitor in the resolutions involving Telia, Keppel, or SBM, which were resolved in the second half of 2017, even though those cases involved aggravating factors (such as the involvement of management in the conduct and a pattern of corruption in the organization) that in the past were used to justify a monitor.



### Continued Focus on Prosecution of Individuals in FCPA Cases

As in recent years, the DOJ signaled that it continues to prioritize the prosecution of culpable individuals under the FCPA. The major FCPA corporate settlements announced in 2017 – Rolls-Royce, SBM, and Keppel – involved U.S. criminal charges against executives, employees, and third parties, while foreign authorities prosecuted executives in the Telia case. Speaking at a widely attended FCPA compliance conference in November 2017, Deputy Attorney General Rod Rosenstein provided insight into the DOJ's goals in issuing the new Corporate Enforcement Policy, predicting that the new policy will increase the number of voluntary disclosures, thereby enhancing the DOJ's ability to identify and punish culpable individuals.

To this end, the expansive view of cooperation found in previous DOJ guidance features prominently in its new Corporate Enforcement Policy.

- **Relevant facts disclosed.** The Policy puts the burden on companies to provide “all relevant facts gathered during a company’s investigation” and identify “sources” of information. However, because of the Policy, prosecutors may be emboldened to demand witness interview notes, which would encroach on the corporate attorney-client privilege.
- **Proactive cooperation.** The Policy requires “proactive” cooperation, meaning that a company must disclose relevant facts in the investigation before requested to do so.
- **Overseas evidence provided.** The Policy also requires companies to make every effort to provide documents collected from overseas and places the burden on companies to demonstrate an inability to provide documents from other countries due to legal hurdles such as data privacy statutes and blocking statutes. Companies also must be mindful of the increasing challenges arising from the more robust data privacy regulations implemented abroad and whether the DOJ will work with companies in navigating these issues. For example, the European Union (E.U.) General Data Protection Regulation (GDPR), which will go into effect on May 25, 2018, requires any company that offers goods or services in the E.U., or otherwise monitors or processes the behavior of E.U. citizens, to provide a reasonable level of protection for personal data. Notably, the GDPR broadly defines “personal data” to include not only an individual’s medical information and bank details, but also his or her name and email addresses. The GDPR further requires companies to obtain “unambiguous” consent from the individual prior to processing or transferring his or her data to a third party and permits individuals to request that companies erase or stop the dissemination of their data. Organizations that do not comply with the GDPR face stiff penalties, including fines of up to 4% of their annual global turnover or 20 million euros, whichever is greater.



### Increasingly Complex Cross-Border Witness Interview and Privilege Issues

The sustained increase in cross-border coordination and enforcement is raising novel legal issues for both the government and for companies conducting internal investigations in cross-border cases.

- For example, in *United States v. Allen*, 864 F.3d (2d Cir. 2017), the Second Circuit overturned the first criminal conviction related to the manipulation of the London Interbank Offered Rate (LIBOR). The court held that the defendant's Fifth Amendment right against self-incrimination was violated at trial because statements compelled from the defendant by the U.K. Financial Conduct Authority (FCA) were shown to the government's lead witness by the FCA before he testified at the defendant's trial in the U.S. and, therefore, irreparably tainted his testimony. In the longer term, the *Allen* decision may force closer and earlier coordination between the DOJ and its foreign regulatory counterparts to minimize the risk that foreign-run investigations compromise the DOJ's own investigations and prosecution of individuals in U.S. courts. In fact, the *Allen* court explicitly noted that, as part of increasing cooperation with regulators, the DOJ has already assigned prosecutors to work directly at the U.K. FCA, Eurojust at the Hague, and INTERPOL in France to promote closer cooperation.

The corporate internal investigation privilege will also be subject to uncertainty in some cross-border cases after two recent U.K. judicial decisions took a remarkably narrow view of the legal advice privilege and the litigation privilege, which are the U.K. equivalents of the attorney-client and work product privileges in the U.S.

- In *In Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), the English High Court held that the legal advice privilege did not cover attorney notes or interview records (many of which were made by U.S. counsel for RBS) of interviews with the company's employees and former employees in connection with subpoenas the company had received from the SEC. The court established a high bar for the application of the legal advice privilege, noting that the notes must reflect communications with employees of the client authorized to seek legal advice for the company. The court set an equally high bar for the application of the litigation privilege, holding it only applies if the notes evidenced an attorney's legal analysis. In reaching its decision, the court found the notes simply reflected information conveyed from witnesses to attorneys and could not be protected as "working papers." The court also denied RBS's attempts to apply U.S. privilege law to protect the interview notes and instead held that U.K. privilege law applied.
- In *Serious Fraud Office v. Eurasian Natural Resources Corp. Ltd.* [2017] EWHC 1017 (QB), another U.K. court compelled the production of attorney



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notes to the Serious Fraud Office (SFO) over the company's objection that the notes were taken during the course of an internal investigation in response to an SFO investigation. The court stated that the existence of an SFO investigation did not rise to the likelihood of an adversarial litigation proceeding (*i.e.*, a prosecution), which was a necessary condition for application of the litigation privilege. The court also rejected the application of the legal advice privilege, noting that the persons interviewed were not authorized to receive legal advice on behalf of the company.

These decisions significantly limit the application of U.K. legal privileges to attorney notes of witness interviews conducted during internal investigations and could result in the disclosure of those notes to U.K. authorities, even when those notes are otherwise subject to the protection of U.S. legal privileges. This will undoubtedly present uncertainty for companies facing parallel investigations in the U.K. and the U.S.

### Continued Focus on Global Financial Markets

In 2018, we anticipate that the DOJ will continue investigating conduct in the global financial system when the DOJ perceives that the conduct undermines the integrity of those markets. In such cases, the DOJ appears to be using new theories to capture such conduct.

- In September 2017, the DOJ brought commodities fraud charges against two former bank employees alleged to have fraudulently manipulated USD LIBOR submissions to benefit their employer bank, Société Générale, ultimately depressing USD LIBOR and causing global losses in excess of \$170 million. The bank's Global Treasury Head and the Paris Treasury Desk Head allegedly directed subordinates to submit falsely deflated estimates of the bank's actual borrowing rates to avoid the anticipated reputational harm to the bank that would result if the accurate and much higher borrowing rates of the bank were publicized to the market through the LIBOR rate setting process. The case marks an expansion from earlier LIBOR cases, which had focused on prosecuting individuals who had manipulated LIBOR submissions to benefit their own personal trading positions rather than their employer's market positions.
- In October 2017, a federal jury convicted the former head of global foreign exchange trading at HSBC Bank plc on fraud and conspiracy charges arising from the defendant's role in causing HSBC to trade ahead of (or "front run") a client's \$3.5 billion foreign currency exchange transaction. According to the DOJ, the defendant's conduct spiked the pricing of the transaction against the client's interest while generating significant profits for the bank. The DOJ touted this conviction as the first to use insider-trading principles to prosecute conduct outside of the equities markets. In January 2018, as part of the same investigation, HSBC Holdings plc agreed to pay a \$63.1



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million criminal penalty and \$38.4 million in disgorgement and restitution as part of a deferred prosecution agreement to settle wire fraud charges.

- Additionally, in January 2018, in an unrelated investigation, the DOJ charged the former New York office head of foreign currency exchange trading for Barclays plc with fraud and conspiracy in a similar front running scheme.

### Financial Institution Retail Consumer Fraud

The U.S. Consumer Financial Protection Bureau (CFPB) maintained a steady pace of enforcement actions against large financial institutions in 2017, targeting conduct that included student loan servicing failures, discriminatory credit card terms, inadequate protections for reporting on consumers' checking account behavior, and improper hurdles imposed on homeowners seeking foreclosure relief. The extent to which the CFPB's efforts to protect retail consumers of financial services will lead to criminal referrals to the DOJ remains to be seen. Some have speculated that Wells Fargo Bank, N.A. – which in September 2016 settled charges brought by the CFPB and other authorities concerning the opening of unauthorized accounts – was the subject of a CFPB criminal referral. The bank recently disclosed that the DOJ and other authorities continue to look into the conduct underlying the CFPB settlement. Given the uncertain future of the CFPB under the Trump Administration, it is difficult to predict whether the CFPB will continue to pursue enforcement actions against financial services firms with vigor or become a regular partner of the DOJ.

### Retail Investor Fraud

Last year, the SEC brought charges against several financial institutions, using theories of liability under various federal securities laws, including the Investment Company Act and the Investment Advisors Act, for practices affecting retail investors, such as:

- inadequately ensuring that clients understood the risks involved with purchasing inverse exchange-traded fund (ETF);
- recommending more expensive share classes of various mutual funds when cheaper shares of the same funds were available;
- misleading investors about the performance of an actively managed ETF;
- collecting improper advisory and mutual fund fees; and
- miscalculating financial metrics reported to investors.

In September 2017, the SEC announced the formation of a "Retail Strategy Task Force," which will aim to leverage data analytics and technology to identify large-scale misconduct affecting retail investors. In its annual enforcement report, released in November 2017, the SEC stated that the Task Force would



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reach beyond typical retail frauds – like Ponzi schemes and microcap and offering frauds – to misconduct by investment professionals that impacts retail investors. This includes improperly recommending to investors higher-cost mutual funds, or volatile products like inverse ETFs and structured products, and engaging in abusive sales practices such as churning and excessive trading. We will watch to see whether, in 2018, the Retail Strategy Task Force's work results in increased investigations.

#### Corporate Health Care Fraud

In recent years, the DOJ has stated that it is focused on prosecuting corporate health care fraud. In September 2016, 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. Last year, the DOJ brought charges against a former executive of Tenet Healthcare Corporation, a former executive of a Tenet-owned hospital, and the owner of a chain of prenatal clinics, each of whom was charged for his role in the scheme.

This year, we will be watching whether the DOJ seeks to bring enforcement actions against pharmaceutical companies in connection with the national opioid crisis. The DOJ and other federal agencies could learn information from putative whistleblowers and relators under the False Claims Act that could bolster such investigations. The DOJ could pursue several theories of criminal and civil liability:

- The government could allege that a pharmaceutical company concealed relevant information from the U.S. Food and Drug Administration (FDA) about opioids or promoted, through published research, misleading information.
- The government could allege that a pharmaceutical company promoted "off-label" uses of opioids that were not FDA-approved, in violation of the Food, Drug and Cosmetic Act.
- Relatedly, the government could allege that the opioid manufacturers promoted non-FDA approved uses for opioids, knowing that healthcare providers would submit claims for reimbursement to Medicare and Medicaid programs for those non-FDA approved uses.
- The government could allege that pharmaceutical companies violated the Anti-Kickback Statute, including by providing pricing concessions to major purchasers (such as healthcare systems) to improperly induce opioid sales, if those purchases were reimbursable to federal healthcare programs.



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