Seyfarth

Commercial Litigation Outlook

2023 Edition

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Introduction

—By Shawn Wood and Rebecca Woods

Welcome to the third annual installment of Seyfarth Shaw's Commercial Litigation Outlook, where our nationally recognized team provides insights about litigation issues and trends to expect in 2023. The continuing global tumult and increasing chances for a recession will weigh heavily on the litigation outlook for 2023.

We expect an uneven year where some litigation booms, some busts. In-house counsel will reap the benefits of the already developed skills and managed risk in some areas (e.g., cyber risk—so 2020 but still very relevant), and will have to crawl up some entirely new learning curves in other areas (e.g., ESG exposures). As was true last year, the trick to navigating the upcoming challenges will require clients and their counsel to be adaptive, creative, and proactive.

One of our two features analyzes the tidal wave of ESG demands, reports, and conflicts (legal and otherwise, including political). With increasing and sprawling rulemaking and private plaintiff actions, we see ESG issues touching every aspect of most businesses. Indeed, the sprawling nature of ESG issues is reflected in their discussion in several of our pieces here, from issues with the rise of "conscious consumerism," to class actions based on environmental and related ESG marketing claims, to securities actions rooted in ESG-related investments and disclosures. Protecting the organization will require significant monitoring, proactive engagement, integration of organizational interests and resources, and creative and knowledgeable partners to help navigate these particularly choppy waters.

We expect to see robust engagement in regulation and enforcement by a host of governmental agencies. The DOJ and FTC will continue to address alleged wage fixing, bring heightened review to proposed mergers, and undertake close scrutiny of cryptocurrency exchanges and other new, largely unregulated vehicles for bundling or investing in cash and securities. Relatedly, we see the cryptocurrency distress, continued cyber attacks, and market gyrations to yield robust securities litigation activity. The DOJ and FTC will also be busy enforcing the Consumer Financial Protection Act and other pro-consumer laws, with a particular focus on "black box" models and junk fees. The NLRB, meanwhile, can be expected to reinstate a more expansive joint employer standard, heightening risk for business entities like franchisors. And FINRA won't be quiet, either, as it appears energized to enforce the SEC's Regulation "Best Interest," particularly in the space of broker-dealer recommendations, and its own rules that regulate communications, particularly with respect to mobile app functions. Finally, nearly all of these agencies are coalescing an increased scrutiny of restrictive covenants.

Privacy will continue to dominate regulation and litigation, what with more laws protecting and regulating the use of personal information, more class actions for claimed breaches of statutory and common law privacy interests, and more litigation based on the intersection of privacy and health care. California will continue to lead the pack on privacy protection laws with its passage of the Privacy Rights Act and several amendments set to take effect in 2023. Any hopes for a national, uniform privacy law will have to be punted to after 2023, and organizations will need to monitor the patchwork of other state privacy laws coming online.

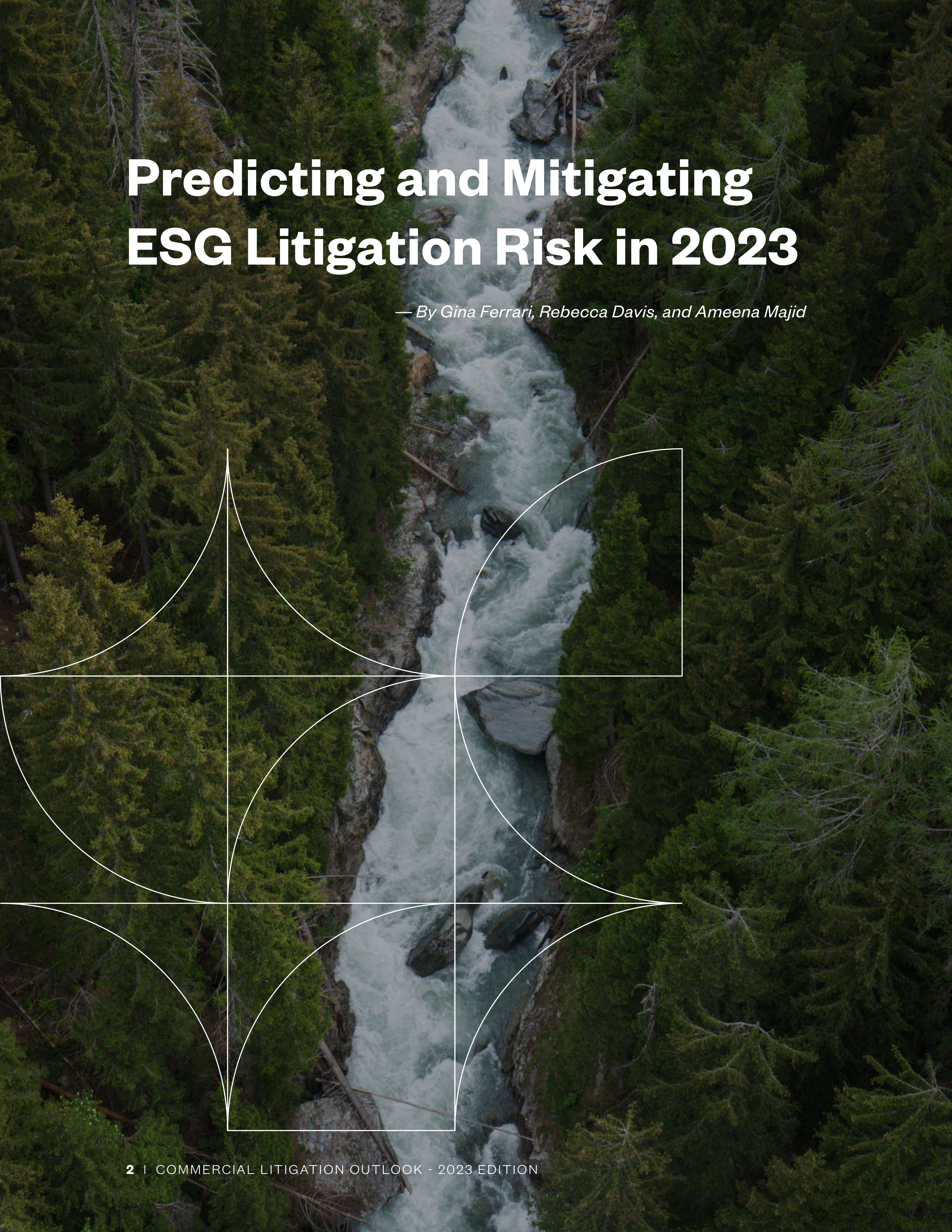
Class actions will continue to weigh heavily on companies, including in the realms of deceptive claims about advertising and product labeling (for example, "Made in the USA" thanks to the increased business focus to on-shore manufacturing), state privacy laws, and consumer protection laws. Of note in our insurance section, policyholders and insurers will continue to lock horns for coverage of false advertising claims. In addition, in-house lawyers and outside litigation counsel who thought they'd mastered every nuance of e-discovery in the last decade will grapple with the latest frontier of complying with discovery obligations that reach to increasingly technical and ephemeral modes of communication.

The health care space will be busy with the No Surprises Act and the governing rules around resolution of charge disputes, as well as continued claims rooted in fraud, waste, and abuse that has deepened with an eye-popping $149 million of false COVID-19-related billings. The growth of telemedicine, a surprising perk of the pandemic, will bring its own challenges for "telefraud."

The novel commercial landlord-tenant disputes that dominated the COVID-19 era are largely winding down. The commercial real estate space will see continued evolution as industries are challenged with changing circumstances, so we expect to see issues arising from the expansion of retailers into rural areas, the transformation of spaces for different uses, to legalization of marijuana, to accommodation of climate change, and to use of "smart contracts" and changing means of payment. Coming out of the pandemic and the height of government relief, we also expect to see more stressed retailers and commercial landlords, with a likely uptick in associated workouts and bankruptcies.

Baseball legend Roger Maris once said "you hit home runs not by chance, but by preparation." We hope this series of prognostications by our commercial litigation team helps you to prepare for, and develop, winning solutions over the coming year.

We encourage you to contact any of the authors for assistance in connection with any areas of law or issues outlined here.



Predicting and Mitigating ESG Litigation Risk in 2023

— By Gina Ferrari, Rebecca Davis, and Ameena Majid

For the past several years, Environmental, Social and Governance—or as it is more colloquially known, ESG—has dominated boardroom and corporate strategy discussions.

By their own volition or through pressure, organizations have responded to stakeholder (e.g., regulator, employee, investor, consumer) expectations by issuing public statements and internal policies that reflect their commitment to the environment and society. The need and desire to make ESG-related promises amidst constantly changing regulations and expectations exposes clients to litigation risk.

ESG Demands Are Increasing Without Standardization

More than 90 percent of S&P 500 companies have published an ESG report. Many organizations have made statements about their ESG-related achievements on social media and product labels, and have provided ESG-related performance metrics to investors.

This trend arises out of the investment community's declaration that ESG is a financial value proposition. Indeed, market studies have shown intangible assets like talent and brand comprise 90 percent of corporate value. Shareholders, in turn, have insisted that organizations increase return on investment by demonstrating how the environment and social justice matters impact their business, and vice-versa.

Similarly, domestic and international regulatory bodies (including the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC)) have created ESG task forces and/or required disclosures on topics including climate and human capital. Business partners, consumers, investors, and employees have asked organizations to explain how they are managing their impact on the planet and people. Organizations have received evaluations from third party ESG raters and rankers.

In response, both public and private organizations have issued ESG-related public statements and internal policies to satisfy these stakeholder expectations even though the definition of ESG continues to evolve: there is no standardized method for measuring ESG performance, ESG priorities differ across industry, and some states have promulgated anti-ESG laws.

Meeting numerous (and sometimes competing) stakeholder expectations may expose corporations to litigation. A review of recent ESG lawsuits and regulatory activity can help organizations predict and avoid future exposure.

Potential Litigation Despite the Evolving ESG Landscape

A relatively small number of ESG-related private lawsuits and regulatory actions have been filed in the last few years. Based on the increase in corporate and regulatory activity since 2020, however, we anticipate a rise in ESG-related litigation in 2023.

> Organizations should expect regulators and plaintiffs' counsel to more closely scrutinize ESG promises and disclosures in 2023.

In the coming year, we expect ESG-related litigation to be similar to, but potentially more expansive than, the matters described below. Organizations that are striving to develop ESG priorities and programs with attendant promises, goals and other disclosures nevertheless may need to defend against private lawsuits attempting to advance new and novel legal theories. While most of these lawsuits to date have been unsuccessful, with courts often rejecting the plaintiffs' claims at the initial stages of the case on motions to dismiss, a focus on governance and cross-functional collaboration to achieve consistency in the implementation of ESG priorities serves to reduce litigation risk and integrate climate and social goals into an overall corporate strategy.

The following provide a baseline for potential future litigation:

SEC Regulations: In 2020, the SEC amended Regulation S-K to require registrants to disclose their "human capital resources to the extent such disclosures would be material to an understanding of the registrant's business." In 2022, the SEC proposed three rules directed at climate and investment funds. The first proposed rule, the Climate-Related Disclosure Rule, will require all organizations with SEC reporting obligations to disclose certain information about direct and indirect greenhouse gas emissions. The second proposed rule requires registered investment companies and advisors, and in some instances even unregistered advisors, to disclose their ESG strategies in fund prospectuses, brochures, and annual reports. The third proposed rule was designed to curtail the "greenwashing" of fund names, and if passed, will require a fund to invest 80 percent of its assets into funds that are consistent with the fund name.

The SEC's intensified rulemaking and its initiation of multiple ESG-related actions in 2022 foreshadow increased enforcement activity in 2023. Indeed, in April 2022–after filing a complaint against a Brazilian mining company based on misleading social nd environmental disclosures–the SEC announced that it "will aggressively protect our markets from wrongdoers, no matter where they are in the world." The SEC followed through with that warning when, a month later, it charged a registered investment advisor for misrepresenting that investments in certain funds had undergone an ESG quality review. The SEC is expected to increase its enforcement activity in 2023.

Federal Trade Commission Claims: The FTC's Green Guide was issued to help marketers ensure that their claims regarding environmental benefits, carbon offsets, and certifications, were true and substantiated. The FTC intends to update the Green Guide in 2023, and will likely add direction on how to avoid unfair and deceptive statements related to climate change and net zero achievements. Failure to comply with Green Guide standards will undoubtedly lead to FTC enforcement actions and private consumer litigation.

The EPA's most touted, and controversial, acts include recent demands for environmental justice and equality.

Biden Administration and Environmental Protection Agency (EPA) Actions: The Biden-Harris administration has focused heavily on climate policies directed at eliminating greenhouse gas emissions and clean energy. Measures taken range from executive orders revoking the Keystone XL pipeline and rejoining the Paris climate accord, to passing the Infrastructure Investment and Jobs and Inflation Reduction Acts. The current administration also has breathed new life nto the EPA, and the agency is steadily pursuing enforcement of existing environmental laws, such as the Clean Air Act and Clean Water Act. The EPA's most touted, and controversial, acts include recent demands for environmental justice and equality.

ERISA Matters: In November 2022, the Department of Labor announced a final rule that permitted plan fiduciaries to consider climate change and other ESG factors when selecting retirement investments as part of the risk-return analysis for an investment. While the rule creates an alignment with the broader investment community view of ESG considerations as a financial value proposition, missteps in selecting appropriate investments may result in ERISA litigation.

After the *Dobbs* decision (overturning *Roe v. Wade*), certain states regulated access to abortion services. In response, some employers committed to providing travel and other benefits to employees living in states where abortion was restricted. It is unclear whether such benefits impact ERISA preemption or expose the employer to criminal action in certain states.

Private Plaintiff Cases on Social Issues: Consumers and shareholders have sued organizations for alleged false promises regarding their diversity and inclusion achievements and their purported "zero tolerance" for sexual harassment. Between 2020 and 2022, more than ten derivative actions were filed against public companies and their officers and directors for failure to follow through with publicly-disclosed diversity goals. During the same time period, plaintiffs' class action lawyers filed several securities fraud cases alleging that stock prices declined after #MeToo allegations were publicized. While most of these cases were dismissed, the plaintiffs' bar has forewarned that it is considering common law fraud and other legal theories for their next round of pleadings.

"Greenwashing": Regulators expect organizations to measure and report on how their operations effect the climate. These expectations are not limited to an organization's own operations; they extend to an organization's supply chain. False or inaccurate climate disclosures (including supply chain disclosures) will lead to both enforcement actions and private litigation.

Consumers and investors are focused on an organization's environmental and sustainability practices, too. Private plaintiffs have successfully asserted false advertising, consumer protection, securities, and breach of fiduciary duty

Governance in the ESG context is more than structure and policy making; it enables and drives a positive culture while building a resilient brand.

claims related to product and operational “greenwashing.” For example, consumers have plead false labeling claims against food, beverage, and apparel retailers based on statements that their products were sourced in an environmentally friendly manner. In another case, investors sued a company alleging that it misrepresented the breakdown of its biodegradable plastic.

As more organizations undertake endeavors to obtain “green” financing, conduct ESG-focused due diligence, obtain ESG based valuations, build sustainable construction projects, and reduce energy consumption through commercial lease incentives, interested parties will look for material misstatements and omissions, and will consider litigation.

Framing and Reframing ESG Strategy To Minimize Risk

How an organization approaches and understands ESG is vital to risk management. ESG can be managed top-down or bottom-up. Both should be at play, with an emphasis on a top-down approach anchored in effective governance at the Board level and cross-functional teams to ensure harmony and consistency.

Instead of considering ESG as three separate pillars and something distinct from financial returns, organizations should consider governance as the foundation and overarching guide for assessing, implementing, and integrating “E” and “S” goals. Governance in the ESG context is more than structure and policy making; it enables and drives a positive culture while building a resilient brand.

ESG touches every aspect of the organization and, thus, exposes the organization to enterprise-wide risk. In-house counsel are essential to guiding the organization and Board through a more comprehensive approach to operations, opportunities, and risk analysis.

Recommendations

- **Be Proactive:** With competing demands from stakeholders, organizations need to take control of their narrative. This requires a review of the organization’s purpose and values, as well as consideration of the organization’s ability to integrate climate and social goals into overall corporate strategy through effective governance.

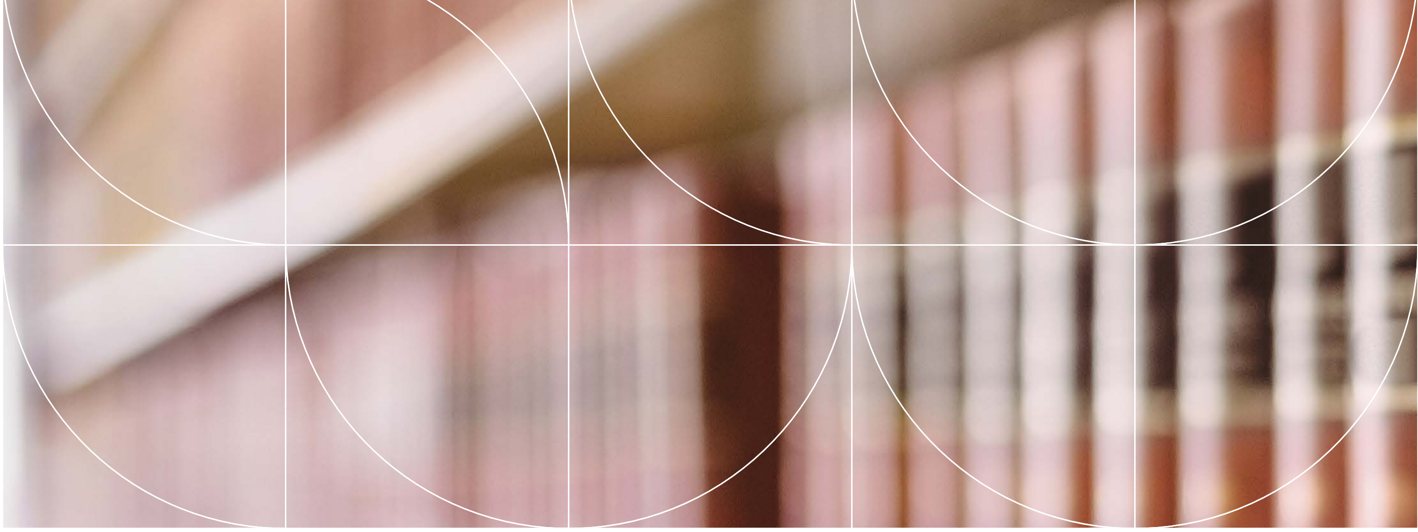
- **Know the “Why”:** When the organization makes a statement or commitment, know why the organization believes it can achieve that goal, or verify the statement’s accuracy and/or the pathway to achieving the goal. Confirm statements are keyed to the organization’s corporate strategy, purpose, and values, and have been vetted with the Board.

- **Challenge the “How”:** Evaluating ESG—whether as a financial proposition, impact driver, or competitive advantage—requires conversations across the organization, with an emphasis on the organization’s purpose and license to operate. Adopt procedures to ensure consistent implementation of ESG endeavors across operations.

- **Break Down the Siloes:** Operations can intentionally or unintentionally become siloed. If separate areas of the business have different or overlapping ESG initiatives, there is a potential for inconsistent strategies, statements, and commitments. Reducing inconsistencies reduces litigation risk.

- **Focus on Impact:** ESG is evolving and amorphous, and has experienced backlash in some arenas. When evaluating ESG strategy, concentrate on how it positively impacts people and the planet.

- **Seek Counsel When Needed:** ESG is complex and dynamic, and an organization should consider seeking assistance at any stage of its ESG journey, whether at policy design, implementation, or refinement, or to asses new rules and regulations.



Key Trends in Commercial Litigation

Antitrust

—By Brandon Bigelow

Businesses should anticipate continued aggressive antitrust enforcement by the US Department of Justice (DOJ) and Federal Trade Commission (FTC) in 2023.

Although the DOJ suffered high-profile trial losses last year in cases involving alleged wage-fixing and anticompetitive no-poach agreements in labor markets, federal criminal prosecution remains a potent threat. Meanwhile, after expressing doubt that existing merger guidelines are adequate to address perceived increases in market concentration, the DOJ and FTC appear more likely to try to block proposed transactions than consider proposed merger remedies. Finally, companies will want to be mindful of recently announced enforcement priorities from the DOJ and FTC.

DOJ Continues to Pursue Criminal Prosecutions of Alleged Collusion by Employers

The DOJ had warned in 2016 in its Antitrust Guidance for Human Resource Professionals that the antitrust laws apply to competition among firms to hire employees and that it would bring criminal charges "against naked wage-fixing or no-poaching agreements," i.e. agreements between employers that are separate from or not reasonably necessary to a larger legitimate collaboration between them. The DOJ followed through in December 2020, filing criminal charges against the former owner of a therapist staffing company based on an alleged scheme with competitors to fix the wages paid to physical therapists. But in 2022, juries dealt the DOJ successive trial losses, with acquittals entered in that case and another case based on a purported "no-hire" agreement between competitors.

One important step all companies can take to significantly reduce antitrust risk is to maintain a robust antitrust compliance policy, supported by regular programs and trainings.

Nevertheless, criminal prosecution based on "naked" no-poach and no-hire agreements remains a potent threat, even if only because of the time, expense, and complexity involved to defend. In October 2022, the DOJ announced that it had secured a guilty plea from a health care staffing company for entering into a criminal conspiracy with a competitor to allocate employee nurses and to fix the wages of those nurses. One important step all companies can take to significantly reduce antitrust risk is to maintain a robust antitrust compliance policy, supported by regular programs and trainings.

DOJ and FTC's Heightened Review of Proposed Mergers

The DOJ and FTC began 2022 with a joint announcement that the agencies would review merger guidelines in the face of evidence indicating "that many industries across the economy are becoming more concentrated and less competitive." In a January 2022 speech, Jonathan Kanter, the newly-appointed

head of the DOJ Antitrust Division, explained that "in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition." Companies should anticipate greater agency skepticism of proposed transactions during the Hart-Scott-Rodino Act review process.

Even post-merger, transactions may not escape agency review and action. For example, in June 2022, the FTC announced that it had filed an administrative complaint and forced the parties to unwind a portion of ARKO's acquisition of 60 retail fuel outlets from Corrigan Oil, a Midwestern company, in part because the parties included a noncompete provision in their agreement covering more than 190 locations operated by an ARKO subsidiary in Michigan and Ohio, many of which were "completely unrelated to the transaction," according to the FTC. Companies should assess the potential antitrust implications of post-merger noncompetes when adding those provisions to an M&A deal.

Recently Announced Enforcement Priorities Will Be An Emphasis In 2023

Finally, both the DOJ and FTC recently have announced new enforcement priorities that are likely to be an emphasis in the coming year. In October 2022, the DOJ announced that seven directors from five different companies had resigned from corporate board positions after the DOJ expressed concerns that their service on multiple boards could be a violation of Section 8 of the Clayton Act, which prohibits "interlocking directorates," i.e. the simultaneous service of directors and officers on the boards of competitors. Section 8 is subject to limited exceptions based on the size of those companies, and is enforceable only by injunctive relief. Nevertheless, companies would do well to assess whether directors and board members hold multiple positions that might fall under scrutiny.

In November 2022, the FTC adopted by a 3-1 vote a new policy statement about how the agency would enforce Section 5 of the FTC Act, which prohibits "unfair methods of competition" and authorizes the FTC to investigate and enjoin such violations of law. The FTC had previously rescinded a 2015 policy statement in which the agency declared that it would interpret Section 5 in a manner consistent with the Sherman Act "rule of reason" test, which asks whether a given restraint of trade is economically "reasonable." In its most recent policy statement, the FTC suggested that Congress, in enacting the FTC Act and creating |the Commission, intended the FTC to be an "expert" body entitled to substantial deference from courts and empowered to reach "incipient" anticompetitive conduct. The FTC is likely to use this broader concept of "unfair methods of competition" to attack conduct that would not otherwise be unlawful under the Sherman Act.

Key Trends in Commercial Litigation

Bankruptcy

— *By Bill Hanlon*

2023 will be a year of debt restructuring and Section 363 sales. The doors will close for overleveraged companies and open for well-capitalized investors.

Inflation is up. The Fed is raising interest rates and reducing bond repurchases. Russia's war against Ukraine and OPEC's production cuts will contribute to high energy prices and inflation. Debt defaults will increase in 2023. Lenders will either make concessions, sell their debt, or consider equity swaps. Debtors unable to restructure will utilize bankruptcy cases to sell their assets free and clear of their creditors' claims, or, less commonly, to effect debt for equity swaps.

Lenders will either make concessions, sell their debt, or consider equity swaps. Debtors unable to restructure will utilize bankruptcy cases to sell their assets free and clear of their creditors' claims, or, less commonly, to effect debt for equity swaps.

The Fed has committed to raising interest rates to quell inflation. Some commentors expect corrective action to continue until the Fed realizes it has overshot the mark. No one knows when that will be. International instability is present and unpredictable, in quantity and duration. Refinancing volume has been extraordinarily high in 2021 and has begun to falter in 2022 as rates have increased and competition to loan has decreased. There are signs of a slowing economy: layoffs in the tech industry, major retailers have reported excess inventories, which will lead to deflationary discounting, and the housing markets have cooled month over month throughout 2022.

Retail bankruptcies peaked in 2020 with names such as Neiman Marcus, Brooks Brothers, and J. Crew. Thanks to federal stimulus dollars, retail bankruptcies dropped precipitously in '21 and '22. But as inflation stresses budgets, reducing spending, and retailers find themselves with excess inventory, expect an increase in retail filings in 2023. Revlon just filed and other discretionary consumer goods retailers—furniture, electronics and personal care, for instance—should be watched, especially their reports on the holiday shopping season.

Real estate bankruptcies are the largest category of Chapter 11 cases in 2022, and the pressures that drive those cases have only increased. The office sector is vulnerable. Low interest rates have supported high prices for the last decade. According to Trepp, LLC, more than $17 billion of mortgage bonds backed by office buildings come due in 2023, up from $7 billion in 2022 and $4 billion in 2021. Remote work has reduced demand for office space, reducing cap rates. Interest rates in excess of cap rates will make refinancing more expensive, less available, and will cause more defaults.

Traditional tools for restructuring will be implemented when new money cannot be found. Amend and extend is the go-to strategy for many lenders and borrowers. Debt for equity swaps and divesting assets are alternatives. Private equity firms, with capital and the skill sets to revitalize ailing businesses, will find attractive investment opportunities as companies sell assets to satisfy creditors. Businesses that have adopted and are adhering to formal ESG standards will be favored, and may find targeted capital. Section 363 sales, both pre-arranged and freefall, will continue to be a vital procedural mechanism for selling assets and managing contracts.

Subchapter V of Title 11, which permits businesses with less than $7.5 million of debt to pay creditors over three to five years while equity remains with existing owners, will continue to be a strong option for smaller "mom & pop" operations. The key to this type of reorganization—allowing equity to retain its position, while dedicating the profits to partial repayment of creditors—is an attractive alternative to traditional Chapter 11 filings. According to a survey from Boston-based Alignable, a network of 7 million small business owners, approximately 37% were unable to pay their full rent in October 2022. An advantage of Subchapter V is the ability to spread lease cure costs over a 3-5 year plan, itself useful in a case or negotiating a resolution outside of court.

Cryptocurrency may become a fertile source of bankruptcies as cryptocurrency exchanges have begun to file for bankruptcy relief. Excessive leverage against declining valuations has begun to show who is skinny dipping as the tide goes out. Commingling of assets, unclear storage agreements, failure to follow proper corporate formalities, and even outright theft are just some of the issues that will affect these bankruptcies.

Landlords and lenders should expect rising default rates in 2023 driven by interest rate increases and softening demand for retail goods and office space. Investors will find opportunities in larger cases, and smaller debtors will seek relief under Subchapter V in order to spread cure costs and retain their equity in their businesses. The crypto winter shows signs of developing into a crypto blizzard.

Landlords and lenders should expect rising default rates in 2023 driven by interest rate increases and softening demand for retail goods and office space.

Court closures and COVID stimulus and moratoria emptied the "bankruptcy pipeline" in 2020 and 2021. Courts are now open, stimulus is gone, moratoria have been lifted, and interest rates are on the rise. 2023 will see the bankruptcy pipeline replenished, and an increasing number of cases filed in '23 and '24.

Key Trends in Commercial Litigation

Consumer Class Action Defense

— *By Kristine Argentine, Joe Orzano, and Aaron Belzer*

Creative Uses of Old Statutes: Privacy Class Actions Involving the Collection and Use of Data Expected to Continue in 2023.

Creative Uses of Old Statutes: Privacy Class Actions Involving the Collection and Use of Data Expected to Continue in 2023. Expect privacy class actions to take center stage in the consumer class action space in 2023. At their annual PrivacyCon in November 2022, the Federal Trade Commission (FTC) highlighted that their focus will remain on consumers' privacy related concerns, including consumer surveillance, data collection practices, and transparency behind the use of collected data.

Organizations should be proactive in evaluating their privacy policies and record keeping as it relates to consumer data and marketing.

This focus tracks with the wave of consumer class actions at the end of 2022 involving data analytic tools and cookie-consent interfaces. These lawsuits, filed pursuant to state wiretap statutes, state privacy statutes, and the Video Privacy Protection Act of 1988 (VPPA), allege that companies' use of technology and collection of consumer information through chat functions, website session reply software, and application of pixels and cookies on websites, violate consumers' privacy rights by failing to obtain consent and lacking transparency about what information is being collected and how it is being used.

For instance, cases involving the VPPA are being filed against companies, big and small, that utilizes pixels to enhance their marketing efforts and whose websites offer video content (pixels are snippets of code that are added to websites to gather data). The VPPA requires that companies obtain specific consent to release personal video viewing information to third parties or face a $2,500 per violation penalty, which when applied to "users" of a website over a 2 year period creates incredible exposure.

Moreover, if this theory is successful—transfer of personal data through a pixel without specific consent—these cases could expand well beyond the VPPA and be applied to state privacy laws that allow for a private right of action, such as he California Invasion of Privacy Act.

Organizations should be knowledgeable about the analytics and marketing tools they use and how they work, including how the software may capture user information and what is being done with that information. Businesses that collect and share information with third parties, even for business purposes, should be transparent with consumers, consider layered privacy policies, and obtain express consent where possible, especially where the company is monitoring, recording, and sharing the consumer's information or communications.

Continued Focus on False Advertising and Product Labeling Class Actions

Consumer fraud class actions will likely continue to inundate state and federal courts around the country. In particular, we expect to see continued focus from the plaintiffs' bar on class actions targeting alleged deceptive claims on product labeling. Environmental marketing claims, including, carbon, recyclable and other similar claims will likely be a focus of litigation in 2023. Alleged deceptive geographic origin claims will also likely be targets of lawsuits. These challenges can be based on alleged deceptive claims of foreign origin, as well as alleged deceptive claims that a product is made domestically or "made in the USA." Further, class actions targeting claims about the ingredients in food products, such as alleged claims about the amount or proportion of an ingredient in a product, will likely continue as well. Last, we expect to see more lawsuits targeting food products alleged to be advertised as healthy while containing ingredients alleged to not be healthy. It will be as important as ever to keep abreast of trends in this area and to thoroughly vet all labeling and advertising to avoid conveying any unintended deceptive messages to consumers. In addition, companies should develop a firm plan on how they will substantiate the claims they make about their products and keep strong records of the investigations or research done to support such claims.

California Outlook

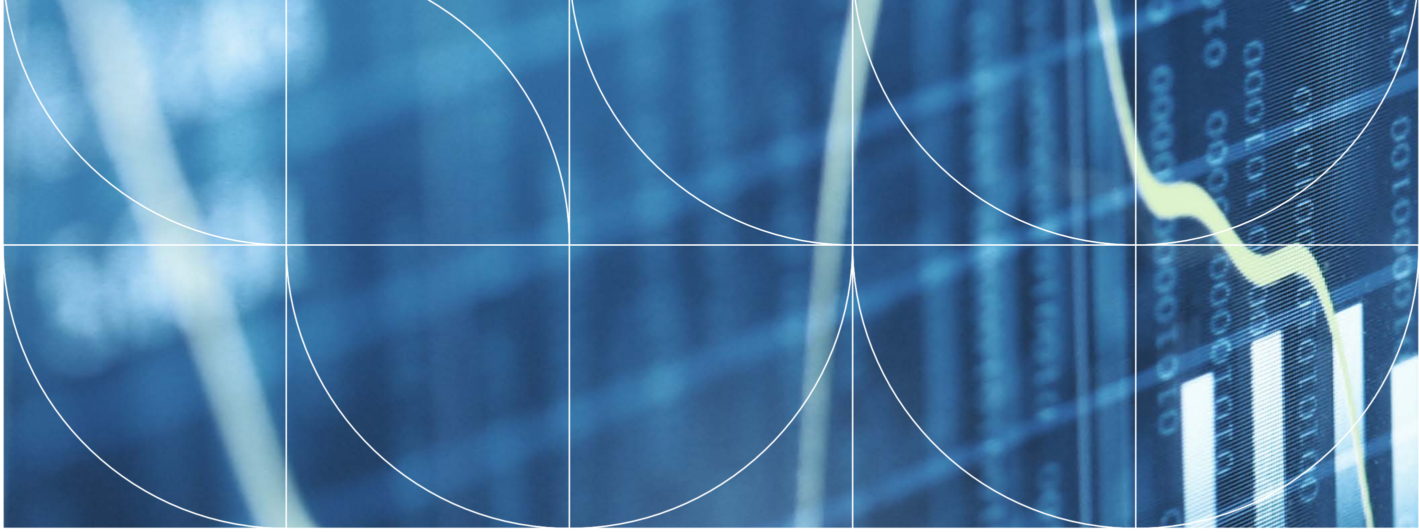
With its strict consumer protection laws and its judicial embrace of novel theories of liability, California will remain a favorable forum for consumer class action litigation. New or recently enacted laws, which strengthen existing consumer protections, will open new avenues for potential liability to creative plaintiffs and ensure that California remains a leader in consumer class actions.

Consumer plaintiffs, for example, will test the boundaries the newly enacted California Privacy Rights Act (CPRA). The CPRA, which goes into effect on January 1, 2023, expands the categories of personal information subject to privacy protections, and introduces new privacy principles on which plaintiffs may rely to establish class liability in data breach actions.

The latest amendments to California recurring subscription laws, which went into effect on July 1, 2022, will also ensure that violations of automatic renewal laws continue to be a focus of both private and class action litigation in California. Not only must businesses offering automatic renewal or continuous service offers continue to comply with current laws, they must also provide additional notices and new cancellation options, creating new traps for the unwary.

The rise of conscious consumerism will similarly ensure continued challenges to advertised environmental, social or governance policies. Recent amendments to California's Supervision of Trustees and Fundraisers for Charitable Purposes Act, which require businesses promoting donation-at-checkout offers to register as a "charitable fundraising platform," and/or to comply with existing charitable trustee laws, are likely to result in new or unique challenges to online and in-store charitable promotions.

In sum, we see 2023 as a busy year for consumer class actions in a variety of areas, but with a specific focus on privacy claims. Organizations should be proactive in evaluating their privacy policies and record keeping as it relates to consumer data and marketing.



Key Trends in Commercial Litigation

Consumer Financial Services Litigation

— By David Bizar

Consumer financial services businesses are subject to regulations and claims specific to their industries and products.

Consumer finance products include secured credit products, like mortgages and auto loans, and unsecured credit products, like student loans and credit cards. Regulators and enforcement authorities of consumer finance providers include the Consumer Financial Protection Bureau (CFPB), Federal Trade Commission (FTC), Office of the Comptroller of the Currency (OCC), United States Department of Justice (DOJ), State departments of banking and finance, and State attorney's general.

Government Rulemaking and Enforcement Litigation

Government rulemaking and enforcement litigation was front and center in 2022 and is expected to continue to increase in 2023. In late 2022, the CFPB began a rulemaking initiative for personal financial and data rights, to activate a "dormant authority" under Section 1033 of the Consumer Financial Protection Act to "accelerate" moving toward open banking and finance. The CFPB intends in 2023 to promulgate a new rule to obligate financial institutions to share consumer data upon request, claiming it will empower people to break up with banks that provide bad service and unleash competition. The CFPB wants lenders to get away from "black-box models that people can't make sense of" and go "back to real-world data," for the ostensible purpose of eliminating bias and reliance on credit scores and other proxies. The CFPB considers abuse and misuse of personal data to have become the norm. It is exploring rulemaking to "strictly limit" the sharing and use of personal data to "give the most comfort" to wary consumers. After launching "an initiative to scrutinize back-end junk fees that cost Americans billions of dollars," the CFPB issued guidance for "surprise overdraft fees" and "indiscriminately charging depositor fees to every person who deposits a check that bounces." The CFPB considers these practices to be unlawful under existing law, and engaged in an enforcement action against a bank "for charging surprise overdraft fees known as positive fees." In 2022, the CFPB also issued guidance to consumer credit reporting companies about their obligation to eliminate "junk data" from consumers' credit reports such as having defaulted on a loan before they were born. Perhaps most controversially, the CFPB also announced an initiative to improve customer service at larger financial institutions. The CFPB is further expected in 2023 to target the steering of college students to more expensive financial products.

The FTC is moving in lockstep. In late 2022 the FTC also announced that it is exploring a rule to crack down on "junk fees" and engaged in proposed rulemaking on "commercial surveillance and lax data security practices." The FTC also brought an enforcement action against a technology provider for alleged lax data security practices. In another 2022 enforcement action brought against an online marketplace business for alleged security failures that led to a data breach, the FTC sought a proposed order requiring the company to destroy "unnecessary data" and restricted the data that the company could collect.

State departments of banking and state attorney's general are also likely to remain actively engaged, as they have been historically, in investigating and enforcing claims of consumer protection law violations.

The volume of consumer financial services litigation in 2023 will be largely dependent on whether the US experiences a recession, on interest rates and housing prices, and particularly on the unemployment rate.

Civil Litigation and Class Actions

The volume of consumer financial services litigation in 2023 will be largely dependent on whether the US experiences a recession, on interest rates and housing prices, and particularly on the unemployment rate. The largest economic stimulus in US history that injected at least $5.2 trillion into the US economy ended in 2021. Interest rates started in 2022 around 3 percent and rose to over 6 percent, amounting to $1,000 more in monthly interest on a newly mortgaged mid-priced home. The Housing Market Index, which gauges the outlook for home sales, declined to 33 in November on a hundred-point scale, its lowest level in a decade except for the first month of the pandemic. Rising interest rates and inflation have been eating into consumers' savings. Unemployment is predicted to reach almost 4.5 percent in 2023 (a loss of 1.5 million jobs), up from 3.5 percent in September 2022. In 2023, the more consumers who cannot pay their bills and refinance their way out of their debt problems, the more consumers will try to litigate their way out of paying them.

FinTech

FinTech, new technology that seeks to improve and automate the delivery and use of financial products and services, is poised to continue to be a growth industry in 2023. While the CFPB has announced that it plans to be more open to encouraging competition by easing the high regulatory burdens especially on new and smaller market entrants, FinTech's are likely to continue to face such high burdens in 2023, as well as regulatory scrutiny from both federal and state regulatory, and increased susceptibility to civil lawsuits. New and novel lending products and services tend to suffer systemic attacks in their infancies, and non-bank lenders that lack a financial regulator may be more likely to miss or misapprehend the myriad, byzantine regulatory and compliance requirements that exist at the federal, state, and local levels.

Key Trends in Commercial Litigation

eDiscovery & Innovation

— By Jay Carle and Matthew Christoff

As we move into 2023, organizations are growing increasingly reliant on informal modes of communication.

The use of these platforms, along with the already heavy use of email, is resulting in the continued rise of data volumes that pose numerous organizational risks. Among those risks, we find rising costs for the maintenance and production of data, as well as potential discovery sanctions resulting from the accidental mishandling or spoliation of that data. Organizations and their counsel should evaluate and consider adoption of robust technological enhancements that will aid them in the management of the risks, costs, and production challenges associated with larger data pools. These cutting-edge technologies, including artificial intelligence (AI), data visualization, as well as sentiment and communication pattern analysis, can be leveraged by eDiscovery attorneys to identify issues in organizations' data management practices, to manage the review and production of electronically stored information (ESI), and to provide value by extracting key information for stronger arguments and case planning.

The use of informal and unsanctioned communication platforms will only increase exposure to risks for organizations that fail to properly identify and preserve such information for litigation. With an increased focus on privacy and anonymity, individuals are shifting the way they communicate with colleagues, whether through standard text messaging platforms, ephemeral messaging platforms like Telegram and Signal, collaboration platforms such as Slack, Teams, and Discord, and social media sites like Facebook and Twitter.

The collection and review of information from these sources is resulting in technical and logistical challenges for many employers from a legal, compliance, and cost perspective. However, the continual evolution of data management technologies and unified platforms is streamlining the eDiscovery process in order to effectively avoid risk and guide case strategy.

As organizations grapple with rising data volumes associated with communication platforms, early-stage eDiscovery issues abound.

As organizations grapple with rising data volumes associated with communication platforms, early-stage eDiscovery issues abound. Despite many organizations reverting to a primarily in-office presence for their workforce, Courts are routinely presented with cases involving mobile devices and messaging applications that contain key, unique evidence. For example, in *Schnatter v. 247 Group, LLC,* No. 3:20-cv-00003, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022), the court sanctioned the founder and former CEO for failing to preserve ESI available on a variety of mobile phones in his possession, custody, and control. Although the record identified numerous instances of failure to preserve text messages and mobile devices throughout the discovery

process, the court found that spoliation sanctions under Rule 37(e)(2) were inappropriate, as there was no finding of an "intent to deprive" the defendant of the use of that information. Instead, however, relying on Rule 37(e)(1) in its finding of prejudice, the court ordered monetary sanctions against the plaintiff.

In *Fast v. GoDaddy.com LLC,* 2022 WL 325708 (D. Ariz. 2022), in addition to a variety of curative sanctions, the court also imposed spoliation sanctions for plaintiff's intentional deletion of an undetermined number of posts to her Facebook accounts, the "unsending" of a key Facebook message, and the deletion of messages on Telegram, an ephemeral messaging platform. The destruction of ESI is becoming increasingly common with ephemeral messaging platforms, as is the case with recent updates to certain mobile devices, which now allow users to edit and unsend chat messages exchanged with other users running the updated software. Although such messages must be "unsent" or edited within a short time after sending, this additional avenue for potential evidence destruction raises concerns for attorneys and organizations into 2023.

In situations where text and chat communications are collected, the volume of these communications continues to skyrocket and many organizations are grappling with methods of efficiently identifying critical messages. Fortunately, many review platforms now structure and analyze complex sets of data in ways that bring this data to life. For example, these platforms string data points together to present counsel with insight into the behavior and sentiments of actors within a case, including identifying extreme expressions of emotions like anger or surprise and providing discovery counsel with a deeper understanding of the attitudes, thoughts, or opinions that are embedded in the ESI. These capabilities expand the current effectiveness of case narratives and play an important role in the preparation of all aspects of litigation.

In addition, the recent focus on leveraging eDiscovery to develop a strong narrative has resulted in the demand for the seamless integration of trial preparation technologies within existing case review platforms. This allows legal teams to remain lean and build comprehensive case positions seamlessly as the relevant documents are identified, rather than waiting until the conclusion of a review or the close of discovery. These secure, cloud-based platforms and their features, such as Everlaw's Storybuilder, are providing counsel with expansive toolkits to develop better stories, organize timelines and address potential gaps, digitize depositions, and pinpoint key portions of testimonies for use at trial. The use of these features will likely be demanded by case teams, and may even be the expected standard in the near future.

Along with the increase in sources of ESI from various communication platforms, the continued development, adoption, and utilization of AI tools and other innovative techniques will undoubtedly continue to surge in 2023. Organizations should evaluate and consider adopting these technologies to streamline the identification of potentially privileged or sensitive information and increasing automation of the document review processes to quickly identify key relevant information. At the same time, counsel and organizations should continue to diligently follow trends in technology that could impact existing preservation and collection workflows. As we move into 2023, businesses should be aware of these trends and look to outside counsel who understand and invest in such technologies and who leverage eDiscovery and Information Governance attorneys to stay ahead of the curve.

Key Trends in Commercial Litigation

Franchise & Distribution

— *By John Skelton, Alison Eggers, and Michael Coffman*

Franchisors, especially quick serve restaurants (QSR) and owner-operator models, continue to face significant worker-related challenges.

California's recent FAST Recovery Act established minimum standards on wages, working hours, and other working conditions for QSRs. The NLRB seems poised to reinstate more expansive Joint Employer standard and disgruntled franchisees continue to bring misclassification class action claims. A voter referendum effort underway to repeal the FAST Recovery Act and two recent cases offer important guidance and protection for franchisors.

Patel vs. 7-Eleven Recognizes the Legitimacy of Franchise Relationships

In *Patel v. 7-Eleven, Inc.,* 489 Mass. 356 (Mass. 2022) (*Patel*), the Massachusetts Supreme Judicial Court answered a certified question from the First Circuit Court of Appeals concerning the application to franchise relationships of the Massachusetts version of the "ABC" independent contractor test. Under the "ABC" test, a worker is presumed to be an employee, unless the putative employer can establish the work: (A) is done without the direction and control of the purported employer; (B) performed outside the employer's usual course of business; and (C) is done by someone customarily engaged in an independently established trade or business. While *Patel* held the FTC Franchise Rule's recognition of franchisor "control" did not preempt Prong A, it still offers important protection for franchisors.

First, *Patel* dismissed concerns that applying an ABC test effectively classifies all franchisees as employees. While simply labeling it a "franchise" is not enough, *Patel* confirms the validity of legitimate franchise relationships and holds that any ABC test analysis "must be done on a case-by-case basis" (*Id.* at 411 n.17). Second, and more importantly, *Patel* held that before a court analyzes any of the three ABC prongs, it must first determine whether the franchisee claiming to be a misclassified employee actually "perform[s] any service" for the franchisor (Id. at 411). This should mean that in true franchise relationships where franchisees operate independent businesses, the three-prong ABC test does not apply.

> While franchisees have the burden of proof, franchisors should be prepared to show why their franchisees operate independent businesses.

While franchisees have the burden of proof, franchisors should be prepared to show why their franchisees operate independent businesses. Franchisors should review their presale disclosures, franchise agreements, and operations manuals and policies to ensure nothing could be construed as franchisees "providing services" to the franchisor. Franchisors should also have a robust acknowledgment confirming that the franchisee will operate an independent business, the success of which depends on, among other things, the franchisee's individual entrepreneurial ability. Also, the franchise agreement should confirm the franchisee's responsibility not only to manage and control all labor relations but the franchisee's customer relationships, pricing, and profits, all hallmarks of an independent business.

The Supreme Court Upholds Arbitration of Individual PAGA Claims

In *Viking River Cruises, Inc. v. Moriana,* 142 S.Ct. 1906 (2022) (*Viking River*), the United States Supreme Court held the Federal Arbitration Act (FAA) preempts portions of California precedent that interpreted California's Private Attorneys General Act (PAGA) as invalidating contractual waivers of the right to assert representative claims. A former Viking River employee brought wage and hour claims on behalf of herself and all other aggrieved employees under the PAGA. Viking River moved to compel arbitration of the individual PAGA claim and to dismiss the remaining representative PAGA claims based on the combination of a class action waiver and severability clause in the agreement. A California court held that PAGA claims cannot be divided into individual (arbitrable) claims and representative (non-arbitrable) claims. The Supreme Court disagreed. Not only could the claims be divided, but once divided, individual PAGA claims may be compelled to arbitration (Id. at 1924-25). Also, because "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims," the "correct course" was to dismiss the remaining claims for lack of statutory standing (*Id.* at 1925).

Viking River highlights the importance of waiver and severability clauses. Franchisors looking to compel arbitration, especially in California, should carefully evaluate (and update if necessary) their existing arbitration agreements. It may be short lived, however. As Justice Sotomayor noted "the California Legislature is free to modify the scope of statutory standing under PAGA." See id. at 1925-26. California's Supreme Court may weigh in as well. In July 2022, it granted review in *Adolph v. Uber Techs., Inc.*, Case No. G059860 (Cal. Ct. App.). While originally focused on who decides misclassification, after *Viking River,* Adolph asked the California Supreme Court to address the PAGA standing issue. The case is fully briefed, but not yet scheduled for argument.

NLRB Proposes a Revised Joint Employer Rule

In September 2022, the NLRB proposed essentially to reinstate its *"Browning-Ferris"* standard for determining joint-employer status under the National Labor Relations Act. Under the 2015 *"Browning-Ferris"* decision a franchisor could be deemed the joint employer of its franchisee's employees not only where it directly or immediately exercises control over the franchisee's workforce, but where the control is indirect, or even simply reserved but not ever actually exercised. In 2020, the Board promulgated a final rule largely rejecting the *Browning-Ferris* standard and required a company (i.e., a franchisor) to exercise "substantial direct and immediate control" over the essential terms and conditions of another company's (i.e., its franchisee's) employees. Unfortunately, the new proposed rule largely reestablishes the broad *Browning-Ferris* standard. While the comment period closed in November 2022, a final rule is not expected much earlier than mid-2023.

What Should Franchisors do?

Absent sweeping federal action, misclassification, class actions and joint employer claims will remain a concern. Franchisors should do a strategic review of their franchise agreement and related documents to make clear franchisees operate independent business and that the franchisor does not have control over essential employment terms and conditions. Especially those operating in California, make sure there is a *Viking River* compliant arbitration agreement.

A Risky World May See More Securities Litigation

— *By Greg Markel, Daphne Morduchowitz, Dallin Wilson, and Matthew Catalano*

We see a mixed outlook for securities litigation in 2023.

There is a substantial risk of weak equity markets in the first half of 2023, and of an aggressive policy agenda from the US Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) continuing, which would likely lead to an increase in traditional stock-drop and event-driven securities cases and more SEC enforcement and FINRA disciplinary actions. Another driver of securities litigation in 2023 may be ESG, with both pro- and anti-ESG investors filing suits and lobbying for legislation. However, the weak market likely will also mean a small number of IPOs and mergers, with some decrease in securities litigation.

Market Drops, Instability of Cryptocurrency Market Prices, and Continued Cyber-Attacks May Also Cause Additional Securities Litigation

When the price of a stock drops significantly, it is commonplace for investor plaintiffs to look for reasons to justify a suit under Section 10(b) of the Securities Exchange Act of 1934, alleging that the drop was due to fraudulent material misstatements or omissions. The market is likely vulnerable to a further decline in 2023 if inflation rises, a recession hurts the economy, or the Federal Reserve continues to increase interest rates.

Adverse events to which many companies will be susceptible in 2023 will likely lead to an uptick in securities litigation that arises when an adverse event is followed by a drop in stock price, usually under the theory that the risk of such an event occurring was misstated or omitted. For example, public companies that issue or invest in cryptocurrency will suffer losses in the near-term if the cryptocurrency market continues to lose stability, and they can anticipate resulting 10(b) actions should their price drop.

As another example, cyber-attacks—to which most companies in the modern world are vulnerable—severely disrupt business operations and can result in regulatory fines, but also can lead to securities litigation alleging that the risk of an attack was inadequately disclosed. We expect such litigation to continue in 2023, notwithstanding the general lack of success these cases have had, particularly if the SEC enacts proposed rules requiring mandatory cybersecurity policies and procedures and disclosures of cyber-attacks, leading to mandatory disclosures which could then be scrutinized by plaintiff's counsel following an incident.

The SEC Is Likely to Continue to Pursue its Ambitious Agenda of Securities Regulations and Enforcement Actions

In 2022, the SEC took an aggressive approach to enforcement actions and rulemaking, ending the fiscal year with the largest ever total awards in enforcement actions in the SEC's history ($6.439 billion), and introducing more proposed rulemaking initiatives in the first eight months of Fiscal Year 2022 (26 proposed rulemaking initiatives) than in any of the preceding five fiscal years.

We expect this aggressive approach to continue in 2023 with additional rule-making on a number of topics which could include climate change, cryptocurrency, and board diversity. An increase in SEC enforcement actions could result in an increase in tag-along private securities class actions in 2023. Expected rule-making will likely result in mandatory disclosures on such topics as ESG and cybersecurity, which could also result in increased securities litigation.

FINRA Exams Foreshadow Growth in FINRA Customer Arbitrations and Enforcement Actions

Although often overshadowed by the SEC, FINRA operates the largest arbitration forum in the United States. In addition to administering customer arbitrations, FINRA investigates potential securities violations and brings formal disciplinary actions against firms and individuals. In 2022, FINRA published a report on its examination and risk monitoring program, which highlighted various topic areas for 2022, including the SEC's Regulation Best Interest (Reg BI), mobile applications, and special purpose acquisition companies (SPACs). These select topics may give insight into FINRA's enforcement priorities going into 2023.

Reg BI establishes a "best interest" standard of conduct calling for broker-dealers not to put their financial or other interests ahead of the interests of a retail customer. FINRA's exam findings found that many broker-dealers had failed to modify existing policies to reflect Reg BI's requirements and failed to comply with their obligations by making recommendations that were not in the best interest of some customers. The findings also included broker-dealers recommending transactions that were inappropriate for certain customers. Reg BI is still in its relative infancy and customer arbitrations and FINRA enforcement actions related to Reg BI are likely to increase in 2023 as broker-dealers continue to adapt to these new regulations.

FINRA Rule 2210 regulates communications with the public and the FINRA exam revealed that many companies violated FINRA rules through their communications via mobile apps, including providing incorrect or misleading account balances, sending false margin call warnings, and distributing false and misleading promotions through social media and "push" notifications on mobile apps that omitted material information. As retail investors' use of mobile applications continues to grow, enforcement actions for improper communications will likely grow as well.

The increased use of SPACs to bring companies public also received significant FINRA attention in 2022. While the use of SPACs has declined significantly, FINRA's focus and enhanced interest in these activities suggest further future legal actions.

> Corporate boards and directors may find themselves caught in tug of war between not only pro- and anti-ESG state regulations, but also pro- and anti-ESG shareholders.

The Rise of Anti-ESG Legislation May Foreshadow Forthcoming Anti-ESG Shareholder Actions

Corporate boards and directors may find themselves caught in tug of war between not only pro- and anti-ESG state regulations, but also pro- and anti-ESG shareholders. Over the past year, nearly 20 states have proposed or adopted legislation limiting the ability, or outright banning, state governments from doing business with entities that have boycotted certain industries based on ESG criteria, including industries such as fossil fuels, mining, and firearms. The underpinning for much of this legislation is that states should not do business with those that "discriminate against" companies with certain policies. Some states have also utilized antitrust laws against so-called "boycotters."

Simultaneously, other states, and federal agencies, have adopted pro-ESG legislation and regulations that encourage corporations and other fiduciaries to consider ESG factors in making investment decisions. For example, the Department of Labor recently clarified that ESG factors can be considered by ERISA-governed plan fiduciaries where they are material to an investment, and the SEC has proposed rules aimed at mandating ESG disclosures, including climate-related disclosures, changes to prevent misleading fund names, and public disclosure of human capital management (HCM) factors.

Unsurprisingly, some shareholders and their lawyers have followed up by bringing derivative actions alleging securities fraud and breach of fiduciary duty claim based on corporations' ESG disclosures. For example, suits have been filed challenging the accuracy of disclosures related to corporate board diversity and climate change policies. While those suits have been largely unsuccessful, given the increased attention on ESG issues, the number of suits challenging ESG disclosures are unlikely to decline any time soon. Likewise, given the recent rise in anti-ESG legislation, it is foreseeable that shareholder derivative suits will follow, challenging corporations' decisions to place ESG concerns over maximizing financial returns.

Faced with a "damned if you do, damned if you don't" decision, corporations and their board members will need to walk a fine line to avoid derivative lawsuits filed by both pro- and anti-ESG shareholders.

Market Slowdowns May Lead to a Downward Trend in Post-IPO and Securities Litigation Filings, But Follow-On Merger "Deal Tax" Litigation Will Continue

Business transactions, including public offerings and mergers, are presently in a slowdown, driven by, among other things, unpredictable markets, increased interest rates, high inflation, and declines in share value. This is especially true in the technology sector, an industry which historically was active in IPOs, mergers, and, more recently, SPAC related transactions. De-SPAC transactions are the acquisition of a target company by an SPAC which went public with the purpose of making such an acquisition. This deal slowdown will most likely continue in 2023, and with it will be a continued decrease in filings of securities litigations related to such transactions, including post-IPO stock price drop cases brought under Section 11 of the Securities Act of 1933.

Perhaps most notably, there have been few de-SPAC transactions. If an SPAC cannot find a de-SPAC transaction within a set time, typically two years, then investors are able to redeem their shares at the original price, typically $10 per share. With more SPACs fizzling out with investors redeeming shares from company funds rather than using funds to acquire a target, the opportunity for investors to file securities litigation has been sparse. This trend may well continue in 2023 as the business world appears to have largely become disenchanted with the SPAC model.

In addition, likely fewer mergers and acquisitions in an unstable market will lead to fewer merger lawsuits under Section 14. That said, the mergers which do occur will continue to be bedeviled by meritless demand letters or lawsuits demanding relatively immaterial supplemental disclosures to the merger to justify attorneys' fees. These cases continue to be filed in federal and other state courts, often as individual cases rather than class actions. Absent court or Congressional reforms, these deal taxes or mootness fee cases, which some plaintiffs' firms largely see as "easy money," will likely not go away.

Key Trends in Commercial Litigation

Health Care Litigation

— *By Jesse Coleman and Drew del Junco*

As the nation emerges from the global pandemic, the health care industry is once again facing extraordinary changes that have the potential to fundamentally transform how the industry operates.

These new developments include sweeping changes to health privacy laws in several states, ongoing implementation of the federal No Surprises Act, and heightened litigation risk of enforcement actions to combat COVID-19 fraud, waste, and abuse—including increased legal challenges to the expansion of telehealth. Although the worst days of the pandemic are seemingly behind us, these developments have led to a surge of legal issues which have the potential to remake the health care landscape in 2023 and beyond.

Health Privacy and Data Security

US businesses need to assess their progress in preparing for sweeping changes to the California Consumer Privacy Act (CCPA) that become effective January 1, 2023, and compliance with four new state consumer privacy laws—in Colorado, Connecticut, Utah and Virginia—that become effective throughout 2023 (collectively, "2023 Privacy Laws"). The HR and business-to-business communications data rules under California's privacy law will also become effective on January 1, 2023, after several delays.

In addition to making privacy program modifications to reflect the changes required by the 2023 Privacy Laws, businesses should take note of recent enforcement actions. Taking another example from the Golden State, a recent settlement involving website analytics and advertising cookies included a $1.2 million civil penalty. Many websites and mobile apps will need to substantially change the way they address cookies and other tracking technologies to avoid similar penalties.

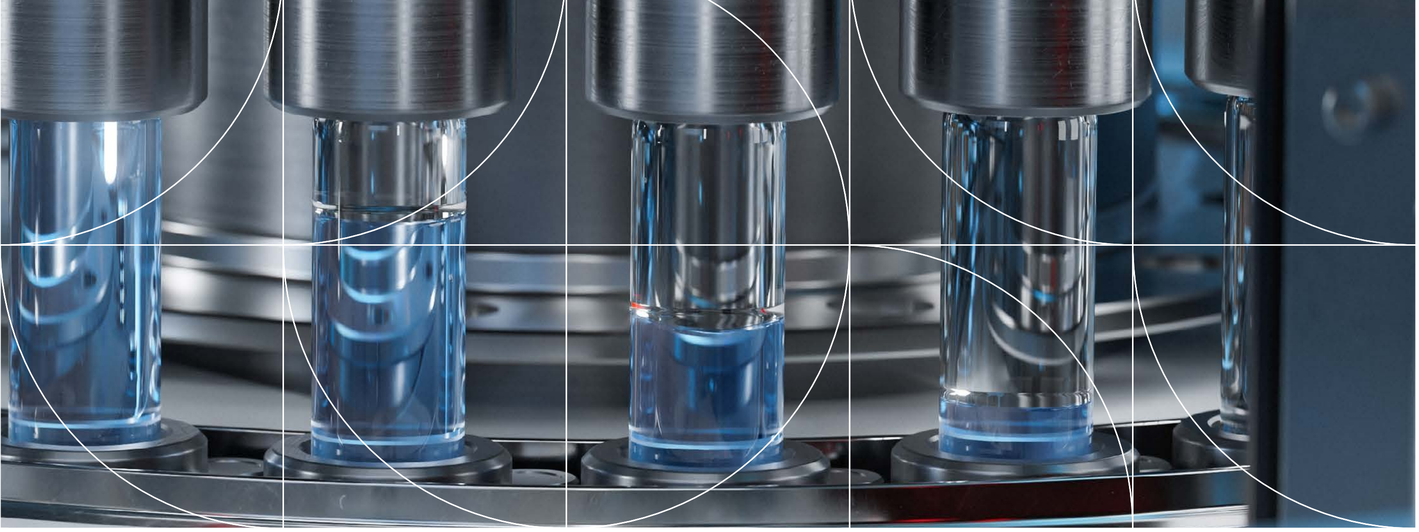
In 2023, we are likely to see increased enforcement actions by the Office of Civil Rights for breaches of the HIPAA Privacy Rule, as well as continued efforts by state legislatures to enact laws to supplement HIPAA protections and protect health information not already covered by HIPAA.

For more on Seyfarth's services in this area, see Seyfarth's contribution to the American Health Law Association's docuseries on Health Law Disruption: Cybersecurity & Emerging Data Risks.

The No Surprises Act

The federal No Surprises Act (NSA) went into effect on January 1, 2022, with the goal of protecting patients from surprise medical bills. Under this law, certain out-of-network (OON) providers cannot bill patients for an amount greater than the patient's in-network cost-sharing obligations and instead must negotiate with the patient's insurer to collect payment.

While the NSA has reportedly averted surprise bills for 9 million Americans in the first nine months of 2022, the law has resulted in an unanticipated greater reliance on the independent dispute resolution (IDR) process to resolve OON payment disputes, which has led to numerous lawsuits challenging the rules governing the IDR process. In particular, providers have taken issue with the rule's requirement that IDR entities presume that the qualifying payment amount (QPA)—the insurer or plan's median in-network rate—is the appropriate out-of-network payment



amount unless a party submits credible information that clearly demonstrates that this amount is materially different from the appropriate ONN rate.

The final rule, published in August 2022, sought to address these concerns by eliminating the rebuttable presumption relating to the QPA. Despite these changes, however, providers remain concerned that the US Department of Health and Human Services (HHS) has over-weighted the QPA and HHS continues to be encouraged to make further changes. In 2023, plans and providers will have to continue to adapt to the developing IDR process, likely leading to increased litigation.

A key aspect of the government's focus on combating pandemic-related fraud concerns the expanding telehealth sector.

Government Enforcement Action Surrounding COVID-19 Fraud, with an Emphasis on Telehealth

The government has made fighting health care-related COVID-19 fraud a clear priority. In April, the Department of Justice announced criminal charges against 21 defendants for their alleged participation in health care-related fraud schemes resulting in over $149 million in COVID-19-related false billings to pandemic assistance programs.

A key aspect of the government's focus on combating pandemic-related fraud concerns the expanding telehealth sector. Prior to the pandemic, most insurers restricted telemedicine solely to rural communities that could not otherwise access health care. Once the pandemic hit, however, regulators quickly removed obstacles to the adoption of telehealth, and insurers opened the door to this treatment in order to increase social distancing and limit the spread of COVID-19. As a result, telemedicine has swiftly grown from a $3 billion industry to a $250 billion business in the last two years.

This rapid expansion has led to a flood of new legal challenges. Foremost among them is fraud, waste, and abuse. In late 2021, HHS announced an initiative targeting providers who order medically unnecessary services resulting from purported telemedicine visits. Although telefraud schemes existed before the pandemic, the increased familiarity and prevalence of telehealth made possible by COVID-19 make it likely that these schemes will continue. While telehealth presents tremendous opportunity, it also presents risk, and we expect that government investigations of telefraud will continue apace in 2023, including qui tam actions.

Key Trends in Commercial Litigation

Insurance

— *By Tom Locke and Rebecca Woods*

Some of the key insurance issues that companies will face in 2023 are generally rising (but moderating) insurance premiums, coverage issues regarding construction claims, and false advertising lawsuits.

2023 Insurance Premiums

The property and casualty insurance market continues to experience historic volatility, fueled by catastrophic losses, inflation, supply-chain disruptions, and social inflation (i.e., legislative and litigation developments that effect insurers' legal liabilities and claims costs). In general, premiums will increase in 2023, but somewhat less than in 2022, with several notable exceptions. Properties near wildfire and hurricane risk will see significant property insurance premium increases. Indeed, Florida's legislature is planning to make additional material adjustments to Florida law to address the difficult property insurance situation, driven in substantial part by catastrophic losses that are predicted to continue, and a very favorable climate for plaintiffs' lawyers. Auto insurance will increase thanks to prolific distracted driving and increasing cost of replacement parts. Premiums for professional liability insurance for architects and engineers will continue to increase substantially and, in some instances, that insurance may be very difficult to obtain. Professional liability in other areas and Directors & Officers (D&O) premiums should moderate. Umbrella/excess insurers have been hammered by social inflation, particularly nuclear verdicts and class action claims, and the reinsurance market has tightened significantly, substantially driving up umbrella/excess premiums. Worker's compensation premiums are a bright spot, decreasing thanks to greater focus on safer work environments and remote work.

Although Representations and Warranties Insurance (RWI) underwriting activity has decreased in 2022, we expect to see about the same percentage of claims made under RWI policies (2021 was a massive deal year, and RWI claims tend to mature one to three years after the transaction closes). Most RWI policies contain mandatory arbitration provisions, so disputes and their resolutions often are confidential. As a consequence, the common law arguably is underdeveloped regarding some of the policy terms. As with all insurance coverage, RWI applicants should consider carefully policy terms and conditions during the underwriting process.

In the past four years, the US has incurred a several-fold increase in ransomware and related cyber events.

As in 2022, cyber and data-breach insurance will continue to present underwriting challenges. In the past four years, the US has incurred a several-fold increase in ransomware and related cyber events. As a result, cyber insurance premiums are expected to increase, although perhaps not at the rate seen in 2022. As occurred last year, insurers may reduce their cyber insurance risk by adding exclusions, increasing self-insured retentions, decreasing sublimits

for certain losses, reducing the time period for business interruption and other time element loss, and controlling the increased expense of complex cyber claims by limiting who policyholders can retain as ransomware experts, accountants and attorneys.

The Contractual Liability Exclusion as Applied to Construction Claims

There were many construction insurance coverage developments that took place in 2022; key among them is the contractual liability exclusion. The exclusion typically precludes coverage for "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract. However, by its terms, the exclusion does not apply to liability that the insured would have had in the absence of the contract.

Some insurers continue to argue—and a minority of courts accept—that the exclusion precludes coverage for liability arising from breach of contract causes of action. Those courts often focus on broad indemnification language in the contracts at issue. But general liability policies provide coverage for "property damage" whether the liability arises from tort or contract. The vast majority of courts agree that the contractual liability exclusion precludes coverage for liability arising from an indemnity agreement only if the insured would not have had liability in the absence of the contract. If the breach of contract—not the indemnification language—gives rise to insured's liability, then coverage exists. To be clear, the exclusion does not preclude coverage when the insured is allegedly liable based on a breach of contract cause of action.

Insurance Coverage for False Advertising Claims

2022 saw an increasing number of frequently specious lawsuits alleging that products were not sufficiently "natural" or "organic" or did not contain enough of a particular ingredient. Insurance coverage for these "false" advertising claims probably is not available under general liability policies because allegedly false representations are not included within the enumerated offenses of the advertising injury coverage part. With respect to advertising, enumerated offenses typically include publication of material that: disparages a person's or organization's goods, products or services; uses another's advertising idea in the insured's advertisement; or infringes upon another's copyright, trade dress or slogan in the insured's advertisement Misrepresentation of an insured's own products does not clearly fall within any of these offenses. However, policy language varies so, as always, policyholders should read carefully their policies for coverage.

Coverage for "false" advertising claims may exist under D&O policies. Specifically, the allegedly false representation may be a covered "wrongful act." D&O policies generally define a "wrongful act" as an actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty. Insurers may argue that coverage is precluded by the unfair trade practices exclusion, particularly if the "false" advertising lawsuit includes a causes of action for violating a state consumer protection statute. However, where a D&O policy does not define "unfair trade practices," some courts recently have rejected that argument. Courts have reasoned that the insurers' argument is inconsistent with the definition of "wrongful act," which includes, in particular, "an actual or alleged error, misstatement, misleading statement."

Key Trends in Commercial Litigation

International Dispute Resolution

— *By Sara Beiro Farabow*

A statistical comparison of filing trends at the leading international arbitral institutions over the past few years provides valuable guidance as we look toward 2023.

Since 1958, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has promoted confidence in international arbitration by providing enforcement of arbitral awards in more than 150 countries subject to some narrow defenses specified in the Convention.

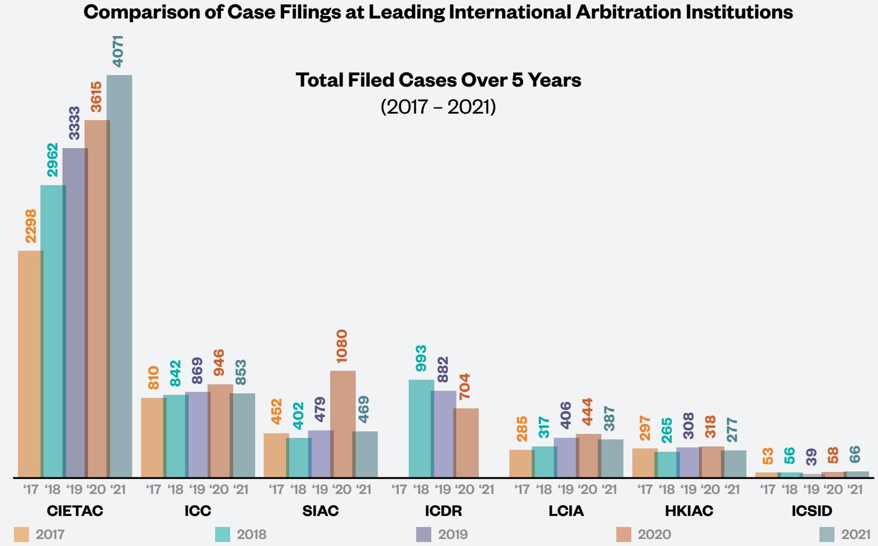
In the past years, the seven leading international arbitration institutions reported steady increases in new case filings until the impact of the COVID pandemic slowed filings in 2021.

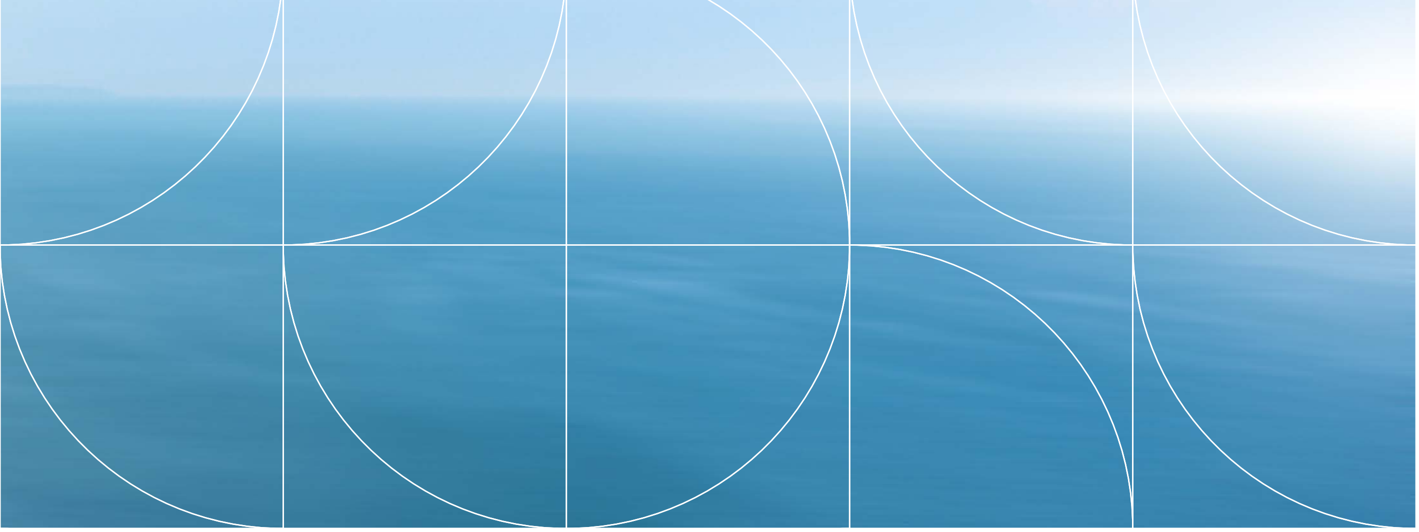
As shown in the chart below, the China International Economic and Trade Arbitration Commission (CIETAC) had been enjoying record years due to China's efforts to attract foreign investment. Loosening up its laws to promote arbitration in lieu of court litigation, in particular, apparently has promoted greater confidence among non-Chinese firms engaging in business in China about the enforceability of arbitral awards.

For many years, the International Chamber of Arbitration (ICC) has been the second busiest arbitral institution based on caseload with the International Court of Arbitration in Paris.

Similarly, new arbitration filings were largely increasing at the SIAC (Singapore International Arbitration Centre), ICDR (International Centre for Dispute Resolution), LCIA (London Court of International Arbitration), HKIAC (Hong Kong International Arbitration Centre, and ICSID (International Centre for Settlement of Investment Disputes, one of the five organizations of the World Bank Group).

Comparison of Case Filings at Leading International Arbitration Institutions





This second chart below compares the number of filings in 2019 before the pandemic against total case filings in 2021. Interestingly, this reveals a relatively modest dip in new arbitration cases for the major institutions—with the significant exception of CIETAC.

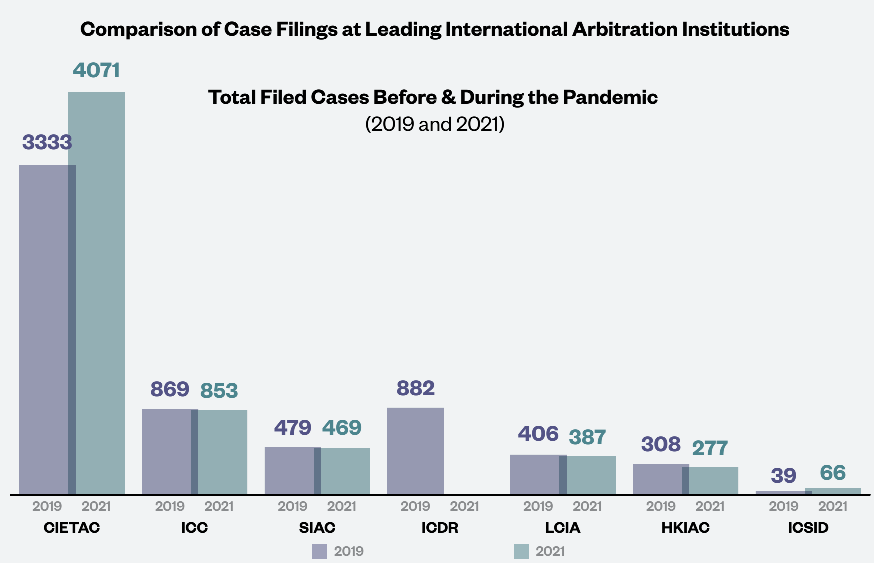
In 2021, the Secretariat of the ICC International Court of Arbitration registered 853 new cases in total according to its preliminary statistical report released in January 2022. (As of the date of Seyfarth's year in review, the ICC has not yet published final statistics through 31 December 2021.) That's almost 10% fewer new case filings than the previous year, however, the average value of those claims more than tripled. Those new cases involved 2,206 parties from 143 countries. The countries in the top-five ranking for filings were the United States, Brazil, Spain, the United Arab Emirates and Mexico, followed by filings from parties from France, Germany, PR China and Hong Kong SAR, India and Italy.

A report from the American Arbitration Association's (AAA) showed 9,196 new cases filed in 2021, combining the domestic and foreign party cases administered by the ICDR. Broken down into seven sectors, an arbitration dispute arising out of the energy industry tops the list with the largest claim amount of $498 million. The largest construction dispute involved a $150 million claim. In 2021, the total claims in AAA arbitrations was $15 billion.

How many of those AAA arbitrations filed in the US involved foreign parties? We turn to the separate statistics on "international" cases involving at least one non-US party filed at the International Centre for Dispute Resolution®. As the international division of AAA, the ICDR® was established in 1996 and has grown steadily since. According to its website, the ICDR "serves parties from over 100 countries with multilingual staff experienced in international dispute resolution proceedings, and a roster of over 725 arbitrators and mediators." To date, the AAA's website is only reporting ICDR® filings for 2018, 2019 and 2020 (not 2021 and 2017).

In 2020, the ICDR reported there were 704 international cases filed involving parties from about 100 countries, for a total of $6.1 billion in claims. The largest was $1.1 billion.

This also shows the top non-US nationalities by country. Outside of the US, you might guess which neighboring country provided the highest number of parties to cases administered by the ICDR—Canada, with 120 parties. The UK had 60 parties, followed by China with 51 parties. France had 18. Segregated by region, the US had 734 parties, Europe had 239 parties and at the bottom is Africa with only 18 parties.



Key Trends in Commercial Litigation

Privacy

— *By Jason Priebe*

We are sticking to our guns and, once again, predicting that there will not be a federal privacy law similar to the General Data Protection Regulation (GDPR) or California Consumer Privacy Act (CCPA) in 2023, particularly now that the 2022 midterms have come and gone.

That said, we expect a fair amount of movement in 2023 from states looking to expand consumer privacy rights, either by adopting a California-style privacy law, or an Illinois-style biometric privacy law. Those new state laws will bring additional litigation, likely only to the extent that states allow for private rights of action by consumers. Otherwise, enforcement is likely going to come in the form of Attorney General or other regulatory body action.

State Privacy Laws

The California Privacy Rights Act (CPRA) amendments to the CCPA are on track to take effect on January 1, 2023. The most significant changes from a compliance standpoint are that both the so-called “employee carve out” and the “B2B exemption” will end. This means that the CCPA will no longer exempt employees, job applicants, and contractors or individuals whose information is shared in a business capacity from the consumer rights granted in the Act.

Our prediction, based on how things went with the original CCPA, is that the CPPA’s enforcement will begin in the Summer of 2023.

There has, however, been a significant lag in the finalization of enforcement regulations by the California Privacy Protection Agency (CPPA). As of December 1, the regulations were still in proposed draft form, creating the expectation that actual enforcement is likely to be delayed. However, nobody knows exactly how long the enforcement delay will last. Our prediction, based on how things went with the original CCPA, is that the CPPA’s enforcement will begin in the Summer of 2023. Organizations should nonetheless be moving ahead with compliance initiatives for the CPRA. Those new elements include: expanded consumer rights; updated notice requirements for online and worker interactions; and enhanced service provider and contractor tracking and management in both the business and HR functions.

As California residents and organizations begin to test the waters with regards to exercising their (potential) privacy rights, organizations should expect an uptick in requests. There will be media reports about the CPRA after the first of the year, which we expect will lead to a temporary surge of consumer awareness. In order to adequately respond to the potential influx of requests, it will be important for organizations to ensure that their data subject rights (DSR) workflows are updated to take the CPRA’s amendments into account.

Other state laws that are similar to the CCPA will also go into effect in 2023. Virginia's Consumer Data Privacy Act (CDPA) is notable because of the additional service provider requirements. Below is a brief outlook of upcoming state privacy laws and their effective dates:

State Privacy Laws	Effective Date
CPRA Amendments to CCPA	January 1, 2023
Colorado Privacy Act	July 1, 2023
Connecticut Act Concerning Personal Data Privacy and Monitoring	July 1, 2023
Utah Consumer Privacy Act	December 31, 2023
Virginia Consumer Data Protection Act (VCDPA)	January 1, 2023

Enhanced privacy legislation is pending or proposed in approximately 20 states. The increase in differing state privacy laws adds complexity to the manner in which organizations deal with divergent requirements. As a result, and in order to simplify internal response to DSRs, we expect organizations to begin providing more "blanket" privacy rights to individuals, regardless of their state of residence.

In addition to the GDPR and other international privacy law contractual requirements imposed for cross-border business and operational activities, we expect to see more companies with a nationwide presence work to adopt some form of a universal data protection addendum (DPA) that complies with both the CCPA and VCDPA.

Biometric Privacy Laws

Similar to the trend of states proposing and enacting CCPA-style privacy laws, there are over 20 states with proposed biometric-related legislation. It is, however, important to distinguish between states that have full-blown biometric-specific laws, like Illinois (Illinois Biometric Privacy Act) and Texas (Texas Capture or Use of Biometric Identifier), and those that have incorporated biometric protection nto broader privacy or security-related legislation. Most proposed laws fall into this latter category, however, some states including Kentucky, Maryland, Massachusetts, New Jersey, New York, South Carolina, and West Virginia have proposed comprehensive standalone biometric privacy laws.

Eventually, and as more states enact biometric-specific legislation, it may be necessary for organizations to begin to provide blanket biometric rights notifications and disclosures to consumers and employees, including a uniform consent procedure, in order to minimize the organizations' time and resources in staying compliant with a separate patchwork of slightly differing biometric privacy laws.

Resultant Litigation

Among the passed state privacy laws, only California allows for a private right of action if a consumer's personal information is breached. Similarly, Illinois is currently the only state that has adopted a broad private right of action for Biometric Information Privacy Act (BIPA) violations. Several more conservative state legislatures have taken note of the large wave of litigation that continues to stem from BIPA's private right of action, and they have made a concerted effort not to include individual rights of action in their currently pending biometric privacy bills. With that said, regulatory enforcement in states like Texas is still a concern. Overall, the public generally favors increased enforcement and protection of what they view to be personal identifiable information, behavioral and biometric details. Much like the "name and shame" campaigns that began ten years ago among the data protection authorities in Europe, state Attorneys General and consumer protection agencies have begun to realize the advantage of press releases and other publication of privacy enforcement among voting constituents.

Key Trends in Commercial Litigation

Real Estate Litigation

— By Elizabeth Schrero and Mark Johnson

The landscape continues to change and storm clouds appear ready to burst.

Demands for the use of space continues to evolve and 2023 appears likely to be the year when some development projects and properties which benefitted from temporary reprieves or financial assistance will be pushed over the edge as lenders refuse further deferrals and high interest rates or changed valuations preclude refinancing options.

Commercial Landlord-Tenant Disputes

The COVID-19 litigation wave that dominated the commercial landlord space the last two and a half years has largely wound down. There are a few lingering lawsuits winding themselves through the courts, but it is unlikely that the established caselaw developed from this era, which tended to skew in favor of landlords, will change significantly.

In 2023, we expect to return to the more traditional commercial landlord-tenant disputes, particularly those arising from delay in complying with deadlines for alteration work and opening for business under lease agreements, as well as guaranty litigation. There will also be increasing pressure in the commercial office space arena in 2023. Companies that shifted to remote work environments during the pandemic are unlikely to eliminate those policies entirely because workers have made resoundingly clear their preference for remote working. Landlords hoping for a return to pre-pandemic in-person work levels to militate against tenants seeking to reduce overall size leased footprints will be disappointed. This trend is expected to result in more tenant defaults in circumstances where the parties are unable to agree on appropriate lease modifications and tenants opt to simply not pay rent, which will trigger landlords' mitigation obligations should they pursue evictions.

An emerging trend that will continue in 2023 is the movement by national discount, low-cost retailers and also retailers in the arts and craft industries into more rural areas to cater to an underserved market-segment, driven by a demand for less expensive groceries and goods in these areas. This trend serves as fertile ground for a variety of commercial and retail landlord-tenant disputes, including tenant-defaults where stores fail to perform to forecasted levels as well as delay-claims in the build-out leased-premises or construction of new buildings altogether.

Real Estate Finance Disputes, Foreclosures, Bankruptcy and Distress Litigation and Purchase and Sale Agreement Disputes

Changes in borrowers' and occupants' uses of properties are resulting in changes in lenders' valuations of properties which, in turn, may trigger remedies and disputes under loan agreements.

We have already seen an increase in mortgage foreclosures and UCC foreclosures on affected office and hotel properties as well as guaranty litigation and hotel and retail franchise disputes. This likely will lead to increased work-out related disputes and bankruptcy filings. For example, tenants' failure to renew office leases and tenant defaults will impact the building owners' ability to pay their mortgages and lead to defaults, while forbearance and refinancing options appear to be less available due to interest rate increases and decreases in valuation.

Supply chain and labor shortages have delayed development projects. We have already seen disputes based upon contract purchasers' claims that delay in delivery or material changes in value and conditions entitle them to terminate purchase agreements.

Climate Change

The impact of climate-related occurrences and government mandates to reduce energy consumption, shift to sustainable energy, and modify vulnerable properties will continue in 2023. Government mandates will also impact valuations and risk assessment decisions by lenders and will lead to distress-related disputes. Shareholder disputes may arise from inadequate disclosure and reporting on compliance and risk, as well as modification requirements and related corporate governance decisions. Disputes also will likely arise as to allocation of responsibility to modify properties to prevent damage from climate-related occurrences and regarding access and rebuilding obligations under commercial lease agreements and loan documents. Above all, owners and landlords will need to be proactive implementing beneficial physical-improvements to buildings for commercial and office space to mitigate against the impact of climate change trends.

The impact of climate-related occurrences and government mandates to reduce energy consumption, shift to sustainable energy, and modify vulnerable properties will continue in 2023.

Landlords Will Continue to Be Stuck Between a Rock and a Hard Place as States Legalize Marijuana

The legalization of marijuana, particularly for medical purposes, will continue to place landlords in difficult positions across the country. The tension is exemplified by the National Apartment Association's standard addendum regarding marijuana use, which, in states that permit medical marijuana, includes language that observes the state of residence permits the use of medical marijuana, but adds that "under federal law, specifically the Controlled Substances Act (CSA), marijuana is still categorized as a Schedule 2 substance." The addendum notes that because the US Department of Housing and Urban development is controlled by the federal government, the use of marijuana, even for medical uses, is not protected under fair housing laws, and there is no required accommodation for medical marijuana use. While true, many states have statutes designed to protect tenants from discrimination based on medical status, some of which specifically mention the use of medical marijuana. This direct conflict in laws places landlords, particularly those who access federal funds (such as Section 8 housing vouchers) in an impossible situation if claims arise, either from other tenants—or example, those seeking to enforce no-smoking policies—or from applicants who use medical marijuana but who are barred from obtaining federally assisted housing because of their use of a controlled substance.

A corollary of the foregoing is whether federal bankruptcy courts will shift from their traditional view of refusing to allow re-organization protection for businesses with connections to or investments in the cannabis industry. Traditionally, because marijuana-related businesses operate in violation of the CSA, bankruptcy courts have ruled that reorganization plans funded by or dependent upon funds that are proceeds of CSA violations are deemed to have been made in bad faith, which disqualifies the plans from being capable of approval. Recently, some courts have rejected such a strict-construction analysis, suggesting that a reorganization plan need not necessarily be found to have been made in bad faith despite the fact that the debtor is related to businesses with connections to or investments in the cannabis industry. The availability of such relief is of paramount interest to commercial landlords, as it could directly impact potential rent payments and landlord's remedies for defaulting tenants engaged in the marijuana industry seeking bankruptcy reorganization protection. We expect this emerging issue to continue to develop through further judicial decisions in the coming year.

Disputes Arising from Use of Cutting-Edge Technology and Bitcoin for Real Estate Transactions

Evolving new technology, tools and platforms such as Blockchain, are rapidly changing real estate transactions and recording of interests in real property. Claims will emerge from the risks and pitfalls associated with "smart contracts" and new technologies. In addition, most Blockchain transactions are irreversible. A "smart contract" can be accepted by a click on a phone, so disputes relating to whether there was a "meeting of the minds" as well as the opportunities for "mistake" may lead to litigation. Claims may also arise as a result of real property transfers where a token representing the real property interest is transferred to the wrong party. Registration of Blockchain real property interests with a digital registry differs from registration with traditional government clerks or registries. These differences necessarily impact third parties' notice of encumbrances on real property interests and also may result in disputes.

Although Blockchain companies boast that digital transactions are even safer from fraud than traditional transactions, risks are posed by the security limitations of the supporting technology itself as well as the inevitable potential for human error and intentional foul play. The dangers posed by these risks create exposure for resulting damage as well as claims of inadequate disclosure of potential risks.

Conclusion: Continued Disruption and Increased Litigation

Continuing disruption in the financial and real estate markets and the impact of climate change and related mandates coupled with the proliferation of new technologies for conducting real estate transactions will result in increased real estate litigation in 2023.

Key Trends in Commercial Litigation

Trade Secrets, Computer Fraud & Non-Competes

— By Michael Wexler, Robert Milligan, and Kate Perrelli

Over the last three years, the move to remote and hybrid work environments have significantly changed how companies conduct business.

Over the last three years, the move to remote and hybrid work environments has significantly changed how companies conduct business. With these changes, companies have had to adapt to ensure they are using restrictive covenant agreements appropriately and that they are adequately protecting their trade secrets. Courts and lawmakers have also needed to respond to this altered landscape in endeavoring to address the protection of trade secrets and enforcement of non-compete agreements. Importantly, the Federal Trade Commission (FTC) recently announced a radical proposal to ban non-competes with employees and other workers, which if finalized will drastically change the landscape of restrictive covenants in the United States.

The FTC Recently Announced a Proposed Rule That Seeks to Ban Non-Competes With Employees and Workers

At the federal level, while we saw some bipartisan attempts to address a uniform approach to non-compete covenants in Congress, the FTC fired a shot across the bow to end the use of employee non-competes with a proposed rule introduced on January 5, 2023. Federal agencies are being empowered with enforcement responsibilities aimed at curtailing the use of non-compete agreements that are perceived to limit workforce mobility and wage enhancement. For example:

- On March 7, 2022, the US Department of the Treasury issued a report entitled "The State of Labor Competition," (the "Report") making clear once again that the regulation of anti-competitive practices, including curtailing the use of non-competition covenants, continues to be a core component of President Biden's agenda.
- In June 2022, the Federal Trade Commission set its sights squarely on non-compete agreements in merger transactions, making them ripe for further scrutiny.
- The Department of Justice pursued criminal indictments against employers in the health care and aerospace engineering industries who have allegedly violated antitrust laws by conspiring to refrain from soliciting or hiring each other's workers with no alleged legitimate business justification.
- In November 2022, the FTC announced a new policy setting forth its view of its enforcement authority under Section 5 of the FTC Act, stating that it will no longer focus on the "rule of reason" framework used in Sherman and Clayton Act enforcement to determine liability. Instead, the FTC indicated that it will broaden its enforcement of Section 5 to focus "on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions."

However, on January 5, 2023, the FTC released a proposed rule that would ban all non-compete agreements between employers and "workers" (broadly defined to include employees, independent contractors, interns, and others). The proposed rule would bar both prospective and existing non-compete agreements. The scope of restrictive covenants that may be banned is unclear because non-compete agreements are defined in the proposed rule to include any agreements which have "the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer." Thus, non-disclosure, non-solicitation and other covenants designed to protect employers from unfair competition may also be prohibited by the FTC's proposed rule depending upon how they are drafted and interpreted. The proposed rule is very broad and does not currently include exclusions, such as for management, executives, or those provided access to trade secrets. The proposed rule impacts not just typical employee non-compete agreements but also non-compete agreements that are made in connection with the sale of business entities for which owners, members or partners own less than 25%. While there is an exception for substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause defined as an owner, member, or partner holding at least a 25 percent ownership interest in a business entity, the 25% interest threshold is arbitrary and ignores the business realities, complexity, and individuality of such transactions. Moreover, it applies retroactively to such transactions so parties to the transaction may not get the benefit of their bargain. The FTC has solicited public comment on the proposed rule before it issues a final rule. The deadline to submit comments is March 20, 2023, and we encourage all affected employers to submit comments.

With the Biden Administration's continuing objective of fostering worker mobility and wage enhancement and apart from the FTC's proposed rule, we anticipate additional efforts will be made at the federal level in 2023 to curb the use of non-compete and no-hire agreements, particularly with respect to lower-wage workers, as the FTC has recently entered into consent decrees with companies who allegedly used unlawful non-competes.

New State Legislation is Creating More and More Challenging Hurdles for the Enforcement of Non-Competes

We have continued to see a push for a narrowing of the use of non-competition agreements with employees and scrutiny of restrictive covenants by state legislators and regulators. Restrictive covenant laws at the state level are changing at a rapid rate, with several bills introduced or pending this year alone.

Some of the trends we are seeing in state legislation for non-competes and other restrictive covenants include penalties for violation on non-compete limitations, wage thresholds, notice requirements, and prohibitions on foreign venue / choice-of-law provisions.

Employers should be particularly mindful of fee-shifting provisions (and other financial and potential criminal penalties) and choice-of-law / forum selection requirements included in some of the state revisions to non-compete statutes. Employers that utilize restrictive covenant agreements and intend to permanently shift to more flexible work locations for employees should seek competent counsel regarding appropriate strategies, including any ongoing or contemplated use of forum selection and/or choice-of-law provisions.

Multistate employers in particular should stay abreast of changes in the law to make sure their agreements remain compliant and enforceable across multijurisdictional and remote work forces.

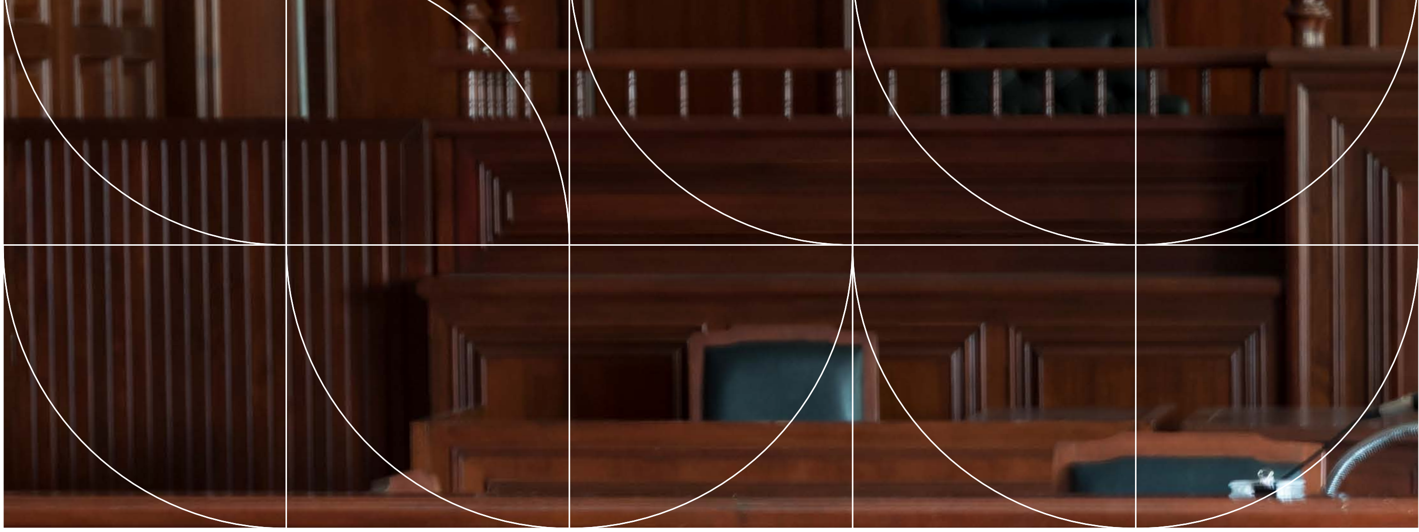
Because of the ever evolving law in this area, especially as it relates to a host of new state statutes relating to the enforceability of restrictive covenants, it is important for companies to frequently assess the restrictive covenant agreements used, especially if members of its remote workforce live and work in some of the states that are passing new legislation.

Recent Events and Case Law Emphasize That Identifying and Protecting Trade Secrets is a Vital Component for a Company's Success and Critical in Obtaining Damages

While companies can protect certain of their assets and confidential information through the use of restrictive covenants and traditional methods of IP protection like patents, trademarks, and copyrights, there is still a treasure trove of other important company information that may qualify as a trade secret under state and federal law. Recent government and media attention on trade secret theft by competitors and foreign actors serve as important reminders of the enormous risk of trade secrets being stolen and the importance of protecting them. Trade secret theft, which has increased in recent years due to the advent of remote workers, technological advances and fierce competition from abroad costs American companies hundreds of billions of dollars per year, and even the largest and most sophisticated companies are victims. Companies must be proactive to protect trade secrets and understand what is a trade secret and how it was developed.

For example, recent large verdicts in trade secret matters illustrate the role trade secrets have in an industry and/or the importance to a company. Judges and juries have shown a greater intolerance for the taking and use of company property and an understanding of the value trade secrets have to a business. New court opinions recognize cost avoidance such that damages in a trade secret case are not limited to typical lost profits or the value a trade secret has but also focus on the advantages a bad actor obtains from taking and/or using trade secrets to decrease development costs and shorten time to market. Consequently, being able to identify trade secrets improperly taken or used along with the development process, the costs put into the process and the benefit obtained by the bad actor are becoming more commonplace for sophisticated businesses and attorneys repressing those interests.

Companies will need to put into place effective trade secret protection plans because 2023 will bring further remote working, competition from abroad, and more aggressive damage modeling with an increase in trade secret misappropriation. Combined with the ever changing landscape regarding the use of non-competes, we anticipate an increased reliance on trade secret protections and misappropriation claims in litigation.



Key Trends in Commercial Litigation

Trial Outlook

— *By Christopher Robertson and Jessica Berk*

Virtual Proceedings Appear Here to Stay.

Virtual Proceedings Appear Here to Stay. Now nearly three years after COVID-19 first disrupted courts in a manner no one could have anticipated, litigators and judges are beginning to settle into a new post-COVID trial landscape. It is becoming increasingly clear that some remote proceedings—including trials—are here to stay. On the other hand, in November 2022, United States District Judge George O'Toole declared in connection with one of the Varsity Blues trials: "My hope is to conduct the trial as we did pre-COVID, all normal habits." He then added that "My own sense, as I am working my way through the world these days, is people are pretty comfortable with each other."

As these comments demonstrate, the extent of reliance upon virtual hearings and trials varies from jurisdiction to jurisdiction, and in some instances, among different judges within each jurisdiction though there appears to be a consensus that it is not only appropriate but also most efficient to conduct at least some proceedings, such as status and scheduling conferences, completely remotely. Civil trials are also more likely than criminal trials to continue via Zoom or in a hybrid format. Recent legislation in California requires courts to allow remote participation in certain proceedings.

According to multiple surveys conducted over the past year, virtual proceedings are the preference of both attorneys and judges for a majority of matters.

Likewise, many court standing orders implemented during COVID to provide for remote access to the court have been adopted on a more permanent basis.

According to multiple surveys conducted over the past year, virtual proceedings are the preference of both attorneys and judges for a majority of matters. A New York survey concluded that judges and attorneys are increasingly more comfortable conducting a myriad of proceedings remotely. Likewise, a voluntary Massachusetts survey of attorneys revealed that the majority of participants favored making permanent the virtual procedures relied upon during the pandemic. This included strong support for continued electronic signatures of attorneys and judges, service by email, remote administration of oaths, and remote depositions. Among the advantages cited for virtual proceedings were increased convenience for attorneys and decreased costs and time commitments for both attorneys and clients.

These surveys echo an earlier nationwide study by Thomson Reuters where nearly 60% of the responding judges indicated that they planned to continue holding virtual civil hearings in the future, 45% said they will hold remote criminal proceedings. Just 7% of judges responded that they did not plan to hold any remote hearings in the future.

Although most practitioners and judges still express some hesitancy with regard to conducting trials virtually, the pandemic has mandated that hundreds of both jury and bench trials be conducted virtually during the past two years. Notwithstanding the undercurrent of concern, virtual trials provide one consistent benefit: jurors, witnesses, attorneys, and clients save the time and expense of transportation to the court. Witnesses and jurors often

miss less work and encounter fewer childcare challenges than they would for in-person trials. Virtual trials also require fewer staff and less space in the courthouse. Recent reports from Arizona and Texas suggest better jury attendance rates for virtual trials as well. Virtual trials do not come without new challenges, however. Attorneys need to dedicate additional time to technological considerations, such as the presentation of exhibits, and courtroom staff must ensure that all jurors have access to a computer and reliable internet service. Numerous trial court surveys revealed instances where Internet access problems complicated or delayed evidentiary proceedings. In certain cases, jurors were excused for not having access. While some have suggested these issues were confined to more rural areas, there were examples of such disruptions n urban areas as well.

Attorneys Must Address Special Considerations Associated with Virtual Trials

Given the likelihood that at least some hearings and trials will continue to be conducted virtually, litigators must be aware of different considerations and employ new strategies. Not surprisingly, research concerning impression formation indicates that likeability and perceived intelligence decrease in an online setting and it is thus more difficult to establish rapport with the jury. Special attention should therefore be given to lighting, framing, and camera angles in order to establish a connection with jurors. For example, studies have concluded that people are considered more trustworthy when filmed at eye level. In the Arizona survey, while a majority of attorneys favored virtual proceedings, they expressed a lingering concern over the inability to develop a relationship with jurors over the course of a trial. Similar concerns were expressed in surveys in other state and federal courts.

While trial attorneys seem primarily concerned with credibility judgments in virtual trials, psychological research has found that people are at least as good at detecting deception in an online or audio-only environment as they are in face-to-face communication. Those findings were echoed in an interview by Judge Emily Miskel, vice chair of the Texas Supreme Court's Remote Proceedings Task Force:

You know jurors tend to be a little older and what they said was, in the courtroom, they can't see the witness very well. They're sitting far away from the witness. The witness is usually facing sideways to the jury box. And so, during the witness' testimony, they didn't get as good of a look at the witness' face, facial expressions and things like that. So the jurors, when they compared it to an in-person experience thought they could better judge the witness' credibility on Zoom because they could see their whole face and all of their facial expressions very clearly. I know that lawyers going into it were afraid that the opposite would be the case that how can you judge a witness' credibility on Zoom.

Notwithstanding the above, one concern often expressed by judges and attorneys in various surveys was the ability to maintain jurors' attention for long stretches of time. All agreed that trial lawyers must make efforts to be engaging and creative in holding jurors' attention, and also accommodate egular breaks, while keeping a consistent schedule during each trial day. Anecdotal evidence suggests that more people show up to be selected for a remote jury than show up in person, meaning there are more potential jurors to choose from with varying demands on their time both during and after the trial day. As one Washington state judge noted: "I've had jurors log in on their phones from their break room and from the coffee shop where they worked." He noted the benefit in terms of the overall mix of the jury pool: "There is no question in my mind that the economic diversity, the social diversity, the ethnic diversity, the racial diversity is significantly higher." We expect these discussions and debates to continue into 2023, with an increasing body of proceedings for proponents and detractors to draw from in framing the future of how trials will be conducted.

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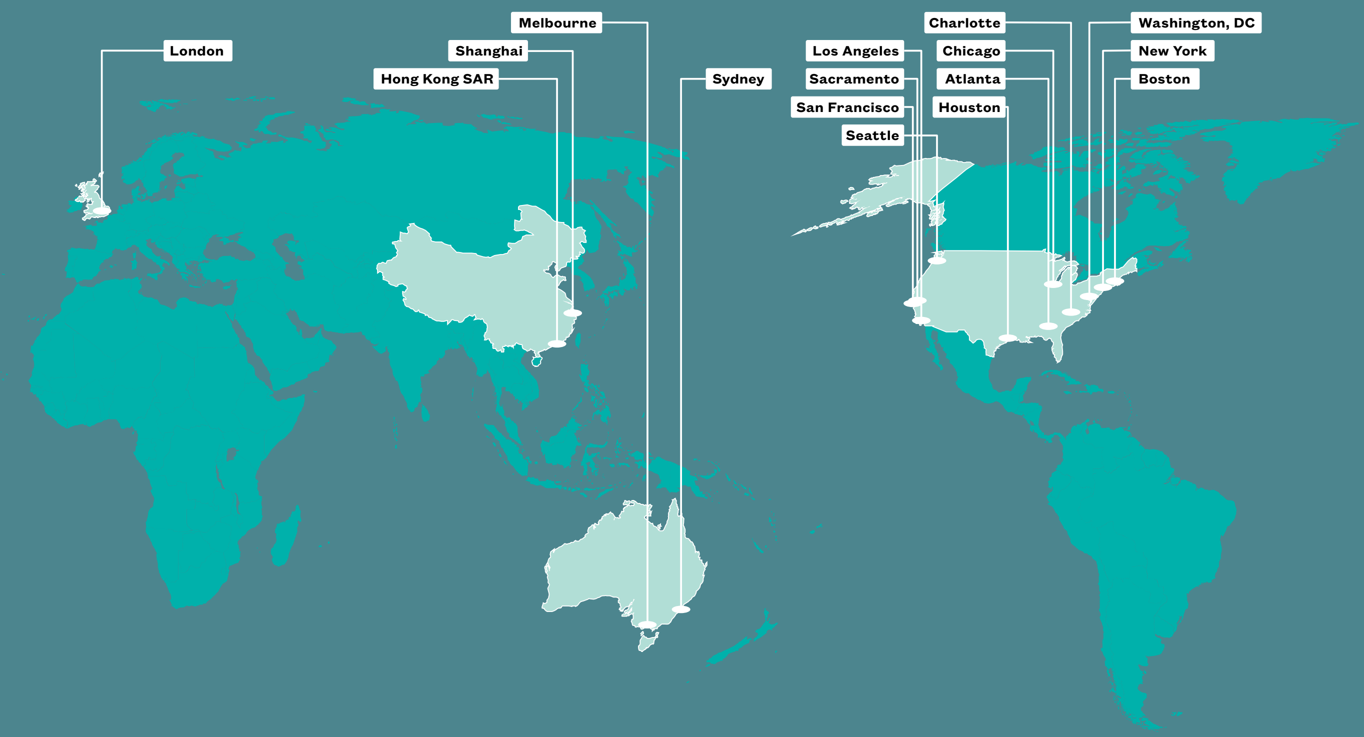

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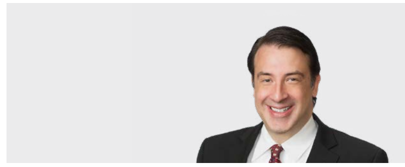

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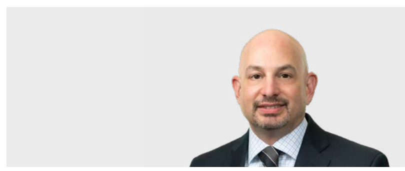

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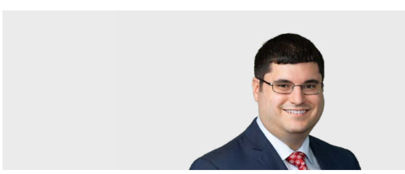

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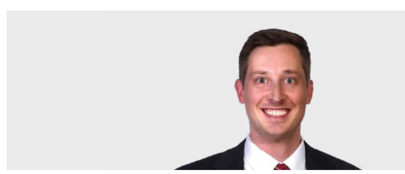

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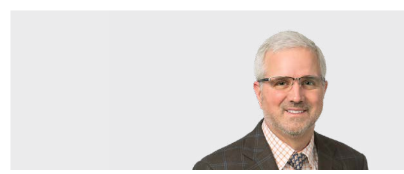

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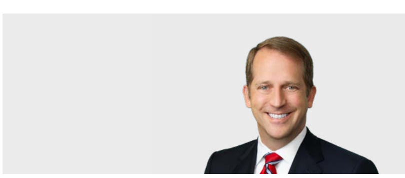

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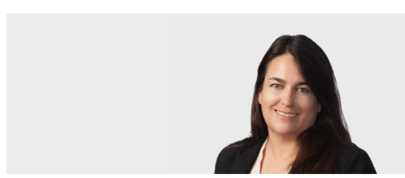

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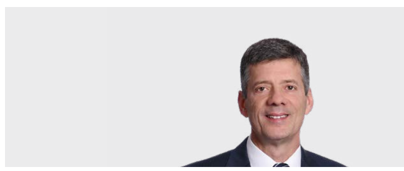

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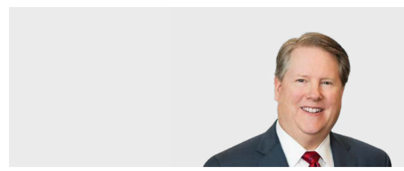

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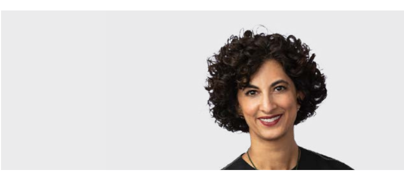

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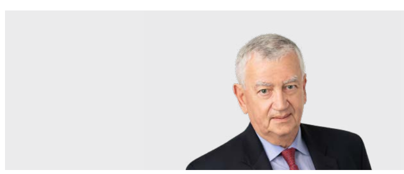

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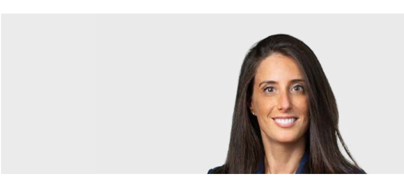

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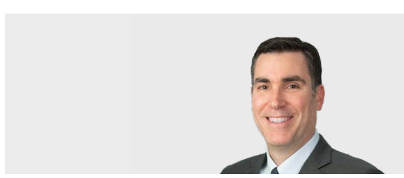

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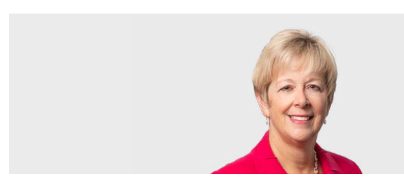

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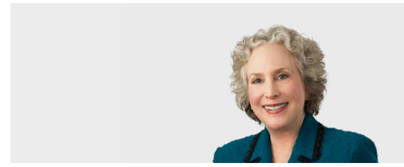

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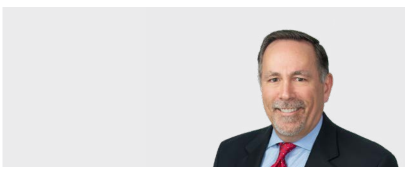

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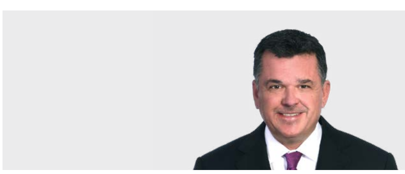

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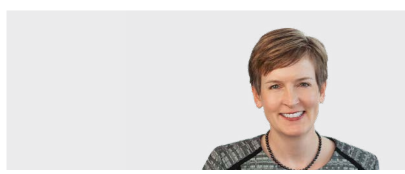

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