Commercial Litigation Outlook

2025 Edition

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Introduction

—By Shawn Wood and Rebecca Woods

Last year's Commercial Litigation Outlook was dominated by the promise and peril that AI poses to myriad industries. No doubt, the evolution of AI in the last year has been significant, and it is still a material consideration.

In this year's Outlook, as we reach our fifth year of publication, we address anticipated developments in commercial litigation against the backdrop of the sea changes expected on multiple fronts with the second Trump Administration.

Many of our articles this year are characterized by the whiplash in agency governance we anticipate (and are now seeing) between the Biden and Trump administrations. But predictions about what's coming are cautious because the Trump administration is ushering in a new era of populism, which scrambles the old calculus of change from a Democratic to a Republican administration.

In the antitrust space, we anticipate the FTC's antitrust vigor will be tamed with a more business-friendly approach to antitrust enforcement overall, but the Trump Administration is unlikely to be as deferential to business interests as past Republican administrations. A wild card is whether the DOJ's aggressive position on algorithmic pricing will be tempered by more business-friendly regulators when there is an active and well-publicized housing crisis. Similarly, how the 2024 amended HIPAA Privacy and Security Rules will fare is up for grabs, given the tension between the administration's likely alignment with those who would limit access to reproductive care and its aversion to regulatory involvement in business matters.

Our authors confess to a hazy economic outlook given the juxtaposition of a business-friendly administration and its unorthodox approach to some economic issues (e.g., tariffs). Bankruptcy filings are going to increase as COVID stimulus runs off, consumer debt rises, and interest rates remain high. Meanwhile, consumer protection litigation such as Fair Credit Reporting Act claims remain the darlings of the plaintiffs' bar, but the volume of these filings may decrease with the recent abolition of *Chevron* deference and higher bars imposed by courts for proof of actual injury.

Meanwhile, the regulatory muscle of the CFPB will surely be clipped by the current administration, although uncertainty remains whether some agency authority (CFPB or otherwise) will still pursue some populist-friendly, consumer-protection issues, like robocalls, junk/hidden fees, Made-in-USA labeling, and other issues that affect many Americans. Perhaps the greatest whiplash will be in regulation of cryptocurrency. President Trump courted cryptocurrency exchanges in his campaign, and we expect the SEC to pare back its aggressive enforcement in that area, perhaps concluding that cryptocurrency is *not* a "security" subject to oversight and the enforcement jurisdiction of the SEC and other securities regulators.

The False Claims Act may be on the ropes, as explained by our authors who discuss a recent case claiming the FCA is unconstitutional because it improperly delegates core executive powers to private citizens. This holding dovetails with the current administration's robust view of executive power. The ruling is, however, in tension with the use of FCA claims to curtail fraud in the health care environment. Meanwhile, it remains to be seen whether the DOJ's recently launched Whistleblower Pilot Program sticks, given the apparent focus by the administration on corruption and waste. Similarly, the FTC's focus on transparency, consumer protection, and franchisee rights will likely continue, if in a milder fashion to balance business interests and consumer concerns.

As nature abhors a vacuum, an additional theme throughout this year's forecast is that state laws are increasingly a source of litigation and may serve

as a tension for businesses. Where the federal government may take a more hands-off approach, states are stepping up, most notably in the privacy space. Several states are following California's lead in developing broad privacy protective statutes, addressed to increasing consumer concerns about data access, biometric information, and sale of personal information. Likewise, the fight against noncompete agreements may continue to be waged but at the state level.

Where the FTC may limit its attack on noncompetes (though this is uncertain), states are moving ahead to materially limit the use and scope of noncompete agreements. This issue plays strongly to a populist approach, but there are significant business interests who advocate for the continued viability of these restrictive covenants. Along the same lines, we anticipate all things "ESG" may be taboo under the current administration, and while SEC-required disclosures related to ESG issues will be strongly de-emphasized, there is plenty of room under state law for litigants to pursue "greenwashing" and similar claims in that space.

On the AI front, courts are busy addressing the scope of AI use, and its use in legal proceedings. Lawyers now have to be wary of their use of AI in their practice, including whether and the degree to which their work product might be revealed in the discovery process or generally, pursuant to court order. The risk of sensitive information bleeds over to clients, whose AI-generated content and prompt histories may be subject to discovery. Meanwhile, the creation of sophisticated forgeries with the help of AI poses a significant threat to the integrity of legal proceedings. The legal system is only just starting to contend with these risks.

AI also will continue to force new legal thinking and rules around intellectual property and its protection as AI technology grows. Federal-level governance of AI is volatile, with the Trump administrations' rejection of Biden-era AI guardrails and robust embrace of AI development as part of its economic and national security vision.

Finally, on the business front, commercial real estate litigation stands to increase in light of the "thaw" on equity's investment in real estate. But this thaw, predicted for months now, was dependent on decreased, or at least stabilized, interest rates. That economic outlook is particularly hazy given the economic policies favored (and so far pursued) by the Trump administration. Economists of all political persuasions see bouncy or increased rates going forward.

Neuroscientist Daniel Levitin once observed that "[i]f everything is utterly predictable, you become bored. If its utterly unpredictable, you become frustrated." While the challenge of predicting the rapid pace of anticipated developments outlined in this year's Outlook are sure to cause bouts of frustration, we can take solace in the notion that the coming year will be anything but boring as courts, lawyers, and businesses adapt and respond to this mercurial landscape.

Disclaimer: Due to the rapidly evolving nature of policies and changes under the current administration, some of the information in this year's Outlook may become outdated over time. To stay up to date on the latest developments and how they may affect your business, we encourage you to follow Seyfarth's Presidential Pulse: Navigating the Second Trump Administration resource for timely updates and ongoing analysis.

Walking the GenAI Tightrope: Balancing eDiscovery Innovation, Compliance, and Risks

— By Jay Carle, Matthew Christoff, and Danny Riley

As anticipated last year, generative AI ("GenAI") has emerged as a transformative force across industries, influencing operations, compliance, and legal processes for businesses and law firms alike.

For instance, many law firms (including Seyfarth) and legal service providers spent 2024 refining GenAI tools and transitioning them from development to active use. As organizations adopt these technologies, they face significant challenges, particularly in the delivery of legal services where transparency and defensible discovery standards are heavily scrutinized. Questions about reliability, cost, unintended consequences, and validation methods loom large, especially as these tools integrate into eDiscovery workflows and beyond. While the potential for GenAI tools to supplement existing discovery workflows is significant, their complexity often reflects Arthur C. Clarke's observation: "Any sufficiently advanced technology is indistinguishable from magic."

Beyond GenAI's adoption in delivering legal services, GenAI is well on its way to transforming how businesses analyze data, develop products, and shape strategic decision-making. These advancements will create challenges for organizations in 2025, particularly with respect to balancing innovation with practicality, and the challenges of being able to respond to discovery requests in litigation (particularly the identification, preservation, and production of AI-generated information). Finally, parties engaged in litigation are likely to face evidentiary issues surrounding increased use and alleged use of deepfake technology.

> The use of GenAI in discovery and litigation processes is expected to grow significantly in 2025, supplementing established machine learning methods like predictive coding and active learning.

ANTICIPATED ISSUES IN 2025

We anticipate three significant areas of focus in 2025. First, we are likely to see defensibility challenges and demands for expanded transparency associated with the integration of GenAI tools within legal practices, especially in eDiscovery. Second, businesses' use of AI technologies may broaden already expansive discovery obligations, deepening concerns regarding the proper preservation, collection, and identification of GenAI inputs and outputs. Finally, the increasing availability and relatively inexpensive cost of AI-generated deepfakes will undoubtedly result in significant evidentiary and litigation issues throughout 2025.

The Use of GenAI Will Redefine Transparency and Defensibility in Discovery

The use of GenAI in discovery and litigation processes is expected to grow significantly in 2025, supplementing established machine learning methods like predictive coding and active learning. However, as GenAI tools become integrated into eDiscovery workflows, litigants are expected to face increased scrutiny regarding the defensibility and transparency of their use.

Legal teams leveraging GenAI for eDiscovery will need to adapt to evolving expectations around transparency, documentation, and defensibility. Opposing parties will likely demand expansive information regarding GenAI technology within ESI protocols, including training prompts, the use of AI generated document summaries, and review validation procedures. These demands echo the early days of angst surrounding the use of predictive coding and technology-assisted review ("TAR"). While cooperation is crucial, legal teams must navigate complex issues related to disclosing counsel's mental impressions and opinions reflected in GenAI prompts for eDiscovery applications. They must also ensure they do not reveal proprietary methodologies or irrelevant details that do not pertain to the case, while still demonstrating that they have reasonably met legal obligations to identify and produce relevant and responsive information.

For example, in *Tremblay v. OpenAI, Inc.*, No. 23-cv-03223-AMO (N.D. Cal. Aug. 8, 2024), a California district court granted the plaintiff's motion for relief from a prior order to produce prompts and outputs. The earlier order, issued on June 24, 2024, had granted defendants' request to compel production of prompts and outputs used in pre-suit ChatGPT testing. The court overturned the prior order and granted the motion for relief, finding it to be a "misapplication of law" because "the ChatGPT prompts were queries crafted by counsel and contain counsel's mental impressions and opinions about how to interrogate ChatGPT." The court emphasized that under Federal Rule of Civil Procedure 26, opinion work product, including an attorney's mental impressions, conclusions, opinions, or legal theories, is virtually undiscoverable. It concluded that the earlier order

had improperly categorized these prompts and outputs as fact work product, which is subject to narrower protections and broader waivers.

In addition to work product protection issues, reliance on GenAI as a substitute for experts or specialized knowledge raises further challenges. For instance, in *In the Matter of the Accounting by Susan F. Weber*, Microsoft Copilot was used to calculate damages, but the user's inability to recall prompts or explain the generated output led the court to require disclosure of AI-generated evidence and consider pre-trial admissibility hearings. *In re Weber*, 2024 WL 4471664 (N.Y. Surr. Ct. 2024).

These rulings highlight the need for legal professionals to adapt to evolving expectations, balancing transparency and defensibility around the use of GenAI, as well as the need for careful consideration of attorney work product protections where prompts and outputs reflect an attorney's strategic or mental processes.

Businesses' Use of GenAI Will Create New Discoverability Challenges

In turn, businesses must proactively address their discovery obligations in litigation by evaluating whether GenAI prompt history and outputs are potentially relevant, requiring legal hold preservation. As companies increasingly rely on GenAI for conducting business, demands for production of GenAI prompt histories and historical outputs are expected to become standard in discovery requests and eDiscovery protocols. Such data, while potentially offering valuable insights into decision-making processes, heightens concerns surrounding relevance, proportionality, and privilege and work product protections.

Businesses should anticipate that AI-generated content and prompt histories will be treated like any other relevant information in discovery. Addressing these challenges requires businesses to proactively manage their AI workflows and develop processes for legal hold preservation and data collection surrounding their GenAI usage.

GenAI Will Amplify Evidentiary Challenges with Deepfakes and False Evidence

GenAI is also normalizing claims that evidence is a deepfake or has been altered. While falsified and fake evidence have posed challenges for some time, the widespread availability of free and low-cost GenAI tools has elevated the sophistication of these forgeries, making them easier to create and harder to detect. Studies highlighted in *Deepfakes in Court: How Judges Can Proactively Manage Alleged AI-Generated Material in National Security Cases* reveal that detection technologies often struggle with inherent biases and limitations, enabling adversaries to refine their methods and circumvent scrutiny. As GenAI tools become more advanced and accessible, they enable savvy users to create highly convincing fabricated media, including audio, video, and text. This undoubtably will create significant challenges for courts, litigants, and factfinders in 2025 and beyond.

The challenge will lie in identifying manipulated evidence while also properly defending genuine evidence from baseless claims of fabrication. Courts will increasingly face questions about the burden of proof for authenticating evidence and the

Litigants will likely need to invest in forensic experts and advanced technology to authenticate disputed evidence, driving up the time and expense associated with litigation.

standards required to establish its legitimacy. Factfinders, whether judges or juries, will be tasked with discerning real evidence from fabrications, often without reliable technological detection methods. Even with expert testimony, jurors may struggle to differentiate between real and fake evidence, as deepfakes exploit visual and emotional cues to influence perceptions.

Untangling these issues is likely to impose a steep cost. Litigants will likely need to invest in forensic experts and advanced technology to authenticate disputed evidence, driving up the time and expense associated with litigation.

The legal system, in turn, must adopt frameworks and innovative strategies to preserve the integrity of evidence while balancing practical challenges to authenticity. For example, courts may increasingly require early disclosure of alleged deepfake or altered evidence during pre-trial conferences and evidentiary hearings. For businesses, the potential for deepfakes to disrupt regulatory investigations, litigation, and brand trust necessitates proactive measures to detect and address manipulated media sources.

CONCLUSION

Generative AI and related technologies are rapidly reshaping the legal landscape, presenting both opportunities and challenges for organizations and practitioners. Looking ahead, three key challenges will shape the legal and business landscape in 2025. The growing integration of GenAI tools in eDiscovery will demand greater transparency and defensibility, requiring legal teams to navigate complex expectations surrounding transparency and disclosure while protecting privileged information. At the same time, businesses will face increasing pressure to address discovery obligations tied to AI-generated information and prompt histories, emphasizing the need for proactive management of preservation and collection practices. Finally, the rise of deepfake technologies will amplify evidentiary hurdles, requiring courts and litigants to develop robust strategies for authenticating and defending evidence.

To meet these challenges in 2025, legal and non-legal organizations alike must adopt innovative and practical information governance strategies, balancing technological advancements with safeguards that ensure compliance with preservation and other discovery obligations. By staying informed and prepared, both legal professionals and businesses can turn these potential hurdles into opportunities for growth, efficiency, and market differentiators.

Key Trends in Commercial Litigation

Antitrust & Competition

— *By Brandon Bigelow & Sam Rowley*

With a new administration in the White House, the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) have new leadership in 2025.

Those looking for wholesale change in antitrust enforcement policy are likely to be disappointed, however, with a bipartisan consensus emerging that the antitrust laws should be used to rein in the power of Big Tech and other large players.

Leadership Changes at the Agencies

The Biden Administration ushered in sweeping changes to longstanding antitrust enforcement policy, with President Biden naming "neo-Brandeisians"—skeptics who doubted the Chicago School's consumer welfare standard and sought a return to older US competition policy informed by a general concern about the abuse of economic power—to run the antitrust agencies. Under the leadership of Jonathan Kanter as head of the DOJ Antitrust Division and Lina Khan as chair of the FTC, the agencies withdrew their joint *Horizontal Merger Guidelines* issued in 2010 and *Vertical Merger Guidelines* issued in 2020, replacing both with the *2023 Merger Guidelines*, which resurrected theories of economic power that fell out of favor decades ago. The agencies also took an aggressive approach to merger enforcement that largely rejected remedies short of blocking deals.

Kanter resigned his post in December 2024, and President Trump has nominated as his successor Gail Slater, a former FTC staff attorney and veteran technology policy advisor who has been vocal in her criticism of Big Tech. Meanwhile, Khan resigned her position as an FTC commissioner shortly after Andrew Ferguson, a Republican commissioner, took over as FTC chair in January 2025. President Trump has nominated Mark Meador, a former antitrust policy advisor to Republican Sen. Mike Lee of Utah also viewed as a Big Tech skeptic, to fill the fifth FTC commissioner seat vacated by Khan. Until he is confirmed by the Senate, the FTC could be deadlocked with two Republican and two Democratic commissioners.

Ultimately, while new leadership at the DOJ and FTC are likely to hew more closely to the data-driven consumer welfare standard, the Trump Administration is unlikely to be as deferential to business interests as past Republican administrations. At the same time, the agencies may rescind some of the more unorthodox positions taken by the DOJ and FTC over the past four years and restore a more business-friendly approach to antitrust enforcement overall. For example, after the November 2024 presidential election, the DOJ and the FTC (by a 3-2 party line vote) announced in December 2024 they were withdrawing the *Antitrust Guidelines for Collaborations Among Competitors*, first published in April 2000 and long thought to be a fairly unremarkable statement of antitrust policy. It is possible new leadership will restore this and other antitrust guidance for business.

Price Discrimination and Information Exchanges

The Democratic majority at the FTC in December 2024 voted 3-2 to bring the agency's first contested Robinson-Patman Act enforcement action in nearly 40 years in *FTC v. Southern Glazer's Wine and Spirits, LLC*, a case now pending in federal court in California. The Robinson-Patman Act is a Depression-era federal law aimed at curbing the perceived power of "chain stores" that prohibits certain types of discriminatory pricing practices. First passed in 1936, the Robinson-Patman Act fell into disfavor in the 1970s, with the FTC and DOJ questioning whether the law actually inhibited price competition to the detriment of consumers, and the DOJ even adopting a tacit policy of non-enforcement in the late 1970s.

In its most recent enforcement action, the FTC alleges an alcohol distributor "repeatedly discriminated in price between disfavored independent purchasers—which include neighborhood grocery stores, local convenience stores, and independently owned wine and spirits shops—and favored large chain purchasers of wine and spirits … ." Although the two Republican FTC commissioners dissented from the decision to bring this particular case, one of them, now FTC chair Ferguson, said he agreed with the decision to enforce the Act, just not the target. Rather, he wrote: "The Commission should focus its enforcement efforts on price discrimination in the heartland of the concern that animated the Act's passage—large retailers with buying power." While there may be a shift in emphasis, it appears a more robust Robinson-Patman Act enforcement policy at the FTC is here to stay.

Businesses may see in 2025 a course-reversal in enforcement priorities in the area of information exchanges, however, where the agencies had been taking an increasingly aggressive approach toward benchmarking activity during the Biden Administration. In February 2023, the DOJ withdrew three "outdated" antitrust enforcement policy statements related to healthcare markets, even though the "antitrust safety zones" they defined were based on well-established precedent and have been used across a range of industries over the past 25 years by antitrust practitioners to minimize the antitrust risk of information exchange and benchmarking activities. And in September 2023, the DOJ brought a civil enforcement action in federal court in Minnesota alleging an industry benchmarking publication violated the Sherman Act by facilitating "extensive" information exchanges among meat processors, even after an Illinois federal court granted a summary judgment motion dismissing similar claims against the same publication by private plaintiffs in the absence of evidence the publication actually participated in any price-fixing conspiracy. That case is ongoing, with dispositive motions due to be filed in July 2025 and trial scheduled for October 2025.

Meanwhile, 2025 will see continued litigation over how algorithmic pricing should be assessed under the antitrust laws. In December 2023, RealPage, a tech company that provides data analytics software for residential landlords, persuaded the court in a federal multi-district class action antitrust litigation pending in Tennessee that claims by tenants who claim the software facilitates collusion among landlords to inflate rents in US metropolitan markets must be judged under the more stringent "rule of reason," which requires that plaintiffs demonstrate that alleged unlawful activity had an anticompetitive effect in a defined relevant market.

The DOJ has actively challenged this decision, filing a Statement of Interest in March 2024 in a similar antitrust action against landlords using algorithmic pricing pending in federal court in Washington. The DOJ urged the court to judge the complaint under the per se standard, which applies an irrebutable presumption of competitive harm, rather than the more lenient "rule of reason" standard. The court in that case in December 2024 sided with plaintiffs and the DOJ, applying the per se standard in denying a motion to dismiss. Meanwhile, the DOJ in August 2024 filed its own civil antitrust enforcement action against RealPage and a group of large landlord in federal court in North Carolina. The nexus of algorithmic pricing and high housing costs make it difficult to predict how new leadership at the DOJ will approach these claims going forward. Regardless, with many states pursuing claims against RealPage and others under state antitrust laws, challenges to algorithmic pricing will continue in 2025.

Merger Review and Antitrust Enforcement

New leadership at the FTC and DOJ are likely to restore the consumer welfare standard as the governing standard for merger review in 2025, but are equally likely to continue heightened scrutiny of proposed transactions in Big Tech and related industries. The first Trump Administration initiated several of the monopolization cases against Big Tech companies now working their way to trial in 2025, and the Republican-led agencies are unlikely to abandon those cases, particularly given bipartisan skepticism of Big Tech market dominance.

Both the DOJ and FTC have professional long-term staff who historically have been the source of thoughtful enforcement decisions and policymaking based on concrete economic data. The agencies have broad authority to collect data to identify the market effects of particular actions by actors in particular markets, and retrospective studies done in the technology industry have provided significant support for agency action regardless of the administration. It was during President Trump's first term that the FTC in February 2020 sought information from five large technology companies concerning acquisitions for which premerger notification filings were not required under the HSR Act to determine whether these companies were engaged in anticompetitive acquisitions of nascent or potential competitors.

In October 2024, the FTC, with the support of the DOJ, voted unanimously to adopt sweeping revisions to the premerger notification form and reporting process under the HSR Act, requiring parties to provide the "rationale" for the proposed transaction and disclose substantially more documents and information where there is potential overlap. The FTC's unanimous vote indicates bipartisan support for an aggressive approach to merger enforcement. While the US Chamber of Commerce has filed a lawsuit challenging the FTC's authority to issue the new HSR form and rules, the new HSR form and rules took effect on February 10, 2025 with no preliminary injunction sought or entered in that action. Ultimately, the DOJ and FTC are likely to continue their scrutiny of proposed transactions in Big Tech and related industries, particular those deemed critical to national security and economic stability, including the telecommunications and defense industries.

Key Trends in Commercial Litigation

Bankruptcy Litigation and Restructuring

— By James Sowka

The "Soft Landing" Comes into Focus, But Challenges Persist.

The Federal Reserve Bank's Interest Rate Cuts Signal a Strategic Shift in Economic Policy

Responding to moderating inflation and a softening jobs market, late last year the Federal Reserve Bank began cautiously cutting interest rates. Rate cuts are expected to continue in 2025, albeit at a slower pace. These rate cuts are an attempt to boost the economy by increasing liquidity for businesses and consumers alike, in hopes of achieving the so-called "soft landing." Even if the Federal Reserve is successful in averting a recession, the US economy still faces numerous challenges that will drive pockets of distress in 2025.

While reductions in interest rates will provide some relief for consumers, we predict that sustained high prices for food, housing, automobiles, and insurance will cause consumer debt to reach new heights in 2025.

Lingering Effects of Inflation and High Interest Rates Will Cause Distress

Inflation and high interest rates will continue to cause distress for various sectors of the economy. For example, higher overhead from elevated borrowing costs, wages, and insurance and worker shortages will continue to be a problem for agriculture, restaurants, and hospitality – especially those businesses which have been unable to convince consumers to pay higher prices for downsized products. Higher borrowing costs, wages, and worker shortages will also continue to stress hospitals and senior care facilities, which are still reeling from the shocks caused by the COVID-19 pandemic.

Growing Fallout from Record Debt Levels for American Consumers?

Consumer spending once again buoyed US economic growth in 2024. Unsurprisingly, the Federal Reserve Bank of New York reports that *American household debt reached a new record high of $17.8 trillion in 2024*, with noteworthy increases in delinquency rates for credit cards and automobile loans.

While reductions in interest rates will provide some relief for consumers, we predict that sustained high prices for food, housing, automobiles, and insurance will cause consumer debt to reach new heights in 2025. This will result in higher delinquency rates for consumer debts with potential adverse impacts on the credit card, automotive and travel industries, among others.

Bankruptcy Filings Will Continue Their Steady Increase in 2025

The US Courts report that for the year ending December 31, 2024, overall bankruptcy filings increased 16.8% compared to 2023. This continues the upward trend in bankruptcy filings from 2023 after the record lows seen in 2022 following the implementation of COVID-19 stimulus measures. Digging deeper into the statistics, business bankruptcy filings are up 40.4% in 2024 from the prior year, while non-business bankruptcy filings increased 16%. Still, bankruptcy filings in 2024 remain down nearly 66% from the record highs seen

in 2009-2011. *Given the record levels of consumer debt, continued high prices and high interest rates, we anticipate another 15% to 20% increase in bankruptcy filings for 2025.*

While the specifics of these proposals are playing out in real time, the possibility of new tariffs and tax cuts is already creating uncertainty regarding the future direction of inflation and interest rates

Stabilizing Interest Rates Will Lock in Lower Collateral Values for Commercial Real Estate

The Federal Reserve's interest rate reductions are expected to continue into 2025 with rates predicted to stabilize as the year progresses. Stabilized interest rates will establish a new normal for real estate valuations. This new normal will result in widespread gaps between collateral values and outstanding debt in the office sector and in other sectors on a market-to-market basis such as multi-family, hotels, and retail. As a result, we predict an increase in distressed commercial real estate transactions as lenders and borrowers look to move on from failed transactions and buyers and sellers begin to reach consensus on pricing.

Trump Administration Policy Priorities Create Uncertainty for the Future Direction of Inflation and Interest Rates

The inauguration of Donald Trump as president brings into focus two of his primary campaign promises: new tariffs and tax cuts. While the specifics of these proposals are playing out in real time, the possibility of new tariffs and tax cuts is already creating uncertainty regarding the future direction of inflation and interest rates. For example, market analysts indicate that the immediate post-election jump in the value of the US dollar was driven by an expectation that tariffs and tax cuts will increase inflation, necessitating sustained higher interest rates. Similarly, the post-election spike in US Treasury yields appears to have been fueled by an expectation of increased budget deficits. The actual impact of new tariffs and tax cuts on inflation and interest rates remains difficult to predict but will come into clearer focus in 2025.

Conclusion

The elusive "soft landing" appears within reach in 2025. Nevertheless, the cumulative effects of inflation, high interest rates, wage increases, and lingering worker shortages will drive pockets of distress and increased bankruptcy filings in 2025. Moreover, stabilized interest rates should start creating a consensus for real estate valuations which will facilitate workouts of distressed transactions resulting in increased deal flow. However, changes in governmental fiscal policy may have unexpected impacts on inflation, interest rates, and the overall economy, so flexibility will be key in 2025.

Key Trends in Commercial Litigation

Consumer Class Action

— By Kristine Argentine, Joe Orzano, and Aaron Belzer

Throughout 2024, privacy-focused class actions centered around the use of tracking technologies for marketing purposes on websites continued to be filed in droves.

These cases were indiscriminate in terms of industry and any company with a public-facing website was, and continues to be, at risk. In the last six months, several key rulings provided a glimpse of developments we might see from courts in 2025. These 2024 decisions included significant rulings on both class certification and summary judgment.

With respect to class certification, in September 2024, the Central District of California denied class certification in *Griffith v. TikTok, Inc.,* Case No. 23-cv-000964. There, the plaintiffs sought to certify a class of non-TikTok users alleging that TikTok illegally collected class members' private information when they visited websites that had the TikTok tracking pixel installed. Significantly, the court found that common issues did not predominate in part because the success of each class member's claims depended on the nature of the information sent through the tracking pixel, which will differ depending on the specific website and actions of the user on the website. Then, in October 2024, the Southern District of Florida denied class certification in a case involving similar allegations and technology. *Martinez v. D2C, LLC,* Case No. 23-21394. In that case, the court found that the plaintiffs had failed to even establish numerosity because of the number of variables that affect whether or not, and to what extent, the tracking pixel actually transmits both private and identifying information of website users. Both of these decisions have broader application to the tracking-pixel class actions since they reject the notion that these privacy claims and the operation of the tracking technology can be analyzed through class-wide proof.

One other decision bears particular attention. In October 2024, the Massachusetts Supreme Court issued an important decision to curtail these tracking technology lawsuits, finding that the collection of website-browsing data does not constitute a wiretap violation because it is not a person-to-person communication. The language of the Massachusetts' wiretap statute is similar to other state wiretap statutes that are the basis for these tracking technology privacy claims, and this finding could serve as persuasive authority for other courts considering substantive rulings for similar wiretap claims.

The 2024 decisions provide valuable guidance for litigants in developing evidence and arguments for defense-friendly decisions.

> We expect to see consumer fraud class actions targeting advertising of sales or discount prices, including alleged "perpetual sales" where an advertised original price is claimed to be fictitious.

Despite these rulings, we anticipate that Plaintiffs may engage in various attempts to side step these rulings by asserting new variations of the tracking pixel-type claims. For instance, they may assert claims under the California's wiretap statute (California Invasion of Privacy Act), that are

not dependent on the interception of communications or confidential information but rather focus on the transfer of basic data like IP addresses. Further, as the case law develops and more is learned about these tracking technologies, claims will become more focused on website interactions which result in the transfer of more specific data such as search terms, payment or cart information; or interactions that occur within password protected member accounts. Additionally, new claims are likely to emerge related to the same or similar technology. For instance, we anticipate "dark pattern" claims may be asserted where a website user elects to reject marketing cookies but those marketing cookies are triggered anyway. Finally, as companies consider how and where to take advantage of generative AI, we expect new consumer privacy theories to develop related to consumer data being utilized to train the AI.

Consumer Fraud Class Action Outlook

Consumer fraud class actions will continue to target a range of business practices, including certain product claims such as environmental, social and governance ("ESG") claims and claims touting a product's or ingredient's attributes or healthfulness; discount or sale advertising; and alleged "junk" fees and failures to disclose harmful substances in consumer products.

We expect to see consumer fraud class actions targeting advertising of sales or discount prices, including alleged "perpetual sales" where an advertised original price is claimed to be fictitious. Retailers should be familiar with the FTC Guides Against Deceptive Pricing and related state statutes such as Cal. Bus. & Prof. Code § 17501, and have compliant policies in place governing the advertising of product prices and sales.

Further, we expect to see consumer fraud class actions targeting alleged "junk" fees. Retailers should be familiar with the FTC's Proposed Rule on Unfair or Deceptive Fees, and state legislative activity such as Cal. Civ. Code § 1770(a)(29), which became effective July 1, 2024. Generally, and with some limited exceptions, under the FTC's Proposed Rule and the California statute, if a business advertises a price for a product, it must be the "all-in" price the consumer must pay for the good or service. To the extent retailers have not done so already, they should also evaluate their transaction flows to identify any fees charged and how total prices and fees are disclosed.

Last, we expect consumer fraud class actions based on testing for alleged harmful substances such as PFAS and heavy metals. These lawsuits tend to allege two main theories of deception. First, plaintiffs allege affirmative product claims such as "pure" and "organic" to be false or misleading based on the presence of the substance. Second, plaintiffs allege that the defendant was required but failed to disclose the presence of the substance in the product. Companies should evaluate existing testing protocols to mitigate risk of litigation over commonly targeted substances, and scrutinize product claims to ensure they do not make an unsubstantiated claim about the absence of a particular substance.

California Outlook

Following many of the trends mentioned above, companies operating in California should anticipate that plaintiffs' lawyers will continue to rely on California's robust consumer protection laws to bring class-wide challenges to their advertising and promotional activities and data-privacy practices.

Data-privacy class actions, in particular, will remain a significant focus due to the state's stringent privacy regulations like the California Consumer Privacy Act (CCPA) and the California Privacy Rights Act (CPRA), which grant consumers extensive rights over their personal data and impose strict compliance requirements on businesses. Given the potential for substantial financial penalties and reputational damage under these laws, businesses should prioritize compliance to mitigate these risks. This includes implementing robust and compliant data protection measures, regularly auditing privacy practices, training employees on data privacy, and staying updated on regulatory changes to ensure ongoing compliance.

Business offering subscription and free trial marketing models should also be aware of California's recent amendment to its Automatic Renewal Law. This amendment expands existing requirements to include free-to-pay conversions, mandates explicit affirmative consent for renewals, requires that consumers can cancel using the same method they used to subscribe, and imposes stricter rules for presenting discount or benefit offers during the cancellation process to encourage consumers to stay subscribed (e.g. "save offers"). Class-action plaintiffs frequently target subscription services. Businesses should therefore thoroughly review their subscription and renewal processes to mitigate risks before the amendment takes effect on July 1, 2025.

Businesses selling consumer products in California should be aware of the state's specific regulation of PFAS-containing products, including new requirements effective in 2025. Current laws already prohibit or require labeling and disclosures for certain PFAS-containing items, such as children's products and cookware. Starting in 2025, these regulations will expand to cover more products, including textiles, clothing, and cosmetics. Given growing concerns over PFAS exposures, businesses will need to ensure that their products fully comply with all state and federal PFAS regulations, including upcoming California requirements.

As the legal landscape continues to evolve, businesses must remain vigilant and proactive in their compliance efforts to avoid the significant risks associated with consumer privacy and consumer fraud class actions. By staying informed about regulatory changes, implementing comprehensive data protection strategies and regularly reviewing their privacy, labeling and disclosure practices, companies can better safeguard themselves against potential legal challenges and maintain consumer trust.

Key Trends in Commercial Litigation

Consumer Protection Litigation

— Esther Slater McDonald, Eric Barton, and Michael A. Merar

Consumer protection litigation has continued to increase year over year, and we expect that trend to continue in 2025.

But we expect to see administrative rulemaking and enforcement actions decrease under the Trump administration.

Litigation Trends

Consumer Filings. Consumer protection cases filed in federal courts increased again in 2024, and we expect that trend to continue in 2025. By November 2024, consumer protection filings were up nearly 7%, with class actions and data breach filings up by nearly 12%. For federal claims, lawsuits filed under the Fair Credit Reporting Act (FCRA) had increased by 15%, under the Fair Debt Collection Practices Act by 13%, and under the Telephone Consumer Protection Act (TCPA) by 4.5% as of August 2024. The top courts for filings were in Georgia, Florida, and California. Credit bureaus were the most active defendants, and Seyfarth Shaw was one of the most active defense firms. The fee-shifting nature of consumer protection statutes make them desirable cases for contingency-based plaintiff's firms, a landscape that is expected to contribute to increased filings throughout 2025.

The fee-shifting nature of consumer protection statutes make them desirable cases for contingency-based plaintiff's firms, a landscape that is expected to contribute to increased filings throughout 2025.

Key Rulings. In February, the Supreme Court ruled that federal agencies may be sued under the FCRA. In June, the Supreme Court abolished *Chevron* deference, clearing a path for new claims and defenses in consumer litigation. In 2025, the Supreme Court will decide whether the Hobbs Act requires district courts to accept the Federal Communications Commission's (FCC) interpretation that the TCPA does not prohibit faxes received online. If the Court holds that courts need not defer to the FCC, TCPA class actions may increase.

Meanwhile, federal courts of appeal reaffirmed that consumers must show more than mere foreseeability of injury in the forum state for personal jurisdiction and more than bare assertions of harm for standing. But the *en banc* Ninth Circuit may disagree when it addresses personal jurisdiction in *Briskin v. Spotify*, No. 22-15815 (9th Cir.). If so, the Ninth Circuit's decision would expand personal jurisdiction for web-based activities, and that would likely trigger a rise in data privacy/collection lawsuits in the circuit.

Government Rulemaking

The Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) continued their aggressive efforts to expand regulatory requirements governing consumer products and services. The CFPB kicked off the year with FCRA advisory opinions. In one opinion, the CFPB opined that a consumer "does not need to use specific language" to request her file and discussed what information must be included in a disclosure. In the other opinion, the CFPB asserted that it is inaccurate for consumer reports to include duplicative information, to report arrests, charges,

or court filings without disposition information, or to report any information that "has been sealed, expunged, or otherwise legally restricted." The CFPB also opined that arrests may not be reported after seven years nor may charges that do not result in conviction.

> Whether the incoming administration defends the rules remains to be seen, but early signs portend significant deregulation.

More recently, the CFPB asserted that employers using "assessments" or "algorithmic scores" of worker data collected on the job must comply with the FCRA when using that information for employment purposes and that companies assisting employers in collecting and scoring data are "consumer reporting agencies." The CFPB's publications include limited legal analysis and, at times, fail to consider contrary authority. Thus, it seems unlikely that courts will give much weight to these publications.

For financial services, the CFPB pushed to expand its jurisdiction to include products not previously considered credit products. For example, the CFPB issued a rule that buy now, pay later products are subject to credit card restrictions and proposed a rule reversing the CFPB's earlier position that earned wage access products, which allow consumers to receive part of their paychecks before their regularly scheduled paydays, are not credit products. The CFPB also capped credit card fees for late payments and gave consumers greater control over their financial data. Meanwhile, the FTC announced its Click-to-Cancel" rule, requiring sellers to make it easy to cancel recurring subscriptions.

Unsurprisingly, the agencies' rules have been challenged in court. Whether the incoming administration defends the rules remains to be seen, but early signs portend significant deregulation. At the time of publication of this forecast, Russ Vought, the newly confirmed director of the Office of Management and Budget and acting head of the CFPB, has effectively shuttered the CFPB, at least temporarily.

Enforcement Actions & Investigations

Enforcement actions started slowly in 2024 but picked up after the Supreme Court affirmed the CFPB's constitutionality. The FTC and CFPB pursued enforcement efforts involving robocalls, advertising, junk/hidden fees, online pricing, earnings-and-income claims, Made-in-USA labeling, consumer reviews, lending services, and debt collection. At times, the agencies seemed to stretch the law (and the English language), such as when the FTC alleged that it was deceptive for a company to advertise that drivers could "make up to $X/hr" because only 20% of drivers made that amount. Both agencies continued to investigate data brokers and to examine businesses' use and protection of consumer data.

Looking forward, the Trump administration is clearly intent on rolling back Biden-era initiatives. Whether the administration will return to focusing on enforcement within the mainstream or substantially capitulate on enforcement efforts altogether is uncertain. Given the new administration's populist agenda, the administration may pursue certain enforcement actions, particularly involving consumer data, although the extent of any such consumer protection efforts remains unclear, and the source of such enforcement (given the CFPB's halt of all enforcement activities) even less clear.

False Claims Act, Whistleblower Standing and Qui Tam Lawsuits

— By Chris Robertson and Teddie Arnold

The False Claims Act (FCA) is poised for significant developments in 2025, especially in light of the recent landmark decision in United States ex rel. Zafirov v. Florida Medical Associates LLC.

This case, decided on September 30, 2024, by the US District Court for the Middle District of Florida, has profound implications for the future of FCA enforcement. In *Zafirov*, the court ruled that the qui tam provisions of the FCA, which allow private individuals (relators) to sue on behalf of the government, are unconstitutional. The court found that these provisions violate the Appointments Clause of Article II of the US Constitution by improperly delegating core executive powers to private citizens. This decision challenges the very foundation of the FCA's enforcement mechanism, which has been a critical tool in combating fraud against the government.

Looking at the long term, the Zafirov decision is currently on appeal at the Eleventh Circuit, the outcome of which could set a precedent that either reinforces or dismantles the current framework of qui tam litigation.

Prior to the *Zafirov* ruling, several district courts upheld the constitutionality of these provisions, often emphasizing the historical precedent and the significant role relators play in enforcing federal laws. However, the *Zafirov* decision marks a notable departure, as it aligns with recent Supreme Court sentiments expressed in *US ex rel. Polansky*, where justices hinted at substantial constitutional concerns regarding the delegation of executive power to private individuals.

Looking ahead to 2025, this ruling is expected to trigger a wave of legal activity. In the near term, expect a wave of motions to dismiss filed by FCA defendants on constitutional grounds. Moreover, given the uncertainty created by the ruling, the Department of Justice might feel compelled to intervene more frequently in qui tam cases to maintain control and mitigate risks associated with the constitutional challenges posed by relators. Looking at the long term, the *Zafirov* decision is currently on appeal at the Eleventh Circuit, the outcome of which could set a precedent that either reinforces or dismantles the current framework of qui tam litigation. If the Supreme Court ultimately addresses the constitutionality of the FCA's qui tam provisions, it could lead to a landmark ruling that reshapes the role of relators and the government's enforcement capabilities.

THE NEW ADMINISTRATIVE FALSE CLAIMS ACT

On December 23, 2024, the Servicemember Quality of Life Improvement and National Defense Authorization Act (NDAA) for Fiscal Year 2025 (FY 2025 NDAA) (P.L. 118-159) was signed into law. Among its numerous provisions, the FY 2025 NDAA revitalizes an existing but underutilized fraud enforcement mechanism: the Administrative False Claims Act (AFCA). This act, previously known as the Program Fraud Civil Remedies Act of 1986, offers a streamlined administrative remedy for addressing false claims and statements that the Department of Justice (DOJ) opts not to prosecute. The recent amendments significantly enhance the AFCA's scope and effectiveness, making it a more powerful tool for combating fraud and recovering funds lost to false claims.

Background

The FCA is a well-known and widely used tool by the Department of Justice to prosecute fraud primarily in Federal District Court. The lesser known AFCA is an *administrative* remedy for false claims and false statements cases that the DOJ *declines* to prosecute, thereby allowing agencies to pursue these false statement and claims in an administrative proceeding. The AFCA aims to resolve small-dollar fraud cases in which the cost of litigation would exceed the damages the government might recover. The AFCA imposes civil *penalties* of up to $5,000 for each certified written false statement and false claim, and *damages* assessment of twice the amount of the false claim in cases where the government has paid the claim. The government does not need to show a specific intent to defraud; actual or constructive knowledge of falsity is sufficient.

Agencies designate an investigating official—usually the IG—to conduct investigations into possible AFCA violations. This official has the power to subpoena documents. The investigating official transmits findings to a reviewing official within the agency who independently evaluates the allegations to determine whether there is adequate evidence that a false claim or statement has been made. If so, the reviewing official refers the matter to DOJ which reviews the charges and determines whether to litigate the case. The agency may commence administrative proceedings only with DOJ approval.

The AFCA requires agencies to issue implementing regulations specifying the identity of the investigating and reviewing officials, the procedures for conducting administrative hearings under the Act, and the like. The government has thus far made limited and infrequent use of the AFCA to combat fraud by government contractors. That may be about to change.

FY 2025 NDAA Changes to The AFCA

The FY 2025 NDAA makes changes to the AFCA (in addition to changing its name) aimed at enhancing the government's ability to combat fraud and recover funds lost to false claims. Among these changes to the AFCA include the following:

- the maximum amount for claims under the AFCA has been significantly increased from $150,000 to $1,000,000, to be adjusted for inflation;
- the definition of false claims is expanded to include those made to avoid or decrease an obligation to pay or transmit property, services, or money to the government, i.e. a reverse false claim. This change targets actions that conceal or improperly reduce financial obligations to federal authorities;
- a clear framework for the recovery of costs incurred by federal entities in investigating and prosecuting false claims is implemented. Amounts collected will first reimburse the authority or federal entity for these costs, with any remaining funds deposited into the Treasury;
- a requirement for detailed semiannual reporting on cases under the AFCA. This includes the number of reports submitted, actions taken, pending and resolved cases, average resolution time, and financial recoveries;
- reviewing officials must now notify the Attorney General 30 days before entering into any settlement agreements or referring allegations to a presiding officer;
- the amendments expand the pool of officials who can preside over hearings to include members of the Board of Contract appeals. This change aims to increase the efficiency and availability of qualified presiding officers;
- the statute of limitations for bringing actions under the AFCA has been extended. Claims must now be filed within six years of the violation or three years after the material facts are known, but no more than ten years after the violation;
- the definitions of "material" and "obligation" have been updated to align with those in the False Claims Act, 31 USC. § 3729 *et seq.*

Federal authorities are required to update their regulations and procedures to implement the amendments within 180 days of the AFCA's enactment. The amendments to the AFCA represent a substantial strengthening of the government's tools to combat fraud. By increasing the financial thresholds, expanding the scope of false claims, and enhancing reporting and oversight mechanisms, the government will likely find the statute a more attractive mechanism to pursue low dollar fraud. These changes are expected to have a significant impact on federal agencies and contractors, increasing the scrutiny and potential penalties for false claims. The extended limitations period and updated definitions provide clearer guidelines for enforcement, while the increased dollar amounts and cost recovery provisions ensure that the government can more effectively recoup losses.

> We anticipate increased litigation by employees asserting retaliation under various state and federal retaliation statutes in 2025.

Looking ahead to 2025, contractors should continue to remain vigilant in strengthening their ethics and compliance programs in the form of establishing strong internal controls and audit mechanisms to detect and prevent false claims, regular training sessions for employees on the importance of accurate reporting and the consequences of false claims, and the importance of maintaining detailed records of all transactions, communications, and claims submitted to the government, in the event contractors find themselves the target of a government enforcement action. Moreover, with the enhanced reporting and oversight mechanisms, contractors should be prepared for increased scrutiny from federal agencies. Being proactive in addressing potential issues and demonstrating a commitment to compliance can help mitigate the risk of investigations and penalties.

THE DEPARTMENT OF JUSTICE WHISTLEBLOWER PILOT PROGRAM

Another major development in 2024 that will impact companies in 2025 is the launch of the Department of Justice Whistleblower Pilot Program. This program is intended to supplement reporting avenues provided by existing federal whistleblower programs, such as those of the SEC, CFTC or FinCEN, and is not intended to replace or undermine the False Claims Act. To be eligible for an award under the Whistleblower Pilot Program, a whistleblower report must not be covered by another whistleblower program.

Among the target areas for the program are violations by financial institutions and their employees not covered by the FinCEN whistleblower program, foreign corruption schemes not covered by the SEC whistleblower program, corporate domestic corruption schemes including bribe or kickback payments to domestic public officials, and federal health care offenses not covered by the federal False Claims Act. The Whistleblower Pilot Program encourages internal reporting by considering whether a whistleblower reported internally prior to filing a report with the Department of Justice as a factor in calculating any whistleblower award. Whistleblowers who first report misconduct internally must report the misconduct to the government within 120 days of the internal report to be eligible for a financial award. The Program also encourages whistleblowers to report instances of company retaliation for whistleblower reporting, and the Department of Justice has indicated it may bring criminal charges against a company that retaliates against whistleblowers or impedes whistleblower reporting.

We anticipate an increase in filings under the Program in 2025 as the Program matures and employees understand the logistics and scope of claims that may entitle them to payments.

EMPLOYEE WHISTLEBLOWER RETALIATION CLAIMS

We anticipate increased litigation by employees asserting retaliation under various state and federal retaliation statutes in 2025. With the United States Supreme Court in *Murray v. UBS Securities, LLC* rejecting an increased burden on employees to demonstrate "retaliatory intent" in Sarbanes-Oxley retaliation claims, and courts appearing to adopt the same standard under other whistleblower statutes, there are potentially increased challenges in disposing of such cases in the preliminary stages or even at summary judgment. Likewise, in the recent *Wirth v. Salesforce, Inc.* case, decided on September 13, 2024, the United States District Court for the District of Massachusetts held that a SOX whistleblower need not necessarily report a fraud that has already occurred – as opposed to one that might occur – to be accorded protected status. Specifically, the court held that while the employee's belief of a violation must be grounded in facts, the employee "does not need to wait until a law has been broken to safely register his or her concern." In doing so, the Court adopted what had been previously understood to be dicta from the Department of Labor Administrative Review Board's seminal 2011 decision in *Sylvester v. Parexel International LLC*. These decisions portend an expansion of potential claims.

Addressing a similarly novel issue, on October 15, 2024, the United States Court of Appeals for the Third Circuit in *Gulden v. Exxon Mobil Corp.* ruled that once an employee removes his or her claim from the Department of Labor into federal court, any preliminary decisions by the Department of Labor are moot and need not be enforced by the federal courts. Specifically, the Third Circuit held that because a preliminary injunction in federal court has no binding effect after dismissal of the suit, a preliminary reinstatement order issued by an agency cannot survive dismissal of an administrative proceeding. The Court continued that "broad Article III principals as well as the statutory and regulatory limitations of the Department of Labor's powers leave no doubt that a preliminary reinstatement order does not survive dismissal of the underlying administrative proceeding, especially after a SOX whistleblower elects to sue in federal court." As such, we expect more deliberation by counsel for whistleblowers when considering whether to remove a case to federal court once exhaustion has occurred, or whether to leave a case with an agency if there have been favorable preliminary rulings.

Key Trends in Commercial Litigation

Impact & Sustainability

— By Gina Ferrari, Ameena Majid, and Emily Kesler

The legal landscape for ESG (Environmental, Social, and Governance)-related initiatives evolved significantly in 2024.

Companies were under increased scrutiny to ensure transparency and accountability in their sustainability claims. This heightened focus led to an increase in ESG-related lawsuits—particularly those alleging "greenwashing"—which we expect to continue in 2025.

> Historically, these actions focused on product labels or advertisements, but now they also challenge broader statements about a company's impact on the environment.

While these legal challenges pose substantial financial and reputational risks, they also offer companies a unique opportunity to enhance transparency and build trust with stakeholders. By proactively verifying the accuracy of their sustainability claims and aligning disclosures with regulatory standards, companies can not only mitigate the risk of greenwashing lawsuits but also strengthen their overall ESG strategies. And, organizations continue to defeat "greenwashing" and other ESG-related claims by coupling tried-and-true defense strategies with strong corporate oversight.

Consumer "Greenwashing" Claims and Defenses

Climate change is pushing sustainable business operations to the forefront for environmentally-focused consumers who prioritize the impact on the environment when making purchasing decisions. Consequently, businesses often make sustainability-related claims, whether out of genuine commitment or to attract more customers. This trend has led to an increase in "greenwashing" class actions and requests for injunctions.

There is no consistent definition of "greenwashing," as it varies widely depending on the context and specific claims being scrutinized. Historically, these actions focused on product labels or advertisements, but now they also challenge broader statements about a company's impact on the environment. Consumers, environmental groups, and governments are filing suits across various industries, targeting claims like carbon-neutrality and recyclability.

Indeed, the most commonly challenged claims concern carbon-neutrality and carbon-reduction, with consumers questioning the overall validity of carbon-offset programs. For example, the New York Attorney General recently filed an action against a meat-processing company for misleading the public about their "net-zero by 2040" emissions goals, while simultaneously increasing meat production without a viable plan to achieve those emissions goals. Other recent cases include accusations against a food and beverage company regarding misleading claims about plastic pollution reduction efforts.

Plaintiff-friendly California and New York continue to be the predominant venues for these actions. Successful defense rulings have focused on tried-and-true legal theories to overcome the misstatement and omission allegations, *to wit*: puffery, forward looking statement, lack of falsity, and lack

of standing. Organizations that provide detailed back-up for their carbon metrics have also been successful in defeating or reaching favorable settlement of "greenwashing" claims.

The increase in mandatory climate disclosures makes it more important than ever for companies to vet the substantiation of their claims to mitigate the risk of a "greenwashing" lawsuit.

Guarding Against Greenwashing

To limit the risk of facing consumer fraud claims challenging sustainability claims, companies should critically review all external statements relating to the sustainability of their operations, products, or services to ensure they are sufficiently substantiated. While not widely codified into state or federal law, compliance with the FTC's Green Guides, which provide non-binding guidance to help marketers avoid deceptive environmental claims, may offer legal protection in some jurisdictions. This proactive approach not only helps in legal compliance but also enhances the credibility of a company's sustainability efforts.

Stricter Regulations on Sustainability Claims

As the real impacts of climate change become more evident, governments are ramping up regulations on environmental impact, disclosure of climate-related risks, and the accuracy of sustainability-focused claims made to consumers. While 2024 saw an increase in federally mandated rules, such as the SEC's Climate Disclosure Rules and amendments to the Investment Company Act "Names Rule," this trend is expected to reverse at the federal level under the new administration. In a series of climate-related Executive Orders issued on January 20, 2025, this administration has already revoked all of former President Biden's climate-related Executive Orders that set the trajectory for a diversified energy environment with a focus on renewable sources. This administration's Executive Orders have signaled the opposite – a fossil-fuel driven energy environment with a light regulatory touch. As such, we expect a rollback of climate-related regulations, including the SEC's Climate Disclosure Rules.

Despite these expected changes at the federal level, climate-related laws are expected to continue at the state and international levels. For example, on August 31, 2024, the California legislature approved the Climate Accountability Package, advancing mandatory climate disclosure laws without extending the original 2026 and 2027 deadlines. Despite industry opposition and ongoing legal challenges, these laws have survived in the courts thus far and are still on pace to go into effect with regulations expected by July 1, 2025. Numerous other states, including New York and Illinois, have introduced similar climate-related disclosure legislation. The increase in mandatory climate disclosures makes it more important than ever for companies to vet the substantiation of their claims to mitigate the risk of a "greenwashing" lawsuit.

Seeking Counsel

Organizations should focus on obtaining counsel from advisors and litigators experienced in both ESG consulting and consumer-based fraud litigation, especially with an administration that has been vocally anti-ESG. It will be important to revisit the purpose of public statements to assess how integrated they are to business strategy and resiliency. This will help organizations better defend against "greenwashing" claims while proactively ensuring that sustainability disclosures are accurate and verifiable. To reduce operational and litigation risk, counsel should be experienced in assisting with comprehensive readiness efforts, aligning disclosures made by parent companies with disclosures made to regulators, and utilizing robust documentation and cutting-edge verification processes.

Key Trends in Commercial Litigation

Franchise & Distribution

— *By John Skelton and Cathryn Johns*

Last year, franchise relationships and business practices were subject to significantly enhanced scrutiny by the Federal Trade Commission (FTC).

Along with a new Trump administration and the impending change to the make-up of the FTC, most notably a new chair to replace Lina Khan, franchisors should expect continued regulatory enforcement in 2025. Even assuming a reduction in actions against tech giants and a retreat of aggressive rulemaking such as the blanket non-compete ban, the recent FTC focus on disclosure, transparency, and consumer-oriented regulatory enforcement should continue in the coming year. Indeed, the International Franchising Association (IFA), citing alignment with the principles outlined in the its Responsible Franchising initiative, was a vocal supporter of California's Senate Bill 919 (S.B. 919) and is urging the next FTC chair to increase transparency in the franchise sales process and modernize the Franchise Rule disclosure requirements. As noted in our recent alert, while the FTC's Combatting Auto Retail Scams ("CARS") Rule targeting bait-and-switch and other unfair tactics was overturned, the decision was solely on procedural grounds, and the general focus on protecting consumers and requiring transparency is apolitical and should continue. If only at the state level, consumer protection agencies will remain highly energized even with a "business friendly" FTC.

The FTC Targets Common Franchise Agreement Provisions as Unfair

In a July 12, 2024 Policy Statement, the FTC declared unfair, deceptive, and potentially unlawful a franchisor's inclusion of non-disparagement, goodwill, and confidentiality provisions that could be seen as inhibiting a franchisee from reporting potential legal violations. The FTC reasoned that these relatively common provisions may undermine its ability to investigate practices that violate the FTC Act or the Franchise Rule. Two commissioners dissented from the adoption of the Policy Statement, arguing it improperly attempted to effect a change in the law and confusingly suggested that neutral contract provisions may be violative of the FTC Act.

In its concurrent Issue Spotlight, the FTC described the top twelve complaints from franchisees. These complaints included the imposition of fees and royalties, unilateral changes to franchise operating manuals, franchise supply restrictions and vendor kickbacks, liquidated damages clauses, and early termination fees. Given a focus on transparency and unfair business practices, franchisors should anticipate future FTC enforcement actions.

FTC Doubles Down on Mandated Disclosure

In Staff Guidance released the same day, the FTC addressed undisclosed fees. Franchisors are required to disclose all relevant fees and costs in their Franchise Disclosure Document (FDD). *See* 16 C.F.R. § 436.5(e), (f), (i). Per the Staff Guidance, an undisclosed new or increased fee may violate of Section 5 of the FTC Act. This is a wide-reaching warning, as fees are routinely changed during a franchise relationship, often by way of updated policies or operations manuals governing new services or technologies. While staff guidance is not binding, it signals likely FTC enforcement. Franchisors should be cautious when imposing any new fees and costs not mentioned in an FDD.

Confirming an emphasis on disclosure, in October 2024, the FTC filed a complaint against coffee shop franchise

Qargo Coffee and its founders for failing to disclose required information in its FDD. The FTC alleges Qargo and founders did not provide prospective franchisees with important information such as the business history and experience of the Qargo founders. The proposed order against Qargo and its founders not only seeks to impose a $1,258,575 judgment (although much of it to be suspended), but also requires Qargo to give franchisees the opportunity to rescind without penalty.

The FTC Continues to Emphasize Transparency in the Auto Industry

Since the Dodd-Frank Act gave the FTC authority over auto dealers, the agency has targeted unfair auto industry practices. In December 2023, the FTC launched its "CARS" Rule targeting allegedly misleading advertising and sales tactics by auto dealers. The CARS Rule was paused, then ultimately invalidated following a challenge by the National Automobile Dealers Association (NADA). However, the 2-1 ruling by the Fifth Circuit Court of Appeals did not address the Rule's substantive provisions, finding only that the FTC violated procedural rules by not providing advance notice of the planned regulation. Further, recent enforcement actions targeting dealers show an aggressive focus by the FTC, with or without the CARS Rule being in effect..

In August, the FTC filed a complaint against Asbury Automotive Group, one of the largest dealer groups in the United States, alleging three Asbury dealerships "systematically" packed junk fees into the cost of the vehicles and discriminated against Black and Latino consumers by targeting them with unwanted and higher-priced add-ons. In October, Asbury sued, seeking to enjoin the FTC's administrative proceeding as unconstitutional. Asbury contends the FTC is unlawfully adjudicating private rights and depriving Asbury of its right to a jury trial.

The FTC's complaint against Asbury follows recent settlements for similar practices with other auto dealers including Coulter Motor Company and Rhinelander Auto Center. In August 2024, the FTC and the Arizona Attorney General announced a $2.6 million settlement to resolve claims that Coulter used deceptive online advertising to lure customers; duped consumers into paying for unwanted "add-on" products; and charged Latino customers more in financing charges than non-Latino customers. Despite the CARS Rule's Fifth Circuit loss, requirements as to price transparency are governed by the more general FTC "Rule on Unfair or Deceptive Fees," which requires all advertising for goods and services to display the total price, including all mandatory fees. Thus, the "offering price" requirement of the CARS Rule, i.e., informing consumers of the final total price, will continue in the wake of its overturn. Given the consumer protection focus, we expect similar enforcement actions in 2025. As a result, the CARS Rule decision is far from a green light to lessen or ignore transparency and disclosure requirements prioritized by the FTC.

> With the new administration, a regulatory focus on transparency, consumer protection, and franchisee rights will likely continue.

What to expect in 2025

With the new administration, a regulatory focus on transparency, consumer protection, and franchisee rights will likely continue. The FTC enjoys broad authority to address what it sees as unfair and deceptive business practices. Even with more business-friendly leadership, the recent Policy Statement, Staff Guidance, and FTC enforcement actions reflect a desire to protect franchisees and consumers by requiring full transparency and disclosure. However, particularly given the Trump administration's stated emphasis on government efficiency and the President's immediate flurry of diverse executive orders, predicting what the FTC will do is difficult. Because a focus on consumer protection and transparency is likely to continue, franchisors should review existing business practices, disclosures, and franchisee agreements to ensure they are fair and transparent and comply with all applicable FTC obligations.

Key Trends in Commercial Litigation

Intellectual Property

— By Matthew Moersfelder and Stephen Lott

While artificial intelligence is increasingly integrated into everyday life and business, the legal landscape continues to lag behind, resulting in uncertainty for those developing and using AI products.

Although legislation and pending court actions may begin to clear the legal outlook in 2025, this coming year is unlikely to address all of the myriad open issues. Regardless, companies will need to take steps to protect their business, and especially their intellectual property assets, during this time of uncertainty.

Use of Copyrighted Material for AI Model Training

Whether copyrighted material can be used to train artificial intelligence models without the permission of the copyright owner continues to be a fundamental unanswered question going into 2025. Historically, AI models have been trained on publicly available material on the internet without differentiating between public domain material and material protected by copyright. As AI becomes more integrated with real world applicability, along with the profits and value associated with it, the practice of using copyrighted material without permission is now being questioned.

The most prominent case addressing this issue was filed by The New York Times against OpenAI. Filed in 2023, the Times' complaint alleged that OpenAI used the Times' copyrighted material to train ChatGPT (OpenAI's large language model generative AI tool) in violation of the Times' rights. Under US law, copyright owners have the exclusive right to copy and reproduce copyrighted works. Open AI has maintained that its use of the Times' copyrighted material is fair use, and therefore allowed under the Copyright Act. The final decision in this case may issue in 2025, with the inevitable appeal concluding in 2026, and perhaps beyond should the case make it to the Supreme Court. The current pending case, however, is likely to have far reaching consequences, in part because the Times is seeking an injunction for the destruction of all models and training sets that incorporate the Times' copyrighted material. If that or a similar injunction is granted, even before an appeal, there will be an immediate paradigm shift in how AI models are trained, requiring developers to obtain licenses for all copyrighted material. Or developers could simply avoid the copyrighted material entirely, but that would result in a potentially inferior AI product.

Due to the uncertainty, entities developing AI or incorporating AI into their products are left with difficult choices. They must balance (1) using a more limited set of materials that either wholly exists in the public domain or which is properly licensed, the result of which could be increased costs and/or potentially decreased efficiency of the model, with (2) potentially being required to destroy their AI models that include any unlicensed copyrighted works.

AI Legislation

The issues raised by the growth and prominence of AI has resulted in a growing recognition of the need for a cohesive federal strategy. In 2024, over a hundred different bills were introduced in Congress addressing different issues related to AI, including requiring disclosure of the use of AI, control and ownership of AI created materials, and limitations on use of

AI technologies to prevent harm to national security. Apart from federal legislation, many states are also introducing bills to address emerging AI issues. For example, California has introduced bills addressing the unauthorized use of AI-generated content and requiring disclosure of training data on AI developers' websites.

The incoming Trump administration has signaled that its approach to AI will be informed by concerns about free speech and the need to stay competitive with China. This likely means that the administration may take measures aimed at making it easier for large language models to be trained using copyrighted materials. This could be done through supporting fair use arguments if the issue reaches the Supreme Court or advocating for a compulsory licensing model not unlike the scheme administered by the Copyright Office in connection with musical works.

We expect that federal and state legislative efforts related to AI will continue in 2025, leading to a shifting legal landscape that adopters of AI must continually monitor to ensure legal compliance. This is further complicated by the lack of a global agreement concerning AI rules, regulations, and laws – the closest to date being the UN General Assembly's 2024 resolution calling on Member States to refrain from using AI systems that pose undue risks to human rights or which are otherwise incompatible with international human rights law.

AI Trends Resulting from Legal Uncertainty

The legal uncertainty surrounding the use of AI will increasingly influence agreements between companies in 2025.

Given the potential for legal exposure resulting from the use of AI, it is becoming more important for there to be a clear understanding between parties about the intended use of AI in any business relationship. This will require understanding how AI is used to deliver services and how AI is incorporated into products. We anticipate that this will result in more specific limitations on the use of AI as well as more clearly defined apportionment of risk for the use of AI.

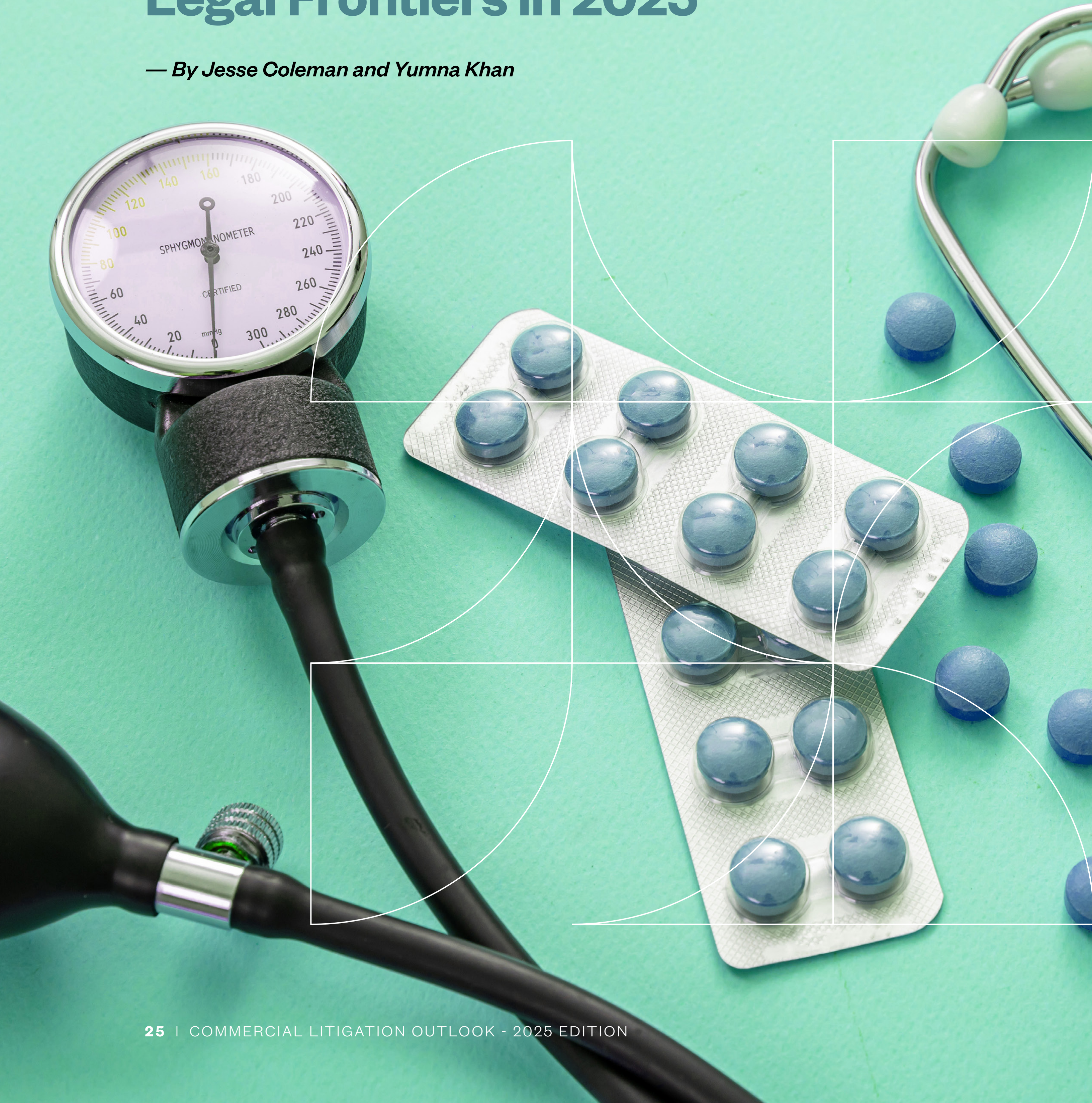
AI will also become increasingly important in merger and acquisition transactions. We have already seen a trend towards including specific representations and warranties concerning its use, specifically in connection with transactions where software comprises a significant part of the value of a company. The growing concern is that content or software code created by AI may inadvertently infringe third-party rights, or that no party can claim ownership in the created content or code.

The growing concern is that content or software code created by AI may inadvertently infringe third-party rights, or that no party can claim ownership in the created content or code.

Similarly, we have seen a number of media companies wrestle with questions related to AI-generated content, specifically with regard to developing internal policies for keeping track of the authorship of such content. For companies that produce and publish a large volume of content, proactively registering copyright in the works may not be economically practical. Rather, many media companies only register copyright in a work once an infringement is uncovered and a registration is required to proceed with litigation. However, the downstream concern is with being able to accurately represent to the Copyright Office, potentially many years after the creation of the work in question, what part of the work was created by a human and what part was created by AI — a vital issue relating to being able to maintain the copyright because currently only the portion created by humans is copyrightable. As such, having procedures in place to ensure that human/AI authorship is accurately recorded as a thorough business record that would satisfy the federal rules of evidence will become an increasingly important concern for these companies.

From Data Privacy to Non-Competes: Health Care's Legal Frontiers in 2025

— By Jesse Coleman and Yumna Khan



Data security, False Claims Act enforcement, drug pricing, vaccine litigation, and non-compete legislation remain hot topics for 2025.

NEW FRONTIER FOR HEALTH DATA PRIVACY

The health care industry can expect a shifting legal and regulatory landscape in 2025. The passing of new data privacy legislation at the state level and amendments of data privacy and HIPAA rules at the federal level will foster change and likely some uncertainty on enforcement.

Previously, the HIPAA Privacy Rule was amended in April 2024 to add new definitions such as "reproductive health care"—which would include but is not limited to abortions—and to establish a new prohibition against the use or disclosure of such information in criminal, civil, or administrative investigations against any person in connection with seeking to obtain otherwise lawful reproductive health care. Recently, however, a Texas federal court preliminarily enjoined the application of the amended HIPAA Privacy Rule to at least one doctor and her clinic on the basis that it forces doctors and other entities covered by HIPAA to decide between risking a violation under the amended version of the rule or risking state penalties for failing to comply with abuse reporting requirements. Specifically, the plaintiff in this case argued that complying with the HIPAA Privacy Rule makes it harder for her and her staff to report to the state "child abuse," which she contends includes abortion and gender-affirming care. This ruling by the court—and likely similar future challenges in other courts—adds further uncertainty to whether the Trump-Vance administration will ultimately repeal the amendments to the HIPAA Privacy Rule or even defend its enforcement in court.

The Office of Civil Rights (OCR) also recently issued proposed updates to the HIPAA Security Rule which significantly strengthen cybersecurity requirements for HIPAA-regulated entities. Some notable changes are: (1) the creation of a technology asset inventory and network map that illustrates the movement of electronic protected health information (ePHI) throughout the regulated entity's information systems on an ongoing basis; (2) 24-hour notice to regulated entities when a workforce member's access to ePHI or certain information systems is changed or terminated; (3) encryption of ePHI at rest and in transit; (4) annual review and testing of the effectiveness of certain security measures; and (5) stronger incident response procedures, including written procedures to restore the loss of certain relevant information systems and data within 72 hours, and written security incident response plans and procedures for testing and revising plans. But, similar to the HIPAA Privacy Rule amendments adding a definition for "reproductive health care," it is also unclear how this proposed rule will fare under the Trump-Vance administration, which has expressed broad interest in less regulation, especially in the technology sector.

> This widespread focus on data privacy and security at the state level means businesses will likely need to comply with stricter data security measures to protect consumer information or risk facing significant fines and legal action for breaches.

The FTC also previously updated its own Health Breach Notification Rule (HBNR) to apply to health apps and similar technologies not covered by HIPAA in April 2024. While the amended version of the HBNR will likely result in increased scrutiny of various technologies' data security processes, the newly designated FTC chair Andrew Ferguson has criticized the FTC's expansion of HBNR and thus its enforcement in 2025 also remains unclear.

Lastly, there has been an increased focus on data privacy and security at the state level in recent years. Previously, four states—Florida, Montana, Oregon, and Texas—adopted new data privacy laws in July 2024. In 2025, eight other states—Delaware, Iowa, Nebraska, New Hampshire, New Jersey, Tennessee, Minnesota, and Maryland—are expected to adopt new data privacy laws which would leave nearly half the states with comprehensive data privacy laws. This widespread focus on data privacy and security at the state level means businesses will likely need to comply with stricter data security measures to protect consumer information or risk facing significant fines and legal action for breaches. The kinds of security measures business will need to undertake include enhanced consumer rights to access, correct, and delete personal data, explicit consent for sensitive information, and mandatory data security practices to prevent breaches.

FALSE CLAIMS ACT ENFORCEMENT AT HISTORIC HIGHS

The health care industry can expect another record year of enforcement of the False Claims Act (FCA) by the Department

of Justice (DOJ) in 2025—particularly in the health care fraud, military procurement fraud, COVID-relief program fraud, cyber fraud and *qui tam* whistleblower sectors. Indeed, enforcement under the FCA remains a high priority for the DOJ—especially against individuals and companies in health care who knowingly submit fraudulent claims to the government. Specifically, in January 2025, the DOJ reported its annual recoveries under the FCA for fiscal year 2024, in which it recovered more than $2.9 billion in settlements and judgments—nearly $300 million more than fiscal year 2023's amount. Notably, fiscal year 2024 produced 558 settlements and judgments—the second-highest number in the FCA's history. Of the $2.9 billion reported, $1.67 billion related to matters involving the health care industry, including managed care providers, hospitals, pharmacies, laboratories, long-term acute care facilities, and physicians, which is a slight reduction from fiscal year 2023's statistic of $1.8 billion. Overall, the DOJ's recent activity shows its continued focus on *qui tam* whistleblower lawsuits as well as FCA claims related to health care fraud (with actions targeting the opioid epidemic, claims related to unnecessary services and substandard care, Medicare Advantage matters, and unlawful kickbacks), military procurement fraud, COVID-relief program fraud, and cyber fraud.

In January 2025, President Trump also issued Executive Order 141731 ("Order") which limits diversity, equity, and inclusion (DEI) policies and programs across the federal government and within private industries that do business with the federal government, including certain members of the health care industry. Notably, this Order directs the head of each agency to require federal contractors and grant recipients to agree their "compliance in all respects with all applicable federal anti-discrimination laws is material to the government's payment decisions" under the FCA. This Order also requires federal contractors and grant recipients to certify they do "not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws." These new certification and materiality requirements for all federal contracts and grant awards has potentially significant implications under the FCA. First, the Order leverages the vast penalties under the FCA as part of a larger effort to limit policies and programs across the federal government and within private industries that do business with the federal government, including certain members of the health care industry. Thus, certain members of the health care industry should consequently expect greater FCA scrutiny and private *qui tam* actions brought by employees and others opposed to any DEI policies and programs. Certain members of the health care industry should also closely examine future agency regulations and guidance as well as judicial decisions to clarify what DEI policies and programs remain permissible. The FCA's anti-retaliation provisions also prohibit adverse employment actions against employees, contractors, and agents for protected activities, including investigating and reporting false claims arising out of non-compliant DEI policies and programs. As such, issues involving alleged discrimination in this area also pose potential FCA risks for certain members of the health care industry.

THE WAR ON DRUG PRICING

Increased agency and executive action at the federal level and ongoing pending litigation involving the pharmaceutical industry, indicate drug pricing will remain an area of focus in 2025.

The Inflation Reduction Act (IRA) provides Medicare the ability to directly negotiate the prices of certain high expenditure, single source drugs without generic or biosimilar competition. As of November 2024, nine lawsuits are pending against the IRA's drug price negotiation program on the basis of constitutional and statutory grounds. Most are either in the briefing stage or awaiting decisions before various US appellate courts. And while no court has sided with the pharmaceutical industry so far, the US Department of Health and Human Services (HHS) could be blocked from continuing to implement some or all aspects of the drug negotiation program if the pharmaceutical industry prevails in any of these lawsuits.

The Centers for Medicare & Medicaid Services (CMS) is also in the midst of negotiating pricing on several Part D drugs and is slated to make public an explanation of the agreed-upon negotiated prices by March 2025.

On September 20, 2024, the Federal Trade Commission (FTC) also filed an administrative complaint against the three largest pharmacy benefit managers (PBMs) for anticompetitive rebating practices which hike the price of insulin. This indicates the FTC may pursue additional actions against entities involved in drug pricing in 2025.

Previously, to implement the IRA's drug pricing initiatives, then-President Biden issued Executive Order 14087 requiring the requiring the Secretary of Health and Human Services to select and assess certain health care payment and delivery models that may lower drug costs and promote access to innovative drug therapies. In January 2025, President Trump issued Executive Order 14148, which rescinded Executive Order 14087 as well as other previously-issued executive orders. But, given that the IRA requires applicable drug manufacturers to fulfill certain statutory obligations once a drug is selected for negotiation, the rescission of Executive Order No. 14087 is unlikely to affect the 15 Medicare Part D covered drugs already subject to the

Thus far, with a few notable exceptions, courts have generally upheld the requirement for the COVID-19 vaccine for certain workers in certain occupations.

second cycle of price negotiations. Additionally, the issuance of executive orders do not affect the many drug pricing initiatives already housed within the IRA (e.g., the $2,000 annual cap on out-of-pocket prescription drug costs, inflation rebates, etc.). Nevertheless, the rescission of Executive Order 14087 indicates drug pricing will remain a focus of the Trump-Vance administration.

COVID-19 VACCINE LITIGATION REMAINS PREVALENT IN 2025

Vaccine litigation—particularly related to the requirement for the COVID-19 vaccine for certain workers in certain occupations—will continue into 2025. Indeed, numerous lawsuits challenging the constitutionality and legality of such a requirement have emerged across the US since the start of the COVID-19 pandemic. These cases challenge local, state, and national level policies in both the public and private sectors and raise multiple arguments, including: (1) constitutional substantive due process arguments alleging violations of fundamental rights of bodily privacy or bodily integrity; (2) First Amendment-based arguments such as those involving the right to free speech and the right to free religious exercise; (3) Fourth Amendment unreasonable search and seizure arguments; and (4) federal or state law violations, including arguments under the Americans with Disabilities Act (ADA), the Civil Rights Act (CRA), and the federal Food, Drug, and Cosmetic Act (FDCA). The vehicle for these challenges is often workplace retaliation claims such as wrongful termination. Thus far, with a few notable exceptions, courts have generally upheld the requirement for the COVID-19 vaccine for certain workers in certain occupations. These decisions indicate courts will likely continue to uphold the requirement for the COVID-19 vaccine for certain workers in certain occupations even in the face of any vaccine-related challenges stemming from the imminent appointment of Robert F. Kennedy Jr. to Secretary of HHS, who has been critical of vaccines, or reinstatement of certain service members dismissed for declining the COVID-19 vaccine by President Trump via Executive Order 14184.

STATES REPLACE FTC IN LIMITING NON-COMPETES

Previously, the FTC passed a final rule to ban most non-compete clauses in employment agreements in April 2024. A Texas federal court later set aside this rule in August 2024 on the basis it exceeded its authority as well as was arbitrary and capricious. While the FTC's nationwide non-compete ban may have come to a halt for the time being, many states appear eager to crack down on non-competes in 2025—particularly in health care.

Indeed, six states—Illinois, Iowa, Louisiana, Maryland, Pennsylvania, and Rhode Island—passed legislation aimed at limiting non-competes in health care in 2024. This legislation ranged from prohibiting non-competes of certain professionals under certain conditions to restricting the temporal scope of non-competes for physicians and health care practitioners. Notably, Illinois, Louisiana, and Pennsylvania's legislation limiting non-competes in health care becomes effective January 2025. Illinois's legislation limits non-competes for licensed mental health professionals to first responders or veterans if enforcement is likely to result in an increase in cost or difficulty for any first responder or veteran seeking such services. Louisiana's legislation limits the temporal scope of non-competes for primary care physicians to no more than three years. Lastly, Pennsylvania's legislation limits the temporal scope of non-competes for health care practitioners to no more than one year and only if the health care practitioner terminated the employment relationship.

In sum, data security, False Claims Act enforcement, drug pricing, vaccine litigation, and non-compete legislation remain hot topics for 2025. For more information, Seyfarth's 50-State Health Privacy Law Survey and 50-State Non-Compete Desktop Reference provide up-to-date tracking and further details on some of these topics.

Key Trends in Commercial Litigation

Privacy

— *By Jason Priebe and Danny Riley*

As the digital landscape continues to evolve, privacy litigation is becoming increasingly complex and far-reaching.

With the proliferation of Internet of Things (IoT) devices, telematics, and advanced tracking technologies, plaintiffs' attorneys are leveraging both new and long-standing privacy statutes to address emerging privacy risks. At the same time, heightened regulatory scrutiny at both the federal and state levels has created a challenging environment for businesses. In 2025, privacy litigation is expected to grow in volume and scope, with corporations facing unprecedented challenges in collecting, managing, and safeguarding sensitive data.

Expanding Claims Under Evolving Privacy Laws

Class action claims for data breaches continue to increase. In our experience, plaintiffs' attorneys are cutting and pasting text from internet news reports of security vulnerabilities or data breach notification letters in a race to the courthouse after a purported event. We expect the frequency of opportunistic data breach lawsuits to increase. Additionally, we anticipate further litigation of individually claimed damages and standing issues associated with the publication of information on the dark web of unknown or undetermined provenance. However, courts have demonstrated an increasing willingness to scrutinize the factual allegations and individualized damages claims. We expect them to remain vigilant in weeding out meritless cases that fail to establish concrete harm or causal links to alleged breaches.

In addition to traditional data breach litigation, the past few years have seen plaintiffs' attorneys reinterpret statutes such as the California Invasion of Privacy Act (CIPA), federal wiretapping laws, and most recently the California Consumer Privacy Act (CCPA), to target businesses using technologies that track, collect, and share consumer data. Historically, the CCPA's private right of action was limited to traditional data breaches. However, a recent case, *M.G. v. Therapymatch, Inc.,* 2024 WL 4219992 (N.D. Cal. 2024) has extended its applicability to data collection disclosures via online tracking tools. Courts have allowed claims to proceed where plaintiffs allege businesses failed to maintain reasonable security practices, even in contexts outside stereotypical data breaches.

> Devices and vehicles that collect and transmit information are gaining increased attention from state regulators and privacy advocates

These cases demonstrate how expanding definitions of "personal information" under state privacy laws are giving rise to new legal theories. For example, data collected by IoT devices, including geolocation and behavioral data, now falls squarely within the ambit of most privacy statutes. With the CCPA granting California residents a private right of action and imposing statutory damages for violations, businesses face significant exposure if their data governance practices fail to meet the evolving standards of reasonableness.

In a similar way, CIPA remains a key tool for plaintiffs, especially in claims involving marketing analytics software, such as website cookies, web beacons and tracking pixels.

CIPA allows for statutory penalties of $5,000 per violation, creating strong incentives for class action litigation. These claims, although often cookie-cutter in nature, require businesses to engage in fact-intensive investigations to mount effective defenses.

Devices and Equipment in Privacy Litigation

Devices and vehicles that collect and transmit information are gaining increased attention from state regulators and privacy advocates. Looking ahead, the rapid adoption of IoT devices, telematics, and advanced analytics tools will likely give rise to new privacy claims.

IoT and Telematics. The IoT ecosystem is rapidly expanding, with "smart" devices in homes, workplaces, and vehicles collecting vast amounts of data. Telematics systems in particular—used in vehicles to track driving behavior, geolocation, and driver usage patterns—are becoming a focal point for privacy concerns. Plaintiffs may allege that manufacturers and service providers unlawfully share this data with third parties, including insurers and marketers. Similarly, claims involving insufficient security measures to protect IoT data are expected to grow as cybersecurity breaches and unauthorized data access incidents increase.

Automated Decision-Making and AI. The use of consumer data in algorithms for automated decision-making is another emerging area of concern. Regulators, such as the Federal Trade Commission (FTC), have signaled their intent to scrutinize businesses that leverage artificial intelligence and machine learning in ways that could lead to unfair outcomes. For instance, cases related to automated decision-making in areas like "surge" pricing, hiring, or credit decisions are expected to give rise to individual state privacy claims, as well as allegations of individual discrimination and information processing that exceeds the purported notice or claimed purpose of collection.

Health Data and Biometric Information. The collection and use of sensitive health and biometric data continue to draw significant attention. Recent enforcement actions, such as the FTC's case against BetterHelp for improperly disclosing mental health data, underscore the risks of unauthorized data sharing. In the IoT context, wearable devices and health trackers present unique challenges, as they often collect highly personal information that is subject to strict legal protections under laws like Washington state's My Health My Data Act.

Biometric Timeclocks and Workplace Devices. There has been no reduction in the number of class action claims based on Illinois' Biometric Information Privacy Act (BIPA). BIPA lawsuits commonly target companies with timeclocks and other workplace devices that collect fingerprint, facial recognition, or retinal scan data. Given the lucrative statutory damages provided under BIPA, these claims are expected to persist in Illinois and will likely serve as a model for similar laws in other states, like Missouri, that permit an individual causes of action for alleged violations. Even in states like Texas that do not permit direct actions for violations of biometric privacy laws, government investigations and enforcement is on the rise. Businesses operating across multiple jurisdictions should anticipate heightened compliance requirements and an expanded litigation landscape. Employers and service providers that rely on biometric timeclocks or employee authentication systems need to assess their notice, consent, retention and other biometric compliance requirements to match their jurisdictional exposure in order to mitigate potential risks.

Strategic Considerations for Risk Mitigation

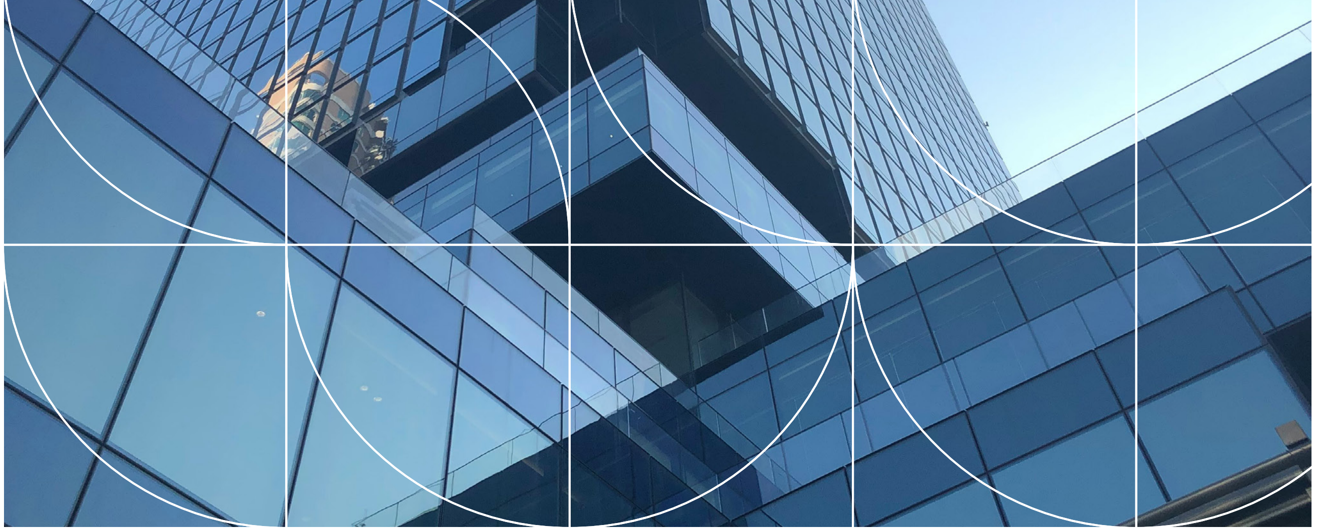
Businesses must navigate an increasingly fragmented regulatory landscape where compliance with one set of privacy laws may not guarantee compliance with others.

To mitigate the risks of privacy litigation, organizations will need to take proactive and strategic measures. Regular audits of tracking technologies and Internet of Things (IoT) systems are essential to ensure compliance and to identify potential vulnerabilities in data collection and sharing practices. Strengthening privacy notices is another critical step. Clear and comprehensive disclosures about how data is collected, used, and shared can not only meet legal requirements but also foster trust with consumers.

Securing meaningful consent through mechanisms like cookie banners and opt-in agreements further reduces risk by providing clear user authorization for data practices. Businesses should also enhance oversight of third-party vendors by negotiating restrictive data protection addenda and ensuring vendor practices align with privacy standards. Lastly, staying informed about changes in privacy laws and regulatory enforcement allows organizations to adapt their compliance strategies effectively. By prioritizing these measures, businesses can better navigate the evolving challenges of privacy litigation.

Looking Ahead

While data breach class actions will continue to grow, new and emerging technologies present additional compliance challenges due to the existing patchwork of state privacy laws. IoT devices, telematics, and AI-driven technologies become integral to daily life, privacy litigation will continue to evolve. Businesses must adapt to emerging risks by implementing robust data governance practices, staying ahead of regulatory requirements, and preparing for new legal theories from the plaintiffs' bar. In 2025, the companies that succeed will be those that take a proactive approach to compliance, transparency, and consumer trust in an increasingly interconnected world.



Key Trends in Commercial Litigation

Real Estate Litigation

— By Elizabeth Schrero, Rebecca Woods, and Mark Johnson

Commercial Real Estate Transactions Are on the Rise, and So Are Disputes.

The rapid rise in interest rates since mid-2022 had numerous effects, including reducing CRE transactions in all but the hottest of asset classes (e.g., cold storage and data centers). While interest rates are not lowering fast or significantly, the CRE market has stabilized and is expected by many to rebound, thanks to pent-up demand, correction of property values, and prices which have baked in the high interest rates. When transactional activity heats up, so do disputes. The industrial sector, particularly warehouses and data centers, have historically been relatively quiet on the disputes front, but we are seeing more issues arise in these sectors related to zoning, tax, and environmental liabilities.

More transactional activity also means more purchase and sale agreement disputes, the most frequent of which are about who is entitled to earnest money and when, claims for escrowed or held-back funds, and general claims of breaches of representations and warranties. Additionally, we are seeing more creative claims, particularly sounding in tort (fraud) and unfair trade practices laws, by purchasers who negotiated “as-is” contacts and later had buyer’s remorse.

Receiverships and Foreclosures in the Office and Multi-family Markets will Continue to Increase

Estimates are that nearly $500 billion in office loans will mature in 2025 and will need to be refinanced, and about 30% of those properties are worth less than the loans by which they are encumbered. The boom in multifamily development in recent years means a number of loans on those developments are maturing, a sizable percentage of which are also under water. Most of these will be resolved (or punted) through refinancings/restructuring/deed-in-lieu, but we anticipate a small uptick in Class C multifamily property receiverships, where mid-sized or smaller investors can’t afford to adequately maintain their properties and special servicers must step in and take control via receivership. Foreclosures will also increase as a result. The underwater office market is going to continue to be vulnerable to foreclosures. Smaller investors may be more likely to file for bankruptcy and attempt to restructure, or simply walk away from underwater projects.

Underwater Investments Will Continue to Spin Off Disputes

Some deals made in prior years are still languishing, with developers and investors delaying breaking ground or stalled during construction because the property valuation dropped, and costs to build and insurance have increased. We see this most acutely in private/public developments, which tend to have slower-moving disputes because the due diligence timeframes are often keyed to site plan approvals or obtaining adequate financing. We will continue to see disputes about the adequacy and timing of due diligence, earnest money (hard and soft), and novel arguments about contract language conjured by lawyers whose clients are desperate to get out of a deal.

Insurance Premiums Continue to Skyrocket Along with Increased Risks from Natural Disasters

Extreme weather and catastrophic destruction of property is fueling a meteoric rise in insurance costs for everyone but particularly for commercial real estate. In addition to killing deals, or slowing them down materially while the painful economics of insurance are evaluated in each deal, we anticipate a material increase in disputes arising from lapsed insurance, under-insurance, as well as disputes between insurers and their insureds. We also predict that contracting counterparties will increasingly negotiate dueling “primary” insurance provisions, hoping to manage their exposure to claims by putting their insurance coverage behind the counter party’s (whose insurance would be deemed “primary”).

Loss histories jack up premiums or cause insurers to drop their insureds, so if there's any ambiguity in those clauses, the calculus of a "litigation ROI" will be different than in years past.

Litigation over such clauses is not typical among entities who are not insurers, but the incentive will be strong to ensure that someone else's insurance will respond to a claim first. Loss histories jack up premiums or cause insurers to drop their insureds, so if there's any ambiguity in those clauses, the calculus of a "litigation ROI" will be different than in years past. There will also be an increase in residential foreclosures by lenders against homeowners who lose their homes as a result of catastrophic natural disasters like the hurricanes which impacted North Carolina and Florida and the wild fires that ravaged California.

Disputes about Defective Construction Will Likely Increase

Construction defect litigation is evergreen, but it tends to be more acute in the years following shortages of skilled labor. The construction industry has been experiencing a skilled labor shortage for most of the last decade, and it likely will get worse in the coming years. There are myriad factors for this, but adding fuel to the fire will be the new administration's focus on immigration: 30-40% of all construction workers in the U.S. are immigrants, with an undetermined number who are undocumented. In addition, with so many people impacted by the hurricanes and wildfires of the last several years, demand for building or rebuilding homes will rise. A scarcity of skilled workers directly increases the risk of defective construction. The labor shortage for 2023 was estimated at about 546,000, for 2024 about 500,000, and it's anticipated to be about 450,000 in 2025.

Additionally, exigent circumstances to replace housing in Southern California destroyed by natural disasters has already resulted in loosening or elimination of certain requirements for rebuilding, and this too may increase the risk of defective construction. Defect claims tend to have a one to three year lag time (from substantial completion), so we will continue to see owners make such claims in 2025 and beyond. Finally, the impact of the 2021 Bipartisan Infrastructure Deal (Infrastructure Investment and Jobs Act) also should be a factor to watch. Inevitably, as projects move from design and approval to funding and then contracting and execution phases, disputes will arise.

Changing Concepts of Property Ownership and Ownership Structures, and Conversion to New Uses Will Lead to Disputes

Conversion of office and retail space to residential use and conversion of malls/retail space to other uses will continue, particularly with the backdrop of the national housing shortage. This trend will provide fertile ground for disputes between owners and governmental authorities which plan and approve such conversions, as well as between private parties with competing or diverging objectives.

We have also seen changes in the concept of property ownership, in light of housing affordability and shortage issues, demographic shifts, the rise of the sharing economy and changing preferences for usage. These changes, coupled with the rise of hybrid and remote work, have brought about the rise of co-housing, fractional ownership, and temporary housing, raising new legal issues ripe for litigation regarding these ownership interests, use structures and parties' property rights.

Disputes are on the Rise Relating to Illegal Cannabis Operations

Cannabis is still classified as an illegal substance on the Federal level. Neither landlords nor their lenders are supposed to accept income that comes from the unlicensed sale of cannabis. New laws have been enacted to address illegal cannabis operations and these new laws and law enforcement operations have created exposure for owners and lenders and have been the subject of litigation. For example, New York City padlocked 750 to 1000 unlicensed weed shops between April and October, 2024 under "Operation Padlock to Protect," under the authority of New York State and New York City laws which granted law enforcement new powers to shut down unlicensed weed sellers' operations. A new New York State law extended enforcement to local city agencies and the New York City law enacted thereafter gave Sheriffs authority to inspect places of business during operating hours and issue immediate orders of closure and seal buildings for up to one year where unlicensed cannabis sales are found to be taking place.

We anticipate ongoing attempts by state and local governments to stop illegal cannabis operators, which will have ramifications for owners and lenders of the properties where such operators are located. Local governments will likely take action to enforce owners' obligations to commence proceedings to evict illegal operators (e.g., imposing civil and criminal fines and penalties on owners). In some states, local governments also will impose fines on landlords who knowingly lease premises to tenants illegally selling cannabis. In addition, lenders will continue to face potential regulatory enforcement of anti-money-laundering regulations relating to illegal drug sales.

Disputes Arising From Use of AI and Cutting Edge Technology

The use of Prop Tech, AI, Smart Contracts and bitcoin for real estate transactions and management continues to become integrated into the real estate world, while legislation and regulatory guidelines have not caught up, leading to cybersecurity lapses, data privacy violations, data breaches, and novel enforceability issues. We expect to see cases arising from this trend going forward.

Key Trends in Commercial Litigation

Securities & Fiduciary Duty Litigation

— By Gregory Markel, William Prickett, and Gershon Akerman

In 2024, there were several trends in securities and fiduciary duty litigation that resulted in cases that ultimately involved large settlements to plaintiffs and risks to defendant companies, officers, and directors.

Importantly, shareholder derivative actions have increasingly accompanied class actions, resulting in larger recoveries for plaintiffs because of increased leverage resulting from the two cases.

Cryptocurrency enforcement actions and class actions have grown, with the House of Representatives passing the first major cryptocurrency legislation this year. There was also a significant increase in ESG-related lawsuits. Traditional banking and financial fraud class actions increased, although federal securities litigation filings have stayed at about the same level in 2024 as in 2023.

We expect many of these trends to continue or increase in 2025. The Trump administration is likely to have a substantial effect on some cases, particularly with regulatory and enforcement cases. We anticipate fewer such cases being brought than under the Biden administration.

Shareholder Derivative Actions

2024 saw an increasing trend in shareholder derivative actions filed with class actions.

A recent report by Cornerstone Research focuses on this trend of more derivative actions being brought with accompanying securities class actions. The report found that between 2019 and 2024, nearly half of new securities class actions were accompanied by a derivative action.

This practice typically results in higher settlements for Plaintiffs (on average 36% higher (per Cornerstone's study)), as well as higher plaintiff attorney fee awards. An overwhelming majority of cases (87%) also result in some corporate reform, such as changes to corporate governance structures or additional disclosures. Cases with solely monetary settlements were far fewer (26%). We expect this practice to continue in 2025.

Class Actions

As for traditional shareholder class actions alleging securities fraud, we expect the trends of 2024 to continue. After several years of relatively strong, rising markets, to the extent we see market retreats over the course of 2025, we can anticipate an uptick of such cases. These actions usually are filed following stock price declines (which are often necessary for the plaintiffs' bar to allege a "loss" caused by claimed wrongdoing), and the more precipitous the drop, the more likely claims will follow. This is especially true when a company's stock declines more than the market average, making it easier for plaintiffs to allege the decline was "caused" by the company's misstatements, and not by general market factors.

In addition, two cases in 2024 suggest that the Supreme Court is interested in further addressing some of the pleading standards governing securities class actions. The Court granted certiorari in *Facebook, Inc. v. Amalgamated Bank* (No. 23-980) and *NVIDIA Corp. v. E. Ohman J:Or Fonder AB* (No. 23-970), but later dismissed both appeals without issuing any opinion. The Court noted in a one sentence order that certiorari had been "improvidently granted." The questions presented in each case concerned specific pleading standards to survive dismissal: in *Facebook*, when

a risk factor in a company's SEC filing can be false or misleading and in *NVIDIA*, the standard for satisfying the heightened PSLRA pleading requirements. The Court, in hindsight, evidently determined both cases were not the best vehicles to answer these questions. We could see them teed up in similar future cases in 2025.

ESG-Related Litigation and Enforcement

There was a significant increase in ESG lawsuits and regulation in 2024. In March 2024, after years of consideration, the SEC finally promulgated a number of its anticipated ESG rules. One new rule requires SEC registrants to disclose the quality and adequacy of certain methods to reduce greenhouse emissions beginning with annual reports for 2025. However, the SEC voluntarily stayed implementation of the rule pending the outcome of multiple lawsuits arguing that the regulation exceeds the SEC's authority granted by Congress. We believe the new Trump administration will not be supportive of these ESG rules or ESG considerations in investment decisions generally. One notable recent example is *Spence v. American Airlines et. al,*, CA No. 4:23-cv-00552-O (N.D. Tex., Jan. 10, 2025). There, District Judge Reed O'Connor held that American Airlines and its employee benefits committee breached their fiduciary duties of loyalty and prudence in using ESG considerations when selecting investments for employee retirement accounts, instead of purely economic factors and seeking to maximize investment returns. While this decision is likely to be appealed, it signals a trend we believe will be emphasized by the conservative, anti-ESG movement that the Trump administration favors.

Cryptocurrency

Like ESG, there were significant cryptocurrency developments in 2024, including enforcement actions, legislation and class action suits. Enforcement actions by the SEC have increased measurably over recent years, but this is likely to change under Trump's presidency. Of note, the SEC successfully brought an action against Coinbase. *SEC v. Coinbase, Inc.,* No. 1:23-cv-04738 (S.D.N.Y.). The court agreed that Coinbase engaged in the unregistered offer and sale of securities, a decision that could have a major impact on other cryptocurrency exchanges. We envision that under the Trump administration, courts will be urged to adopt the opposite result, that cryptocurrency is *not* a "security" subject to oversight and enforcement by the SEC and other securities regulators.

Other key cryptocurrency trends include the first significant cryptocurrency legislation – the Financial Innovation and Technology for the 21st Century Act (FIT21) – that was passed by the House in May 2024. If enacted, FIT21 will, among other provisions, exclude certain types of digital currency from SEC and other regulatory jurisdiction, potentially paving the way for more widespread acceptance of such assets. There were also increased cryptocurrency class actions in 2024, which most often allege various types fraud or theft concerning the sale of digital assets. Many of these cases bring claims similar to those brought by regulators. We expect this trend to continue given the continued investor (and regulatory) focus on cryptocurrencies. Once again, however, it is likely that the new administration will seek to influence these trends by favoring cryptocurrency

SEC Enforcement

The past year saw an uptick in companies involved in regulatory proceedings including SEC enforcement actions. Notably, there were two high profile Supreme Court decisions that undermine agency enforcement authority.

In *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (June 28, 2024), the Supreme Court expressly overruled the long-established *Chevron* doctrine, holding that federal judges no longer need to afford deference to an agency's interpretation of federal law. Going forward, this inevitably will result in a significant decline in securities enforcement (and other types of regulatory) cases.

In *SEC v. Jarkesy,* 144 S. Ct. 2117 (2024), the Supreme Court held that the Seventh Amendment guarantees that "a defendant facing a fraud suit has the right to be tried by a jury." Under *Jarkesy*, the SEC now must bring most securities fraud actions seeking civil penalties in federal court rather than administrative proceedings. Before *Jaresky* the SEC enjoyed a home field advantage, litigating enforcement cases before its own ALJs. Now, having to bring these cases before a jury of the defendants' peers, will significantly reduce that advantage. Like *Loper*, we believe this decision will have a material impact on the SEC's appetite and ability to litigate securities fraud claims going forward.

In one post-*Jarkesy* case involving FINRA – *Blankenship v. FINRA*, D.I. 26, 2:24-cv-03003 (E.D. Pa. Sept. 4, 2024) – the plaintiff's effort to enjoin FINRA's disciplinary action was denied on jurisdictional grounds. We can expect more challenges to the authority of other federal agencies, and quite possible mixed results on the questions of administrative authority over agency enforcement, depending on the circumstances.

Data Breach and Cybersecurity

2024 saw the continuation of the dramatic increase in data breach and cybersecurity actions filed in federal court. Between 2021 and 2023, Bloomberg found an over 600% increase in federal complaints mentioning ransomware and an over 200% increase in data breach filings. The trend continued in 2024.

A recent Ninth Circuit decision – *Greenstein v. Noblr Reciprocal Exch.,* No. 22-17023, 2024 WL 3886977 (9th Cir. Aug. 21, 2024) – analyzed pleading requirements regarding data breach claims brought in response to data breach letters and held that plaintiffs must sufficiently plead either misuse, or theft, of sensitive information. *Greenstein* may impact cases nationally. As to standing issues, we will have to see if this 9th Circuit decision has any impact on slowing down the number of data breach class action suits.

Key Trends in Commercial Litigation

Trade Secrets, Computer Fraud & Non-Competes

— By Dawn Mertineit & Kate Perrelli

The law surrounding restrictive covenants continued to evolve greatly in 2024, and we anticipate a similar landscape in 2025 of legislative and judicial attempts to limit such clauses.

However, with a new administration, the trend of federal agencies tightening the screws on restrictive covenants may be coming to an end. Regardless, trade secret protection should remain a key priority for businesses, particularly given evolving technologies and legislative and judicial hostility toward non-competes.

Federal Restrictions on Non-Competes

The big news in 2024 was the FTC's attempt to ban non-competes, implementing a rule that had been set to go into effect in September 2024. This precipitated lawsuits by businesses or associated groups attacking the FTC's authority to implement the rule. Those legal challenges will continue into 2025, as the FTC appeals two cases in which a district court determined that the FTC lacked authority to issue the ban.

> While there is some bipartisan support for a federal non-compete ban, it is doubtful that Ferguson will continue to press the ban, particularly given the bruising losses the FTC has already faced.

We expect these appeals will not be successful, as the FTC faces tough audiences in the Fifth and Eleventh Circuits. Moreover, President Trump has replaced former chair Lina Khan with Republican FTC member Andrew Ferguson—who vociferously dissented from the FTC's rule, calling it "unlawful" and "forbid[den]" by the Constitution. While there is some bipartisan support for a federal non-compete ban, it is doubtful that Ferguson will continue to press the ban, particularly given the bruising losses the FTC has already faced. It is unclear whether a reconstituted FTC would withdraw the appeals (which seems unlikely) or simply wait for a presumed loss at the Fifth or Eleventh Circuit and use the loss as a statement regarding the bounds of the FTC's authority.

While the non-compete rule is unlikely to survive appellate scrutiny, we anticipate that the widespread media coverage of the (currently ineffective) rule could result in an increase in non-compete litigation, as certain employees may be unaware of the court decisions putting the rule on hold, and thus may erroneously believe that their non-competes are unenforceable. If such individuals join competitors in roles that violate their agreements, we could see an uptick in lawsuits seeking to enforce non-competes.

In addition to the FTC's attempts to regulate non-competes, the NLRB has focused on restrictive covenants, including its former General Counsel having issued memoranda in 2023 and 2024 targeting employers who require employees to sign non-competes and "stay-or-pay" provisions. But the NLRB has a new acting General Counsel, and just as with the FTC, we anticipate the leadership change means that employers may face weaker headwinds from the NLRB in 2025.

State-Level and Judicial Initiatives

Regardless of what happens at the federal level, we expect state legislatures to continue tightening laws on restrictive covenants. Recent updates include industry-specific legislation limiting the scope of permissible covenants (most notably in the healthcare industry), a general ban of employee non-competes in Minnesota, and a pair of draconian new California

statutes, one of which required notification to employees and former employees regarding unenforceable covenants. The other purported to invalidate all non-competes in California, regardless of where the employee lived or provided services when the agreement was executed. We anticipate litigation on a dual-jurisdiction track, where employees who have decamped to California seek a declaratory judgment to invalidate their non-compete, while the former employer files in a more friendly state, seeking to uphold the agreement. We predict inconsistent judgments in such actions, with a potential Circuit split arising in the future.

Employers should expect states to continue targeting covenants for low-wage workers, imposing industry-specific restrictions (or outright bans), and requiring notifications to employees that may be onerous and confusing. Businesses should also anticipate that the patchwork of state laws will become even more varied, further underscoring the need for well-drafted agreements that contemplate the laws of the states where employees live or provide services.

Many courts nationwide have begun to curtail the use of restrictive covenants, including most notably in Delaware (which many businesses use as the governing law and/or forum in their agreements).

Finally, it is not just legislative action changing the playing field. Many courts nationwide have begun to curtail the use of restrictive covenants, including most notably in Delaware (which many businesses use as the governing law and/or forum in their agreements). This trend is not limited to employment agreements, but includes restrictive covenants entered into in the sale of a business. For example, multiple cases in 2024 affirmed that Delaware courts generally hesitate to "blue pencil" or modify overbroad covenants. *See Hub Grp., Inc. v. Knoll,* 2024 WL 3453863, at *1 (Del. Ch. July 18, 2024) (refusing to modify an overbroad covenant, and noting that blue-penciling risks a "perverse incentive towards overbreadth or lack of clarity"); *Fortiline, Inc. v. McCall,* 2024 WL 4088629, at *4 (Del. Ch. Sept. 5, 2024) (similarly refusing to judicially modify an overbroad-as-drafted covenant, and opining that blue-penciling "supports a regime of 'sprawling restrictive covenants'"). Other courts have noted that non-competes prohibiting an individual from joining a competitor in *any* capacity likely violate the so-called "janitor rule" and are generally overbroad and unenforceable. *See, e.g., Med-1 Sols., LLC v. Taylor,* 2024 WL 4876906, *8 (Ind. Ct. App. Nov. 25, 2024) (non-competes prohibiting work for a competitor "in any capacity," even as a security officer or custodian, are unreasonable and unenforceable "because they extend beyond the scope" of any legitimate interests).

In sum, whether to comply with federal agency priorities, new legislation, or evolving judicial attitudes, it is more important than ever for employers to ensure the scope of their restrictive covenants is reasonably limited and calculated to protect legitimate business interests.

Trade Secret Trends

As the enforceable scope of restrictive covenants becomes more limited, trade secret protection will become more important—and trade secret litigation more prevalent. Indeed, given that non-competes are often a business's first line of defense against trade secret theft, employers with personnel in jurisdictions that limit non-competes in particular must embrace technology tools and robust policies to protect critical intellectual property assets. Even where restrictive covenants are permissible, given the judicial trend away from enforcing broadly drafted covenants, employers should redouble their efforts to properly train their workforce about the importance of confidentiality, implement strong policies to protect critical assets, and prepare critical teams (such as HR, legal, and IT) to spring into action when there is a risk of trade secret misappropriation.

We expect courts to continue placing high burdens of proof in misappropriation cases, emphasizing the need to clearly establish a secret's unique value and the specific harm caused by misappropriation. It will be more important than ever for companies to maintain documentation showing the distinct competitive advantage provided by their trade secrets to support claims of misappropriation. Additionally, keeping thorough records of trade secret identification, protection measures, and employee access can strengthen businesses' position in disputes.

This is all the more important with continued global competition, and particularly notable given the rise of artificial intelligence (AI), which is rapidly transforming workplaces and posing new challenges for trade secret security. As companies leverage AI tools for data analysis, innovation, and operational efficiency, they must be vigilant about safeguarding proprietary information. AI's potential misuse could also make it easier for to extract sensitive information from complex data systems. To mitigate these risks, companies should develop protocols around AI use and ensure that proprietary AI-related information is shielded with comprehensive digital and legal safeguards.

Despite the challenges (and price tag) associated with trade secrets litigation, parties that successfully prove misappropriation may recover eye-popping verdicts. In one recent case, an insulin pump manufacturer obtained a jury verdict of over $450M against a competitor and three former executives after proving misappropriation. See *Insulet Corp. v. EO Flow Co.,* United States District Court, District of Massachusetts, C.A. No. 23-11780-FDS. However, damages awards are also subject to reversal on appeal – as seen in the Virginia Court of Appeals' July 2024 decision reversing the largest jury award in state history when it determined that the trial court had made significant errors leading to a $2 billion award in *Pegasystems Inc. v. Appian Corp.*

Conclusion

Businesses should regularly review their restrictive covenants agreements to ensure compliance with various state laws, federal rules, and/or judicial trends. They should also take measures to prevent information loss and mitigate harm that may occur notwithstanding best efforts to prevent trade secret misappropriation.

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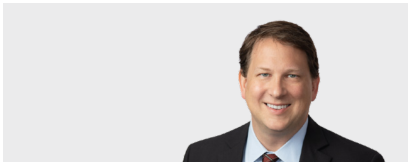

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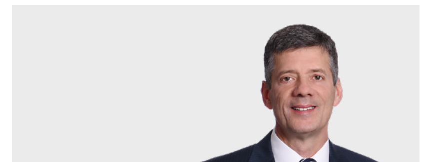

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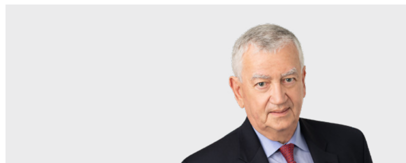

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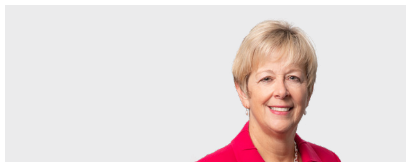

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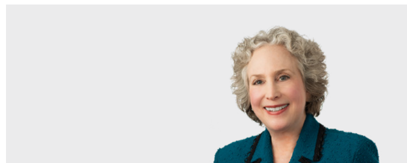

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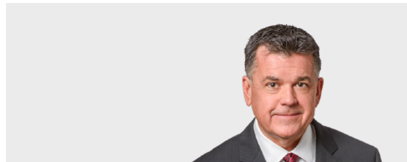

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