Seyfarth

Commercial Litigation Outlook

2024 Edition

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Introduction

—By Shawn Wood and Rebecca Woods

By any measure, the world has changed vastly since we issued our first Commercial Litigation Outlook in 2020. We are now on our fourth installment of providing insights and flagging trends for what to expect in the coming year, and 2024 promises to be one for the history books. Indeed, a vastly more robust regulatory and litigation landscape, the rise and challenges of ESG, artificial intelligence that will touch almost every level of society, the nature of remote work and all of its risks and rewards, and the tidal wave of commercial loans coming due all present new and different challenges that commercial litigators will be expected to face head on in the coming year.

Notably, AI has taken the commentariat, if not actual world, by storm. In this year's Commercial Litigation Outlook feature article, we discuss the arc and key risks posed by AI, but you'll also see a common thread in most of this year's articles addressing AI's anticipated effects on just about every aspect of the law. Actual AI use beyond curiosity-driven searches on large language model programs like ChatGPT and Bard is still limited, with business adoption happening at greater acceleration than legal's adoption. The legal focus for AI today is largely clustered around the business and legal risks posed by the fairly limited use cases, and the legality of the AI tools themselves. Our Intellectual Property experts discuss these issues, explaining important developments likely to happen in the areas of patentability of AI subject matter, and in copyright fights over vast amounts of protected material used to train large language models. In our Privacy and Consumer Class Action pieces, we discuss the surge in biometric and related litigation rooted in "tracking tools" claims, whether new and expanded use of voice and facial-recognition technologies or the collection, use, and sharing of pixel data.

The more robust regulatory space and cultural flashpoint considerations for businesses are the second strongest themes in this year's Outlook. ESG remains a hot topic in boardrooms and in court proceedings where plaintiffs continue their attempts, often without success, to pursue claims in the DEI, greenwashing, and environmental justice spaces. Class actions rooted in ESG-type claims are expected to increase as well, and businesses are awaiting the SEC's final rulemaking on ESG disclosures for registrants, with continued risk for those entities who choose to voluntarily disclose such information in the interim.

The increased regulatory hostility to non-compete agreements will continue in 2024. The FTC is expected to issue its final rule-making in spring 2024, likely mostly banning noncompetes, and the NLRB will enforce the guidance it provided last year that noncompetes risk violating the NLRA. Whatever happens on the federal level, states are poised to follow suit with courts in Minnesota and New York following California's lead in banning noncompetes (in whole or in part). Similar regulatory challenge continues in the franchise world, with the FTC likely to subject franchise relationships to more regulatory scrutiny. The NLRB and its latest take on joint-employer status and the DOL's proposed rulemaking regarding employee/independent contractor classification under the FLSA also stands to add wrinkles to business structures and planning in 2024.

Regulatory agencies continue to have their eye on privacy and health data security. 2024 will bring more focus on the HIPAA security rule, and continued focus on modernizing rules that protect personal health information, especially as new applications and the use of AI make such information more vulnerable. Fintech will continue to bring increased scrutiny by regulators, with the CFPB seeking to make personal financial data more protected and controllable by consumers. The FTC will remain robustly involved with fees and practices by financial institutions.

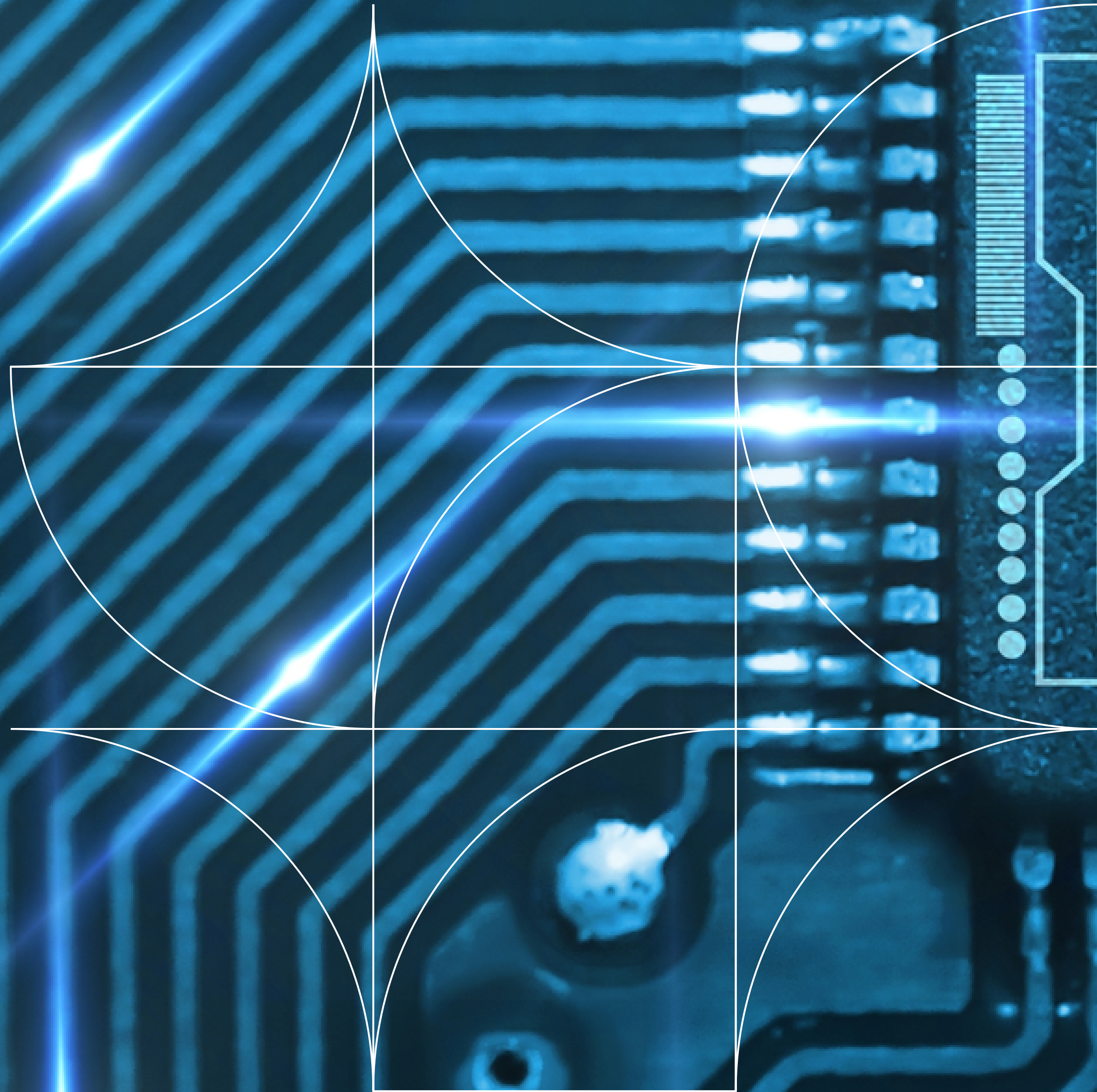
With respect to the practice of law, AI is expected to transform the way that lawyers research and write, and 2024 will focus in-house and outside counsel on the challenge of training for those use cases, as well as managing the business of law through those changes. Our eDiscovery article discusses what may be the most significant AI use cases in litigation—document production, analysis, and use—and the changing terrain that lawyers in that space will have to navigate. Our trial piece discusses how courts are continuing to use technology to refine the sea-change in remote appearances and practice that the pandemic brought. The bottom line? Remote hearings are common across jurisdictions and are here to stay.

Although a recession did not occur in 2023, the rise in interest rates has created a significant amount of instability in the commercial office space market. As we discuss in our Bankruptcy and Real Estate pieces, we expect a lot of activity around foreclosures, possible bankruptcies, and workouts as trillions of dollars of commercial debt comes due this and next year in this high interest-rate environment. Tenants will continue to have the upper hand in negotiations about commercial space as businesses continue to transform their use of space.

Physicist Stephen Hawking, who is often quoted for predicting that AI "could spell the end of the human race," also offered the less famous insight that "intelligence is the ability to adapt to change." We hope to focus on the latter and more constructive of these observations as we move to what promises to be an eventful 2024.

The Rise of Generative AI: Transforming Legal Practice in 2024 & Beyond

— By Rebecca Woods and Owen Wolfe



AI was the headline superstar of 2023, and will remain so for 2024.

Although certain forms of AI have been used by lawyers for decades, the emerging generative AI technologies will be game-changers in the legal industry, but slowly, owing to lawyers' inherent risk aversion and the so-far noisy and imperfect marketplace of products. In 2024, we expect to see increased integration of AI in legal practice, as well as increased need for AI-related counseling, litigation, and regulation.

Many document review platforms are integrating ChatGPT-like chatbots into their platforms to assist lawyers in locating documents of interest.

Use of AI in the Legal Practice

In 2023, lawyers and law firms started to dip their toes into the use of generative AI. Most have done so only in limited fashion, and many lawyers are understandably nervous about using AI. A high-profile case in New York federal court, in which lawyers cited fake cases provided to them by the generative AI program ChatGPT, put lawyers on guard about the potential havoc that AI can wreak if not used correctly.

Some law firms have begun using internal, proprietary AI programs or AI programs offered by third-party vendors. And lawyers are increasingly turning to generative AI programs to help them determine how best to word legal arguments; to brainstorm ideas; and to summarize complex concepts in an easy-to-digest manner. Many document review platforms are integrating ChatGPT-like chatbots into their platforms to assist lawyers in locating documents of interest. Some lawyers are using AI programs to generate first drafts of documents or to compare two similar documents and identify changes or missing pieces. AI is also being used to summarize voluminous records or documents, such as deposition transcripts or property records. Some lawyers are using AI with access to databases of court decisions to perform legal research.

In 2024, we expect to see more lawyers adopt AI in their practices. As the technology gets more reliable and helpful, lawyers' comfort level with the technology will rise, although we expect the profession in general to lag behind other businesses' use of AI. Lawyers will have to keep an eye open for new use cases, be discerning about vendors offering AI solutions, and crawl up the learning curve to optimize the use of AI. As lawyers integrate AI into their practices, litigators in particular will need to keep tabs on individual court rules regarding AI usage when preparing court papers. Federal judges in several jurisdictions have issued rules that require counsel to attest that their court papers were not prepared using generative AI programs, or that any AI-generated content was checked for accuracy by a human. Other courts, including appellate courts at the federal and state levels, will likely follow suit in 2024.

Outside counsel will have to prepare for the significant changes that AI will bring to the practice of law. AI poses material risks of a sea-change in the leveraged model where associates typically outnumber partners. Meaningful portions of the time-consuming (and lucrative) work performed by younger associates, such as document review, privilege logs, and legal research, are certain to require significantly less time as AI tools for such work get better and become ubiquitous. Both outside and in-house counsel will see that AI will replace some of the training that young lawyers used to get using more "analog" methods. This will up the ante for training and development of younger lawyers to ensure they matriculate into lawyers with solid legal skills and strong judgment.

Businesses that use AI in their hiring process or to monitor employee communications and conduct could find themselves facing lawsuits alleging bias, privacy violations, and other claimed misconduct.

Risks of AI for Clients

For all the benefits that come with AI, there are significant risks as well. Businesses and their counsel need to be aware of and monitor those risks.

These risks include reliance on AI output that includes "hallucinations" or false information. Companies that rely on AI to summarize voluminous documents, identify regulatory gaps in contracts or corporate policies, or otherwise guide decision-making could face operational consequences if the AI misses important information or provides incorrect answers. Businesses that use AI in their hiring process or to monitor employee communications and conduct could find themselves facing lawsuits alleging bias, privacy violations, and other claimed misconduct.

AI can pose risks to businesses' intellectual property, trade secrets, personal information, and privileged information as well. If employees enter confidential information into a publicly available AI program, the information may no longer be secret and could be revealed by the AI program to other users or bad actors. These issues could lead to a variety of lawsuits, including suits asserting privacy claims; confidentiality breaches; or violations of proprietary rights. Several large companies have banned employees from using ChatGPT and similar, public-facing generative AI programs for that reason. Other IP-related risks include companies potentially being unable to seek copyright protection, trademark registration, or patents for works created using AI. Companies could also inadvertently commit infringement by publishing or using AI output that contained someone else's copyrighted or trademarked information.

Lawsuits are not the only risk that comes with using AI. Companies should consider the possibility of regulatory and reputational risks as well. Even aside from AI-specific regulations (discussed more below), regulators may keep a close watch on companies to see if their use of AI violates existing regulations (e.g., regulations relating to personal information). Moreover, if a company misuses AI or commits errors due to its reliance on AI, it could lead to anger or distrust among the consuming public.

Forthcoming Regulations

Businesses should also prepare for forthcoming AI laws and regulations. In January 2023, the US National Institute of Standards and Technology issued its Artificial Intelligence Risk Management Framework, providing guidelines to organizations using AI. In October 2023, President Joe Biden issued a sweeping Executive Order that directed federal agencies to issue AI-related guidance in 2024 in a host of industries and areas. The guidance that emerges in 2024 could have a significant impact on how US businesses use AI.

Individual cities and states in the US have passed AI-related laws of one kind of another, including laws on bias in AI-assisted hiring processes and laws against "deepfake" videos, images, or audio clips. More will come as a result of numerous state-level commissions designed to investigate risks of AI. In the EU, the European Parliament passed the AI Act in 2023, which would have tiers of AI regulation based upon whether the EU perceives the AI program to be an "unacceptable risk," a "high risk," or a "limited risk." The AI Act would also impose disclosure requirements on certain generative AI programs. Once in effect, the AI Act could have significant impacts on how businesses operating in the EU use AI. Because so many companies that are governed by the EU also operate in the US, we expect EU-level compliance to slowly become more prominent in the US.

In 2024, as governments grapple with the social and economic consequences of AI usage, we expect to see more regulation at national, state/provincial, and local levels all over the world.

As the technology advances and becomes more sophisticated, it is possible that AI may reduce the human time spent on many tasks traditionally performed by younger lawyers.

Lawyer Training

Increased usage of AI will also likely impact how lawyers are trained. This is an issue law firms, in-house legal departments, and law schools will all have to address. Most immediately, lawyers of all ages will need training on how to safely and effectively use AI. This may include spotting and mitigating the risks posed by AI and properly vetting AI output. But it could also include more technical training, such as how to craft an appropriate prompt in order to get the AI to generate higher quality output.

In the long term, AI may have impacts on how new lawyers are trained. As the technology advances and becomes more sophisticated, it is possible that AI may reduce the human time spent on many tasks traditionally performed by younger lawyers. These tasks include document review, first drafts of certain documents, and performing legal research. The legal industry as a whole will have to consider how to re-focus training efforts to ensure not only that young lawyers know how to appropriately use AI programs, but are trained on, and then perform, uniquely human tasks that AI cannot replace.

The Future

Past technological advancements have radically altered the legal practice, including email and replacing legal research books with online legal research databases. Although lawyers are often slow to adopt major new technology, when they do, it can result in better outcomes and more efficiency for their clients. AI is no exception: although adoption is slow, it has the potential to dramatically alter the legal landscape. Lawyers and their clients need to keep in mind the risks that the technology poses, however, and use the technology wisely.

Key Trends in Commercial Litigation

Antitrust

—By Brandon Bigelow

With the US Department of Justice (DOJ) and Federal Trade Commission (FTC) questioning the legitimacy of the past 40 years of antitrust enforcement, and with plaintiffs successfully challenging business arrangements long thought settled as a matter of law, it is difficult to predict developments in US antitrust law in 2024.

Clubber Lang, the punishing boxer played by Mr. T in the movie *Rocky III*, put it best when asked for his prediction before his second bout against Rocky Balboa: "Prediction? . . . . Pain."

DOJ and FTC Implement 2023 Merger Guidelines

In January 2022, the FTC and DOJ launched a public inquiry to strengthen enforcement against anticompetitive mergers, culminating with the issuance in December 2023 of the joint 2023 Merger Guidelines. The 2023 Merger Guidelines supersede the 2010 Horizontal Merger Guidelines and the short-lived 2020 Vertical Merger Guidelines and represent a marked departure from prior US merger enforcement policy.

> Whether courts will follow the presumptions in the 2023 Merger Guidelines remains to be seen, but companies should anticipate the agencies will follow them in making enforcement decisions.

Notably, the agencies in the 2023 Merger Guidelines reverted to presumptions used prior to 2010 about the likelihood that proposed mergers between competitors (i.e. "horizontal" mergers) will substantially lessen competition in moderately and highly concentrated markets. And relying on a 1963 US Supreme Court decision, the agencies announced that a merger that creates a firm with a market share of as little as 30% could be presumed to substantially lessen competition in certain circumstances.

The agencies in the 2023 Merger Guidelines also expressed skepticism toward mergers involving "vertical" integration, like the acquisition by a distributor of a supplier, that threaten to create a firm that may limit access of rivals to products or services used to compete. Emboldened by the December 2023 federal appeals court decision in *Illumina v. FTC* holding the FTC had carried its burden to show a proposed vertical transaction was likely to substantially lessen competition, the agencies declared they would infer a transaction that results in a merging firm having a 50% share of a related product market will substantially lessen competition.

Whether courts will follow the presumptions in the 2023 Merger Guidelines remains to be seen, but companies should anticipate the agencies will follow them in making enforcement decisions. These are, of course, only presumptions, and parties to transactions have the right to rebut them and should be prepared to push back with real-world evidence and economic data to the contrary. Even in the *Illumina* decision touted by the agencies in the

2023 Merger Guidelines, the appeals court held that parties to a challenged transaction can offer evidence of structural changes they propose to make as part of the transaction (binding supply agreements, for example) and need only demonstrate that with those changes, the challenged transaction will not "substantially lessen" competition, rather than showing that the changes will completely negate the anticompetitive effects of a merger.

New Antitrust Challenges to Old Business Models

In addition to renewed skepticism from federal antitrust enforcers, the plaintiffs' bar enjoyed success in 2023 bringing antitrust challenges to business arrangements long thought settled, portending a tumultuous year in 2024.

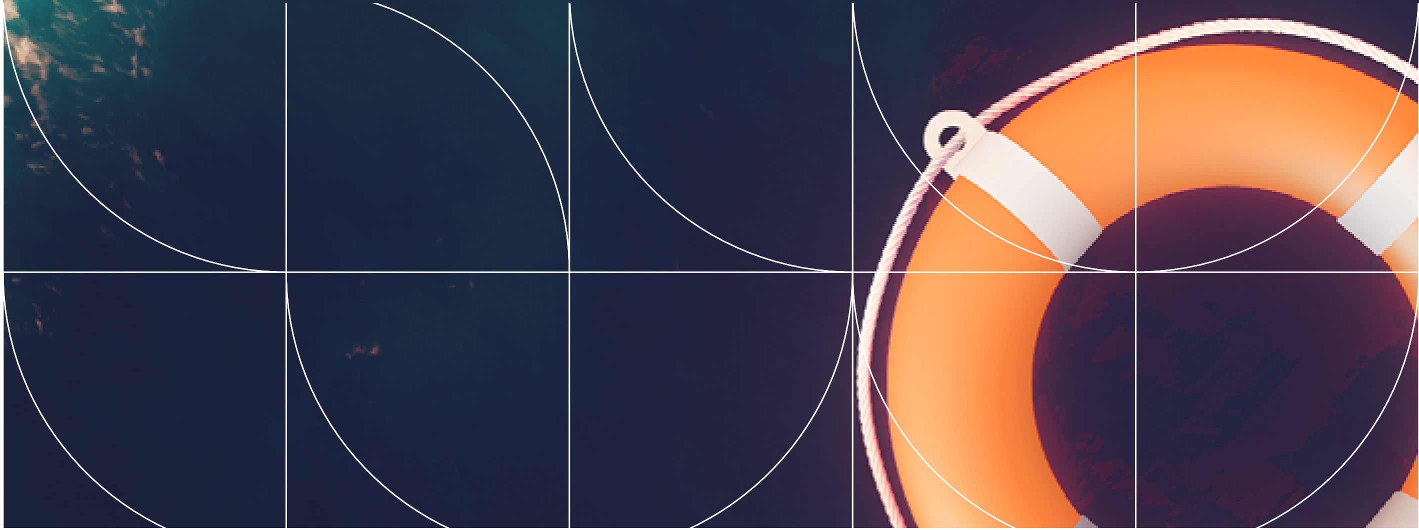
In a case that was decided in summer 2023, a federal appeals court reversed the dismissal of a putative class action brought by employees of franchisees of a fast food restaurant, who claimed that a "no-poach" clause in the franchise agreement of their employers violated Section One of the Sherman Act. The appeals court ruled that the complaint filed by the employees adequately alleged a "naked" agreement among competitors in the employment market, and that any argument that the "no-poach" clause was an ancillary agreement necessary to the success of the fast-food chain was a defense that remained to be proven. The impact of this decision extends far beyond fast food franchises; any businesses using "no-poach" clauses in their agreements will want to ensure that they have a legitimate and pro-competitive explanation for including those provisions.

In another case likely to have an outsized impact in 2024, RealPage, a tech company that provides data analytics software for residential landlords, and a number of large residential real estate companies are in the early stages of defending a federal multi-district class action antitrust litigation brought by tenants who claim the software facilitates collusion among landlords to inflate rents in US metropolitan markets. RealPage and the other defendants have moved to dismiss, claiming that the RealPage software merely provides a lawful information exchange and algorithm for landlords to use in making their own independent decisions about the rents they charge. But the DOJ in a November 2023 Statement of Interest threw its weight behind the tenants, arguing they had adequately alleged a per se violation of the Sherman Act. With the increased reliance on algorithmic pricing across a variety of industries, this case is likely to have an impact well beyond real estate.

In this environment, companies cannot assume they will be able to push through a deal or make an early exit from expensive antitrust litigation.

Finally, a Missouri jury in October 2023 issued a $1.8 billion verdict in an antitrust case against the National Association of Realtors ("NAR") and real estate brokerages. The plaintiffs in that case alleged that an NAR rule relating to the commission arrangement between seller's agents and buyer's agents, and the requirement that sellers accept that arrangement as a condition to listing homes for sale through the Multiple Listing Service ("MLS"), stifled competition among buyer's agents and artificially inflated commissions to those agents. The jury's decision upends an arrangement long thought legal in the massive US residential real estate market, and has sparked a series of copycat lawsuits, including one asserting claims on behalf of a national class of residential purchasers. Unless the Missouri jury's verdict is reversed on appeal, these cases are likely to force industry participants nationwide to make substantial changes to how they do business.

In this environment, companies cannot assume they will be able to push through a deal or make an early exit from expensive antitrust litigation. Even issues long thought settled appear to be open to question, and now is a good time for businesses to examine their practices and ensure they have legitimate and procompetitive reasons to do the things they do.



Key Trends in Commercial Litigation

Bankruptcy

—By Bill Hanlon and James Sowka

Interest Rates. War. Election Year. Real Estate Values. Health Care Costs. Labor Shortages. Opportunists. Bank Failures. These factors will play in next year's bankruptcy trends.

Where Are We Now?

According to statistics released by the Administrative Office of the US Courts, annual business bankruptcies rose 29.9 percent, from 13,125 to 17,051, in the year ending September 30, 2023. Recall that bankruptcies fell especially sharply after the pandemic began in early 2020, despite some COVID-related disruptions to the economy. Even with the recent increases, both business and total filings remain far lower than pre-pandemic levels. We anticipate business filings will increase in 2024.

We anticipate seeing loan sales as banks clean up their balance sheets and part with sub- and non-performing loans in order to meet regulatory requirements.

Interest Rates Will Drive Insolvency and Asset Sales

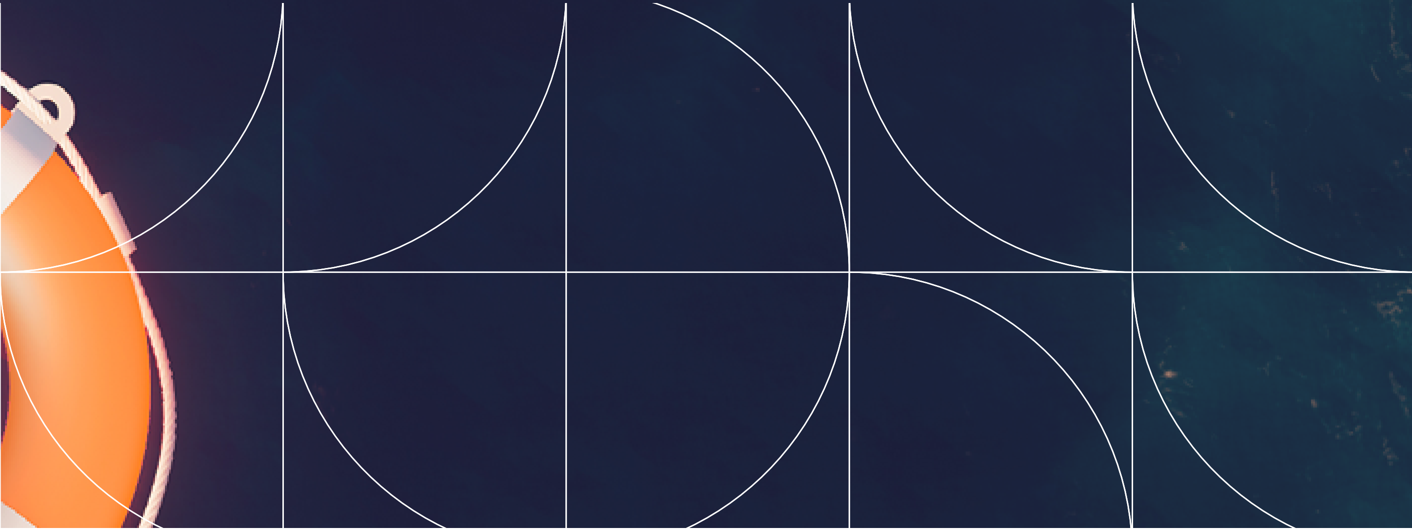
Most businesses took advantage of historically low interest rates over the past several years, and many of these loans are coming due. Highly leveraged businesses will have trouble refinancing in a higher interest rate environment and must restructure their balance sheets or sell their assets, inside or outside of bankruptcy.

The Office Sector Will Be Hard Hit

Hybrid work is here to stay, with many businesses reducing office size and attendance requirements. Older leases are expiring and will not be renewed. The sublease market is flooded. Cushman and Wakefield anticipates there will be 300 million square feet of excess office space by 2030, and that only about a quarter of that space can be feasibly converted to residential use. Higher interest and vacancy rates will drive cap rates up. With non-recourse financing, borrowers faced with capital demands to refinance will walk away. Those borrowers with valuable assets at risk—including at the guarantor level – may file for bankruptcy to restructure or maximize the value of their asset. The good news? There is a lot of capital on the sidelines waiting for the adjustment in rates and values, and there will be opportunities at the bottom of the real estate cycle.

Banks, Not Just Borrowers, are at Risk

The failures of Silicon Valley Bank and Signature Bank were shots across the bow of the banking community. The Federal Government's quick and decisive rescue of both banks and its willingness to extend credit to other banks based on the par value of their assets averted a melt-down in the lending market. However, lending from national, regional and local banks has contracted, and increased regulatory scrutiny has led to tighter underwriting standards. Regional banks, particularly those that



have pursued a high-growth model by expanding office and construction lending, suffer from the same decline in the value of collateral affecting the banks' borrowers. We anticipate seeing loan sales as banks clean up their balance sheets and part with sub- and non-performing loans in order to meet regulatory requirements. Loan sales will present opportunities to well-funded buyers. We also anticipate bank failures and a robust debate over the extent to which the Federal Government should bail them out.

As many as 1.4 million Americans could become seriously delinquent on at least one credit product in the next 12 months because of the financial pressure from student loan payments.

The Health Care Industry is Stressed

On the heels of the COVID-19 pandemic, health care operators have experienced rising labor costs, employee burn-out and attrition. Facility operators suffer from the same headwinds as all property owners: rising interest rates and skyrocketing construction costs. Operators claim that reimbursement rates have grown slower than inflation. The segments most affected are senior care, pharma and hospitals, and these segments are experiencing their highest level of insolvencies since 2020. We expect this trend to continue into 2024.

Politics and War May Affect Borrowers, Including the US

Congress is polarized and wars rage on in eastern Europe and the Middle East. Moody's, a leading risk assessment agency, has lowered the United States government's credit ratings outlook from "stable" to "negative," citing political polarization in Congress. Moody's still assigns the US its highest AAA credit rating, though it's the only one of the three main rating agencies to do so. In August, Fitch Rating downgraded the government's long-term credit rating from AAA to AA+. Standard & Poor's lowered its score to AA+ back in 2011, after an earlier debt-ceiling crisis. If Moody's changes the US's actual credit rating, rather than its outlook, the government may not be able to borrow as much money, or would have to accept a less desirable interest rate. That could affect the ability to pay government workers and provide critical services like Social Security. Calls for funding ongoing wars and potential interruptions in food and energy supplies pressure governments, businesses and consumers.

Consumer Debt Defaults Will Increase as Student Loan Repayments Commence

Speaking of consumers, analysts predict that the resumption of federal student loan payments will likely cause a spike in delinquencies on all kinds of household credit, including cards and personal loans. As many as 1.4 million Americans could become seriously delinquent on at least one credit product in the next 12 months because of the financial pressure from student loan payments, which resumed last month after a three-and-a-half-year pandemic freeze. And the Federal Government has introduced new discharge guidelines for government-held student loans, which lowers the traditionally high bar to obtaining relief through bankruptcy. Coming on top of major banks' multi-billion dollar write down of consumer debt, we anticipate an uptick in consumer bankruptcies and additional pressure on banks due to customer defaults.

Bottom Line

Strong headwinds portend increased insolvencies. Stay on top of your receivables. If you have to refinance, start early and often. And if you have cash to spend, look for opportunities.

**Since this publication has been released, Bill Hanlon has retired. If you have any questions on Seyfarth's Bankruptcy practice, please reach out to James Sowka.*

Key Trends in Commercial Litigation

Consumer Class Actions

—By Kristine Argentine, Joe Orzano, and Aaron Belzer

Class actions alleging collection and use of data on websites continues to flood both courts and arbitration.

In our 2023 Commercial Outlook, we predicted that consumer class actions on the collection and transfer of data on consumer- facing websites would continue to be hotly pursued by the plaintiff's bar in 2023. The volume of this litigation far exceeded our expectations in 2023, yet little was resolved in terms of the validity of these claims. Accordingly, 2024 will be an important year for substantive rulings on these issues at summary judgment and class certification stage. In the meantime, we expect that these class claims will expand both in terms of substance and geography.

Plaintiffs' firms are already starting to focus on not just pixels, but any tracking or analytics tools or services that engage in deanonymization of visitors to the website.

These cases allege that the placement of a pixel or other tracking tool on a website causes the immediate transfer of information to third parties and a visitor of the website has no opportunity to consent or block the transfer. Thus, plaintiffs allege that website operators are aiding and abetting third parties in illegally eavesdropping on consumers' communications. California has been the venue of choice given the $5,000 per violation statutory damages and fee shifting under the California Invasion of Privacy Act. These cases are presently being fought at the motion to dismiss stage. We have had success weeding out extraneous claims, as well as focusing the courts on technology-related issues, such as whether the interactions with the website are truly "communications" within the meaning of the statutes, and whether the third parties receiving such information can be classified as service providers. Additionally, we have been successful in presenting some favorable arguments on the consent and expectations of privacy on consumer-facing websites.

Without any consistent resolution in the courts as to whether the use of a third party to collect, manage, store, or analyze data is a wiretap, or what disclosures and consents are going to serve as adequate defenses, we expect that this type of litigation will explode in 2024. Plaintiffs' firms are already starting to focus on not just pixels, but any tracking or analytics tools or services that engage in deanonymization of visitors to the website. Additionally, we expect to see cases start popping up in other jurisdictions with similar wiretap statutes, as well as claims under computer hacking statutes alleging that the placement of the tracking technology constitutes computer hacking since the website causes certain cookies, pixels, or other identifiers to be placed directly on the plaintiff's browser.

Interestingly, there are several plaintiff's firms going directly to single plaintiff arbitrations based on commonly placed arbitration provisions in website terms and conditions, filing five or ten plus arbitrations against the same website operator at the same time and trying to leverage a settlement based on the statutory damages and the arbitration fees. We expect this trend to continue in 2024, making it exceptionally difficult to get judicial decisions, which would provide a consistent body of law, or to track the progress and success in these types of cases.

Continued Focus on Consumer Fraud Class Actions Targeting Product Packaging & Labeling

Consumer fraud class actions will continue to target consumer product packaging and labeling. We expect to see a focus on class cases on environmental, social and governance ("ESG") issues. These claims can include environmental marketing claims, animal welfare claims, and ethical sourcing. We also expect see class actions alleging deceptive geographic origin claims, including alleged deceptive claims of domestic origin, or "Made in USA" claims, as well as those of foreign origin. Further, class actions targeting claims about the ingredients in food products will likely focus on the amount or proportion of an ingredient in a product, or attributes of an ingredient or ingredients, such as "natural." These types of challenges are not limited to food products and will likely focus on other industries such as cosmetics, textiles, and other consumer products. Last, we expect to see continued lawsuits targeting food and beverage products alleged to be advertised as healthy that plaintiffs contend are not. Businesses should continue to pay particularly close attention to claims placed on product packaging and labeling, and ensure they are adequately substantiated. Further, because many challenges are based on messages that are allegedly implied by a product's label, rather than something that is expressly stated, it is important to evaluate all messages reasonably conveyed to consumers by a product label whether expressly stated or not. Courts have been willing to dismiss at the pleadings stage challenges based on unreasonable interpretations of product labels, particularly where the alleged message is not expressly stated on the label. Clear and conspicuous disclaimers can also help mitigate risk of challenges based on unreasonable interpretations of product labels.

California Outlook

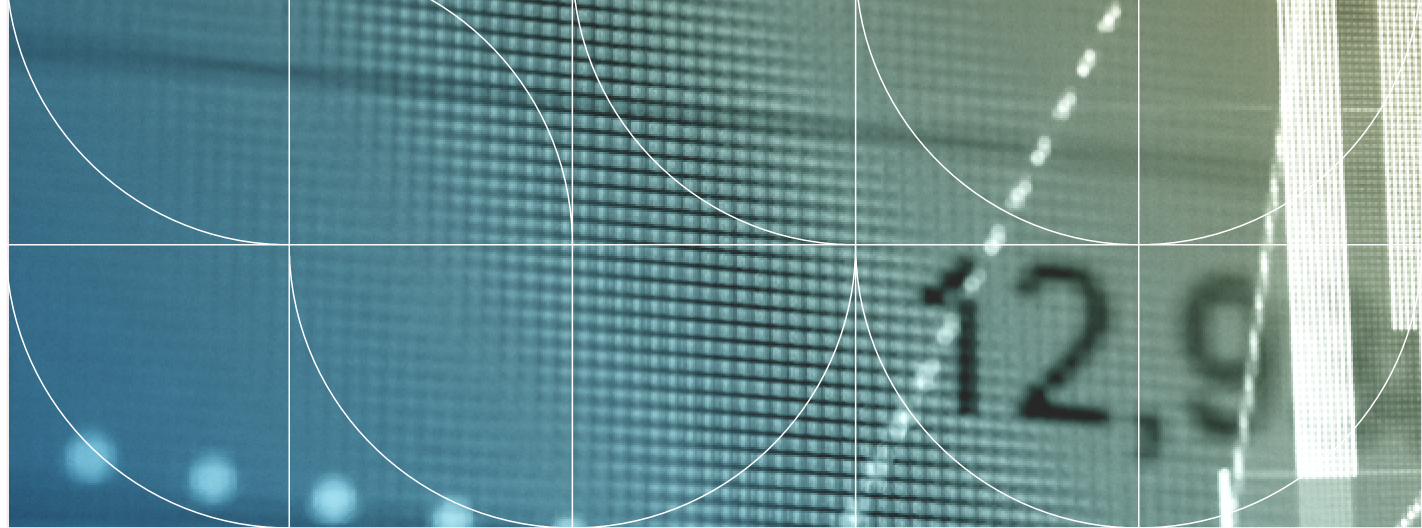
Following its enactment of the California Privacy Rights Act (CPRA), which expanded the categories of personal information subject to privacy protections, California continues to enact new privacy legislation and regulation that create additional litigation risks for businesses. The recently enacted Delete Act, for example, allows consumers to ask every data broker, through a single verifiable request, to delete their personal information. Following such request, data brokers will also have a continuing duty to delete any new personal information related to the consumer. Although the Act does not go into effect until 2026, its obligations will require businesses that collect and sell consumer personal information to be proactive in their privacy compliance efforts to mitigate the ongoing risk associated with consumer privacy class actions.

California is also likely to see an increase in class action pricing litigation, following its recent amendments to the California Legal Remedies Act (CLRA) to ban "junk fees" and "drip pricing." As amended, effective July 1, 2024, the CLRA will declare unfair and deceptive the advertising of a price for a good or service that does not include all mandatory fees or charges.

These types of challenges are not limited to food products and will likely focus on other industries such as cosmetics, textiles, and other consumer products.

Environmental or "greenwashing" class litigation relating to per- and polyfluoroalkyl substances ("PFAS") in consumer products will also continue to grow following California's recently enacted bans on PFAS in textiles, apparel, cosmetics, food packaging, and children's products, and because of California's unique PFAS disclosure requirements under Proposition 65. As California and other states continue to target the use of these "forever chemicals," businesses that continue to use PFAS in their products face increasing risks of litigation.

Finally, providers of consumer goods and services that rely on arbitration agreements to resolve consumer disputes should be aware that, starting in 2024, consumers in California state court will be allowed to continue pursuing claims during the pendency of an appeal of an order denying or dismissing a company's petition to compel arbitration. Current law allows corporate defendants to pause a consumer action brought against them by simply filing an appeal of a trial court's denial of a motion to compel arbitration. This new law gives courts discretion to allow consumers to move their case forward if a company files an appeal, rather than waiting for years while the appeal is heard. This new law, therefore, has the potential to increase the time and expense of litigating consumer cases that are ultimately sent to arbitration.



Key Trends in Commercial Litigation

Consumer Financial Services Litigation

—By David Bizar and Esther Slater McDonald

The 2023 key trends in consumer financial services litigation have taken root and are predicted to develop and grow in 2024.

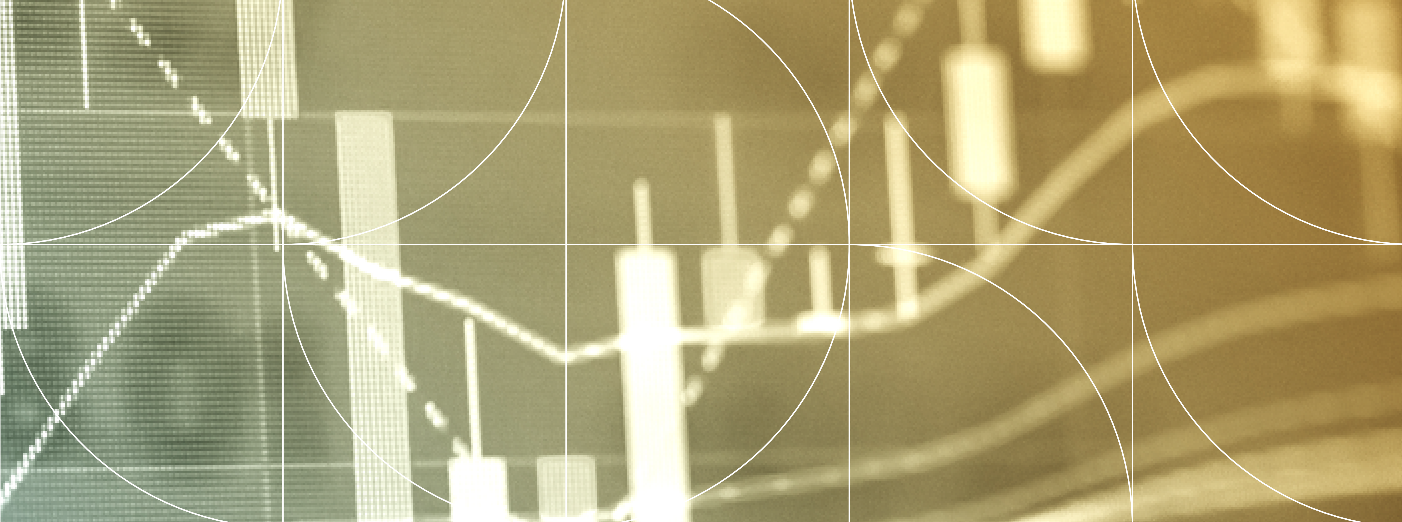
Government Rulemaking and Enforcement

As we predicted last year, the Consumer Financial Protection Bureau (CFPB) continues to accelerate its efforts toward open banking and finance. In October of 2023, the CFPB announced a proposed new "Personal Financial Data Rights" rule to "accelerate a shift toward open banking, where consumers would have control over data about their financial lives and would gain new protections against companies misusing their data." If adopted, the proposed rule will require banks and other providers subject to the rule to make consumers' personal financial data available at no charge through dedicated digital interfaces. It will also afford a legal right to grant third parties access to information associated with consumers' credit card, checking, prepaid and digital wallet accounts, and would allow consumers to "walk away from bad service" by "more easily shift[ing] their data to a competitor offering better or lower priced products and services." If adopted, the proposed rule would further prohibit third parties from collecting, using, and retaining data to advance their own commercial interests through targeted or behavioral advertising, give consumers the right to revoke access to their data, move the market away from "risky data collection practices" such as "screen scraping," and impose "requirements to ensure industry standards are fair, open, and inclusive."

We also predicted that the CFPB would focus on "junk fees" in 2023, and it has. "The CFPB launched an initiative to save households billions of dollars a year by reducing exploitative junk fees charged by banks and finance companies." In October 2023, it issued an advisory opinion to prohibit "large banks and credit unions from imposing unreasonable obstacles on customers, such as charging excessive fees, for basic information about their own accounts." The CFPB also forced companies to refund $140 million to consumers, $120 million of which was "for surprise overdraft fees and double-dipping on non-sufficient funds fees." As a result of the pressure that the CFPB has put on the industry, "most financial institutions have eliminated non-sufficient fund fees, saving consumers an estimated $2 billion every year." The CFPB is expected to continue to focus on "junk fees" in 2024. As its Director, Rohit Chopra stated, "[t]he CFPB continues to uncover junk fee scams that violate the law and undermine consumer trust" and "will continue to combat the illegal fees cropping up in consumer finance markets."

> As we predicted last year, the Consumer Financial Protection Bureau (CFPB) continues to accelerate its efforts toward open banking and finance.

As anticipated, the Federal Trade Commission (FTC) has also been active in 2023 with combatting "junk fees," bringing multiple enforcement actions, see here, here, and here, and issuing a proposed rule to ban them. The FTC's proposed rule, if adopted, "would ban businesses from running up the bills with hidden and bogus fees, ensure consumers know exactly how much they



are paying and what they are getting, and help spur companies to compete on offering the lowest price. Businesses would have to include all mandatory fees when telling consumers a price, making it easier for consumers to comparison shop for the lowest price."

Even if the United States avoids a recession in 2024, these economic headwinds and conditions will likely result in an uptick in consumer financial services civil litigation and class actions in 2024.

In 2023, the FTC also followed through on its commitment to a heavy enforcement focus of protecting students who were allegedly "deceived" by for-profit colleges and universities, *see* here and here, and from student loan debt relief "scams," *see* here, here, here, here, here, and here. The FTC can be expected to continue with its focus on assisting student loan borrowers in 2024.

Civil Litigation and Class Actions

Consumer financial services civil litigation and class actions are ever-present, but their volume reliably trends countercyclically with the economy, peaking in the vicinity of the end of bust cycles. This is because, in the main, consumers of financial services are far more likely to bring lawsuits or counterclaims to try to litigate their way out of debts that they incurred but cannot pay. And industry participants may also be less able or willing to settle the influx of consumer claims that occur during harder economic times.

As of December 2023, most economic forecasters are assigning a probability of 50% or less that there will be a recession in 2024, and while the unemployment rate is expected to rise in the next year, few anticipate it will exceed 5%. Mortgage interest rates at the end of October 2023 were at 7.79%, "the highest average 30-year mortgage rate since November 2000, according to Freddie Mac." The Fed is likely to begin cutting interest rates in 2024, but not precipitously. Additionally, the student loan repayment restart, which began in October 2023, is expected to have a significant negative impact on consumer spending. Excess savings, which surged during the pandemic, are being rapidly drained and are predicted to run out. Even if the United States avoids a recession in 2024, these economic headwinds and conditions will likely result in an uptick in consumer financial services civil litigation and class actions in 2024.

FinTech

Per the FTC, "FinTech describes the emerging marketplace of new financial technologies. Even as companies innovate in the products they offer and how they offer them, established consumer protection principles apply." FinTechs have traditionally been set up to avoid being regulated as heavily as financial institutions, while focusing on providing a superior customer experience. As we move into 2024, these lines between FinTechs and financial institutions may be blurring. The CFPB, for example, has become engaged in a "broader effort to monitor the shift to open banking in the US, including trends in consumer payments and the introduction of multi-service super apps into this space." FinTechs are expected to continue to focus their efforts in 2024 on enhancing the customer experience with artificial intelligence (AI) and machine learning, buy now pay later financing options, Software as Service (SaaS) implementations of more robust security measures, better mobile payment options, and open banking API integration allowing for more personalized financial services—all of which will pose continuing regulatory, compliance, enforcement, and civil litigation challenges for the industry.

In sum, the 2023 key trends in consumer financial services litigation have taken root and are predicted to develop and grow in 2024.

The Impact of AI Technology on Securing and Protecting Intellectual Property Rights

— *By Edward Maluf, Brian Michaelis, Lauren Leipold, Puya Partow-Navid, and Owen Wolfe*

Various IP issues associated with AI technology, particularly those involving machine learning models (MLMs), remain unaddressed going into 2024.

One such issue is the patent eligibility of AI. While algorithms, such as MLMs, generally do not qualify for patents, certain improvements in their application might. Still, these patents may face enforcement issues. Also at issue is the scope of copyright protection for AI-generated content, as well as potential liability surrounding the use of copyrighted materials in AI training. We anticipate additional guidance as litigation makes its way through courts, as well as directives from the US Patent and Trademark Office and US Copyright Office. The next year will likely be pivotal in determining the boundaries of AI in the intellectual property domain, considering the challenges in protection and enforcement, as well as potential evolution of governing law.

AI and Patents

Machine learning, a subset of AI, focuses on algorithms that allow systems to perform a task by learning from data over time without being explicitly programmed. While all machine learning is AI, not all AI is machine learning.

Most pertinent for patents are MLMs used in, for example, generative AI, virtual personal assistants, and more. MLMs learn dataset patterns to predict new inputs, while employing algorithms like decision trees, neural networks, and autoencoders. We expect to see a rise in AI- and MLM-related patent applications in 2024. Several considerations will be relevant to those applications.

Is AI Subject Matter Eligible for Patenting?

Generally, MLMs alone are algorithms, which are not eligible for patent protection. Also, simply applying an MLM to a problem to improve an existing methodology is likely unpatentable as an "abstract idea," "mathematical concept," "method of organizing human activity," or "mental process." Furthermore, adding elements like "a processor," "a memory," "a computer," or "an apparatus," may be viewed merely as use of a computer as a tool to perform an abstract idea, and therefore would still not be eligible for patent protection.

Approaches To Subject Matter Eligibility For AI

This does not mean that all is lost when it comes to the patentability of MLMs. To make the concepts eligible for patent protection, as an initial matter, the inventor must be (only) natural persons (i.e., only human beings can be named inventors on US patents, thereby excluding artificial intelligence from being listed as an inventor per se), *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022). To make the subject matter eligible for patent protection, a patent application may be directed to an improvement of an MLM. This application may be considered a technical improvement (though other patentability requirements must be met).

The MLM invention may be patentable by improving the performance of the model. Examples may include improving accuracy of a final output (e.g., inference) and/or reducing the use of resources (e.g., memory and/or processor use) of a device implementing the MLM. In one example, the accuracy of the MLM may be improved by using one or more new inputs to a conventional MLM.

Additionally, improvements to the architecture of the MLM may be patent-eligible. For example, the use of a new type of architecture may avoid subject matter eligibility rejections. The patent application specification should provide support showing that the use of the improvement to the conventional architecture, or the new architecture, improves the performance of the MLM.

> MLM inventions, while potentially having patentable subject matter, present unique challenges when it comes to identifying or proving patent infringements.

Further, an improvement to the training process of the MLM may be patent eligible. The improvement may include generating or using a new type of training data and/or using a new training architecture. For instance, systems may be trained by collecting data from real-world environments, e.g., using various external and internal sensors. This type of improvement may be patentable if it can be shown that the data improves accuracy.

Enforcement

Before rushing to file patent applications on MLM inventions, inventors and developers should weigh various considerations (preferably with advice from experienced IP counsel). MLM inventions, while potentially having patentable subject matter, present unique challenges when it comes to identifying or proving patent infringements.

Specifically, patenting MLM training has challenges because enforcing the patent requires detectability. And because training often happens privately, rendering the MLM more like a trade secret, determining an MLM's training method can be difficult, making the enforcement of such patents challenging, if not impossible. Similarly, the new type of input that was key to finding the MLM patentable may not be accessible to the user of the MLM (or the owner of the patent that wants or needs to have a reasonable basis to believe that there is infringement before taking action). Furthermore,

the new or improved subject matter, e.g., type of architecture claimed, may not be readily discernible based on the output of the AI invention. Understanding the issues associated with AI inventions will increase the likelihood of obtaining meaningful AI patents in 2024 and beyond.

Government Guidance

With respect to patents, President Biden's Executive Order directs the USPTO Director to publish guidance to patent examiners and applicants addressing inventorship and the utilization of AI in the inventive process by the end of February 2024. The USPTO Director is also required to issue guidance on other considerations "at the intersection of AI and IP" by July 2024. The USPTO Director's publications will be closely watched and may address some or all of the considerations identified here.

> Litigation is anticipated over the extent to which AI-generated content is copyrightable.

AI, Copyrights, and Trademarks

Thanks to the popularity of generative AI, authors of creative content, including artists, writers, filmmakers, and others, face an uncertain legal landscape in connection with their own works, as well as AI-generated works. Litigation is anticipated over the extent to which AI-generated content is copyrightable, and over the extent to which AI platforms can use copyrighted works to train AI models without notifying or compensating authors. Although AI has so far had less impact on trademark law, litigation over unauthorized use of proprietary trademarks and trade dress in AI-generated content is probable. And the 2023 Executive Order inevitably will have an impact on copyright and trademark law in 2024.

Who Owns Rights in AI-Generated Content?

In 2023, the US Copyright Office refused to register several AI-generated works. The Office concluded that purely machine-generated works are not protectable under the US Copyright Act because the Act was designed to protect only human authorship. At least one federal court has affirmed this position. However, decisions in cases involving a mix of both AI-generated and human-generated content leave room for some protection of those elements authored by a human. In 2024, authors of creative content will likely pressure both courts and the Copyright Office to address exactly where to draw the line in granting copyright protection for hybrid content.

Can AI Platforms Use Protected Works Without Permission?

MLMs "learn" by reviewing existing materials and recognizing any patterns that they contain. They use that information to generate new content in response to user prompts. Although prior case law has held that digitization of copyrighted works for a transformative purpose constitutes "fair use" of those works, groups of writers and visual artists whose works have been used as training materials for popular AI platforms claim this practice is not fair use. Rather, they argue, it is an indefensible infringement.

In 2023, well-known authors such as actor/comedian Sarah Silverman and Game of Thrones author George R.R. Martin joined a number of class action lawsuits against AI companies such as Open AI and Stability AI. The suits allege that: (i) direct copying of the material at the training stage constitutes infringement; (ii) the AI platforms are themselves infringing derivative works because they contain the direct copies of copyrighted works that were part of their training; and (iii) any AI output must necessarily be based on those direct copies, and is thus also infringing. The AI companies, for their part, argue that the AI outputs do not necessarily resemble the copyrighted works on which the AI programs were trained. Without at least substantial similarity between the original materials and the newly generated content, there can be no infringement. They have also argued that even if there were infringement, they should not be vicariously liable for the actions of individual users.

At least one federal court in 2023 suggested that "substantial similarity" between the original work and the AI output is required to show copyright infringement. Other federal courts may opine on that issue and whether the defense of "fair use" could shield AI companies from liability. Fair use involves a fact-dependent analysis of four statutory factors: (a) the purpose and character of the use; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect of the use upon the potential market for or value of the copyrighted work. AI may lead to a reevaluation of these factors and their application. And, as often occurs, different courts may reach different conclusions, setting up a potential showdown in the appellate courts, including perhaps the Supreme Court, about what constitutes infringement in the AI context.

AI and Trademarks

At least one suit filed by a content owner in 2023 contained trademark infringement claims based on the unauthorized appearance of a registered brand name in AI-generated material. As image-generating AI technology continues to improve and becomes more widespread, there likely will be more infringement lawsuits based on AI-generated images.

Impact of the 2023 Executive Order

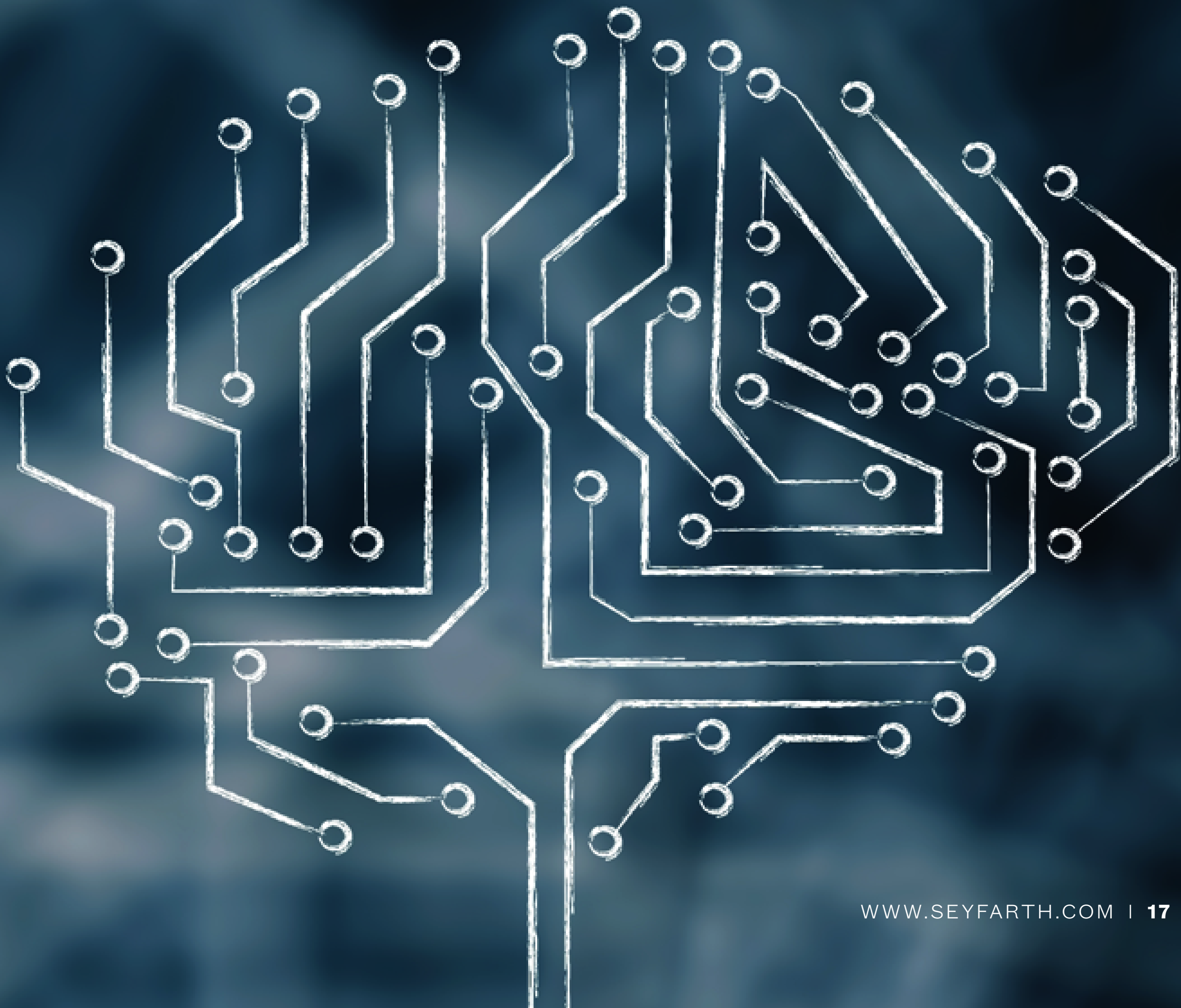
The Executive Order directs the USPTO Director to consult with the US Copyright Office to issue guidance by July 2024 on potential executive actions relating to copyright and AI. The guidance must also address issues relating to the protection of works produced using AI and the treatment of copyrighted works in AI training.

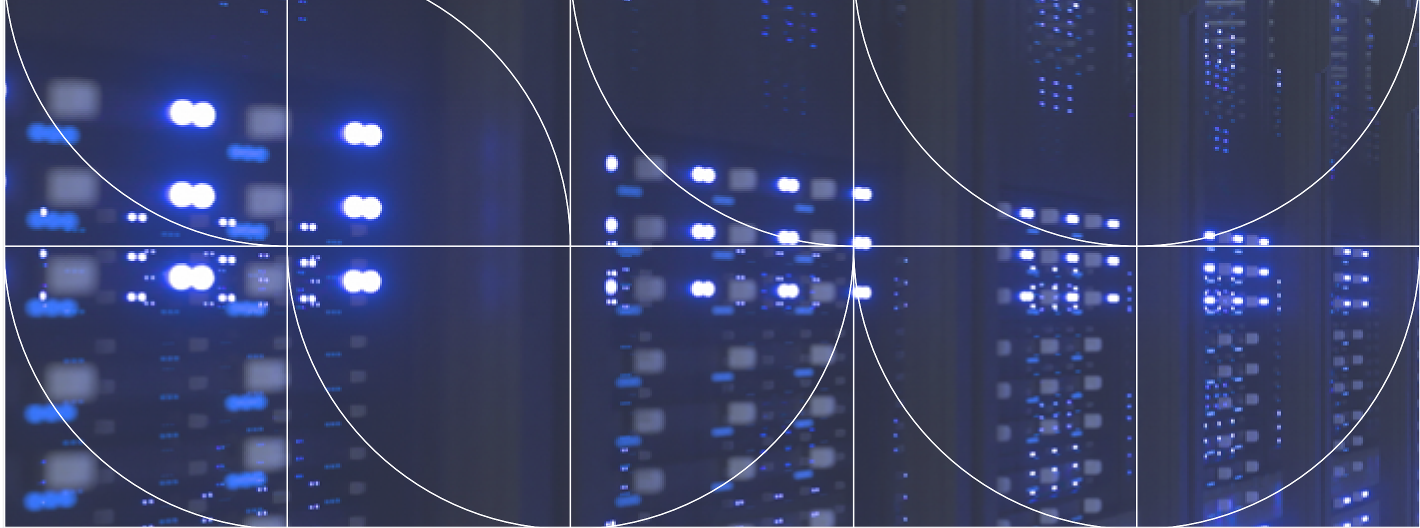
We expect that enforcement of patent, copyright, and trademark rights in relation to AI technology will continue to present significant challenges.

More broadly, the Executive Order directs the Department of Homeland Security (DHS) to develop a risk mitigation program for AI and IP by the end of April 2024. The program must include: (i) having DHS assign personnel to collect and analyze reports of AI-related IP theft; (ii) promoting broad collaboration and information sharing among various government agencies and international organizations; and (iii) developing guidance and resources for private sector actors to mitigate AI-related IP theft.

Conclusion

AI is a further advancement in computing technology that will remain ubiquitous. It raises many questions relating to IP, some of which may be answered in 2024 in response to the Executive Order as well as in continued litigation. Even so, we expect that enforcement of patent, copyright, and trademark rights in relation to AI technology will continue to present significant challenges. To overcome these challenges, careful monitoring of ongoing legal developments and consultation with experienced counsel will be required to understand the legal landscape and determine the best strategy to secure and protect IP rights.





Key Trends in Commercial Litigation

eDiscovery & Innovation

—By Jay Carle and Matthew Christoff

2024 is likely to see the application of generative AI in more eDiscovery workflows.

As the global market continues to identify novel applications of generative artificial intelligence (AI) to streamline their businesses, increase productivity, and reduce inefficiencies, many leading eDiscovery developers, service providers, and law firms are racing to incorporate Generative AI into their investigatory and review workflows. These tools range from generating concisely formatted narrative summaries and timelines of documents, to estimating responsiveness, privilege, and relative importance, to supporting and refining specific arguments developed by case teams. The potential of querying large populations consisting of diverse documents collected from client systems and produced by opposing parties and receiving real-time and iterative responses will be a dramatic leap forward in the ability to quickly identify key evidence and focus investigations at the beginning of discovery or even during investigatory stages.

We predict that 2024 will bring the refinement and increased availability of preliminary generative AI tools available throughout review platforms.

Fortunately, the eDiscovery field has long been familiar with the application of artificial intelligence and machine learning within review platforms through technology-assisted review (TAR), continuous active learning (CAL), categorization and clustering, sentiment analysis, audio transcription, and language translation. Unsurprisingly, when some of these technologies were initially introduced, they were met with apprehension and scrutiny by some within the legal community. Today, these technologies are commonplace and Seyfarth regularly applies a combination of these tools across its matters in order to provide cost-effective legal services.

We predict that 2024 will bring the refinement and increased availability of preliminary generative AI tools available throughout review platforms, and an increased focus on reasonable and practical generative AI validation techniques to help avoid common pitfalls. However, we may see slow adoption of the actual use of generative AI tools in litigation due primarily to concerns related to defensible use of the technology, or the complexities of negotiating discovery protocols that incorporate use of generative AI tools.

Anticipated Issues in 2024

The widescale availability of generative AI tools, and specifically ChatGPT, have resulted in the unprecedented interest and use by the public without all of the necessary legal and educational guardrails to protect against misuse, resulting in industry-wide embarrassment.

Although we expect novel use cases to emerge throughout 2024, the following are likely to enter mainstream usage next year:

Document Summarization: While document review rates are often estimated between 40 and 60 documents per hour, highly detailed or lengthy documents, including those comprised of almost entirely mundane or non-responsive information, can reduce an individual's review rate dramatically. Alternatively, review accuracy can suffer in favor of ensuring that the pace of a review is unaffected. Reviewing concise summaries prepared by generative AI for every few pages of a document will focus reviewers' attention on only the most relevant pieces of

information and allow them to target specific sections that warrant further analysis. Of critical importance, however, is that these summaries should not be exclusively relied on for determining the responsiveness of a document without proper sampling and common validation techniques to confirm their accuracy, similar to those used to validate a CAL review. Failure to do so could result in a violations of federal and state rules requiring accuracy in pleadings and representations to the court, as well as an attorney's ethical obligations regarding the benefits *and* risks of technology to the practice of law.

> 2024 will be a year of refinement as developers iteratively incorporate months of feedback from early adopters.

Subjective Coding Determinations: Some eDiscovery developers have not only incorporated document summarization, but also responsiveness predictions based upon discrete issues identified and described in detail by the case team. Not unlike prioritized review using CAL, we expect that these predictions will streamline the identification and production of highly responsive information quicker and that by doing so, overall costs of discovery will be reduced. As with most information created by generative AI tools, case teams must follow the mantra of "trust but verify" in order to validate that the coding predictions prepared by the tool are accurate.

Generative AI Syntax and Querying: Most attorneys are familiar with common search techniques through their usage of LexisNexis, Westlaw, or industry-standard eDiscovery platforms, such as Boolean conditions, proximity searches, and analysis of documents' metadata. Generative AI's ability to "comprehend" natural language queries across huge document populations provides an unprecedented level of potential support in developing arguments and providing precise document-level citations for those arguments. Unfortunately, the failure to properly craft a Boolean search query may "only" result in specific documents not being identified—comparatively, the failure to properly query a generative AI platform may actually provide inaccurate or hallucinatory results, instead. To address this issue, we expect that 2024 will see a steep rise in Continuing Legal Education and certification courses focusing on methods of crafting queries to most effectively leverage generative AI tools to create accurate and reliable output.

Unanticipated Costs: Many generative AI developers are providing initial access to their generative AI tools at no cost to their clients in the form of "early access" or "beta" programs. Although this encourages testing and usage of these platforms without consideration of cost, once these tools are released to the public, their initial cost could be prohibitive. For example, when CAL tools were initially released, some eDiscovery vendors charged a flat per-document fee to utilize the technology, whereas others charged a per-document fee for any document that was *excluded* from review due to the Continuous Active Learning workflow. Most eDiscovery vendors have yet to disclose their expected pricing for generative AI tools, but if history is any guide, we expect that there will be a minimum per-document charge for any document analyzed by a review platform's generative AI tool, including premiums for highly complex, lengthy, and/or multimedia documents.

2023 was a year of deployment with generative AI options being included in nearly every platform as developers responded to marketing pressures and administrative demands to be first to market. In contrast, 2024 will be a year of refinement as developers iteratively incorporate months of feedback from early adopters to identify the specific areas they can position themselves as generative AI differentiators and dominators. Once the dust settles and clear market leaders are identified, 2024 should also see an increase in generative AI adoption by risk-averse organizations hesitant to deploy generative AI.

Seyfarth's attorneys, and specifically, those in Seyfarth's eDiscovery and Information Governance (eDIG) practice group, have already incorporated generative AI into their existing investigatory and review workflows and will continue to iteratively revise those processes throughout 2024 to ensure appropriate validation techniques are in place to avoid risks.

Key Trends in Commercial Litigation

The Rise in ESG Litigation

—By Gina Ferrari, Ameena Majid, and Matthew Catalano

As companies across all industries continue to promote their Environmental, Social, and Governance (ESG) achievements, the plaintiffs' bar, as well as certain state and federal regulators, stand ready to jump on any perceived misstep.

For the last few years, we have been anticipating a wave of lawsuits related to ESG initiatives; 2023 proved those predictions accurate. As explained below, traditional defense strategies along with strong corporate oversight of ESG matters will help mitigate litigation risk.

The pursuit of successful strategies in this regard begins with recognition that, technically, there is no "ESG" specific case law. Instead, ESG focused lawsuits have been packaged as violations of securities, environmental, constitutional, or consumer-protection laws, or common law causes of action. Because ESG issues have been alleged as standard claims, organizations have defeated many of those claims by employing tried-and-true defense strategies. Below we provide more detail on the types of lawsuits that have been recently filed, and highlight winning tactics for defeating these claims.

Consumer "Greenwashing" Claims. Since 1992, the Federal Trade Commission (FTC) has been publishing "Green Guides," a set of non-binding guidance designed to help marketers avoid making "unfair" or "deceptive" environmental claims (i.e., "greenwashing"). In 2022 and 2023, the FTC extended the public comment period for updating and strengthening the Green Guides, and hosted a public workshop focusing on misleading recyclability claims.

We anticipate that the updated Green Guides will reflect more stringent guidance on environmental claims (e.g., "zero-emissions" promises), or social claims (*e.g.,* human rights in the supply chain). In some jurisdictions, failure to follow Green Guide standards may be evidence of false advertising. Adhering to the guidelines, however, provides a safe harbor in certain jurisdictions including California. Companies should continue to work with their counsel to: ensure their statements align with the language and/or spirit of the Green Guides; ensure their statements are consistent across public filings, press releases, and other marketing materials; monitor FTC activity; avoid vague and overly broad "green" claims; and maintain backup for any claims made.

Because ESG issues have been alleged as standard claims, organizations have defeated many of those claims by employing tried-and-true defense strategies.

On the private litigation front, there has been a rise in consumer protection class actions alleging false statements or omissions related to an organization's goals or commitments to limiting its impact on the environment. The retail and airlines industries were the subject of most of those lawsuits, with plaintiff-friendly California and New York as the predominate venues. Many of these cases have survived a motion to dismiss and are now being challenged at the class certification stage. Others have resulted in class settlements. Successful motions to dismiss focused on puffery and other traditional pleading challenges. There, the courts relied heavily on the context of the purportedly misleading or false "green" statements." In one case against a retailer, the court dismissed the class after finding that the retailer's website adequately described its carbon footprint calculations, provided details on its methodology, and explained its reliance on certain industry standards. Corporations making environmental impact promises should take note, and aim to provide similar detail in their public statements to reduce litigation risk.

Securities Litigation Alleging Material Misstatements or Omissions Regarding ESG Commitments
As companies increasingly disclose their ESG efforts in public filings, they risk allegations that the achievements or metrics that they present constitute material misstatements or omissions in violation of securities laws. Over the past few years, the SEC has indicated that it is sharply focusing on ESG disclosures, whether as to climate risk, board and workforce diversity, human capital management, or human rights policies.

This has not gone unnoticed by the plaintiffs' bar, with putative investor class actions filed alleging a variety of ESG-related misstatements or omissions, such as carbon net-zero claims, sustainability efforts, or commitments to DEI, as well as breach of fiduciary duty claims. In derivative actions, plaintiffs have successfully extended the duty of oversight to officers focused on improving corporate culture and other DEI initiatives. So far, traditional securities, derivative and fiduciary duty defenses have served corporations well in defeating these claims. For example, courts dismissed the Board diversity lawsuits on motions to dismiss, holding that corporate promises to reach a certain Board composition were statements of optimism. Regardless, it continues to be important for Boards to adequately exercise their duty of oversight over climate and social initiatives to the extent it is important to the business.

DEI and Other Human Capital Efforts
Following the U.S. Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* (which requires race neutrality in college admissions), private litigants filed numerous lawsuits challenging corporate DEI efforts, alleging claims under Section 1981, Titles VII, VI, and IX, state common / statutory law, the Securities Exchange Act, and the Fifth and Fourteenth Amendments. The outcome of those cases has been as wide-ranging as the claims made (some cases have been settled after a voluntary change to DEI policies, some have been dismissed for lack of standing where injunctive relief was sought, some have resulted in the imposition of a temporary injunction, and some have dismissed federal civil rights claims while allowing state law claims to proceed). Because of the prevalence of this litigation and the wide range of outcomes, as well as competing demands from regulators and investors for more specificity on DEI metrics, Boards and management across the country are revisiting the scope of their DEI efforts. Corporations are relying on Firms that have a deep knowledge of DEI programs and a multi-disciplinary team to perform that analysis and track the current litigation.

Mitigating ESG Risk
While litigation risks in the "E" and "S" of ESG abound, they can be mitigated with effective "G," that is, Governance. Companies should not only implement effective governance both at the Board level and through cross-functional teams across an organization, but also pressure test the systems put in place as the space continues to evolve. Also, the following recommendations can be implemented to help reduce ESG litigation risk:

Be Proactive: Key decision-making to the organization's purpose and values, and consider the organization's ability to integrate climate and social objectives into overall corporate strategy through effective governance.

Know the "Why"; Challenge the "How": Know why the organization believes it can achieve a stated goal or why it is focusing efforts and resources on ESG areas. Vet any statements that are keyed to the organization's corporate strategy, purpose, and values with the Board. Adopt procedures to ensure consistent implementation of ESG endeavors across operations and entities along with understanding human rights risks and opportunities associated with environmental endeavors.

Know the Tradeoffs: Understand the trade-offs made in the sustainability endeavors and to the extent able or if asked, explain the choices.

Be Familiar with the Disclosure Requirements: Some US states have enacted climate disclosure requirements, while the SEC is still considering the scope of their own climate regulations. This raises questions of interoperability between different disclosure frameworks and requirements. Additionally, even if an organization is not directly subject to a disclosure requirement, they may be indirectly subject to the requirements where business partners require such information in vendor codes of conduct and supply chain verifications.

Break Down the Silos: Reduce inconsistencies between separate business areas' different or overlapping ESG initiatives.

Seek Counsel When Needed: ESG is complex and dynamic, and an organization should consider seeking assistance at any stage of its ESG journey, whether at policy design, implementation, or refinement, or to asses new rules and regulations. Retaining counsel experienced in both ESG consulting and litigation is essential to defeating private claims early in litigation and for negotiating favorable resolutions with regulators.

Key Trends in Commercial Litigation

Franchise & Distribution

—By John Skelton, Cathryn Johns, and Laura Caro Ruiz

Recent regulatory actions by the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB) and the Department of Labor (DOL) likely means that 2024 will bring more scrutiny of franchise relationships and business practices, and more challenges from franchisees, and thus, potential liability for franchisors.

FTC Reviewing Franchise Relationships

On the heels of its proposed new rule effectively banning noncompete clauses imposed by employers, the FTC issued a sweeping Request for Information (RFI) in March 2023 regarding franchise agreements and franchisor business practices. The RFI is separate from the FTC's pending regulatory review of the Franchise Rule and its proposed noncompete rule. However, given the FTC's request for input on how franchisors exert control over franchisees and their workers, and the scope and the effect of common franchise agreement terms, franchisors need to prepare for regulatory changes affecting the franchise relationship and franchisor business practices. In the RFI, the FTC sought comment on:

- The ability of franchisees to negotiate the terms of franchise agreements, the prevalence and justification for certain common franchise contract terms and the ability of franchisors to make unilateral changes to franchise agreements;
- Payments to franchisors by third parties (e.g., suppliers, vendors) based on franchisees' purchases of required goods or services; and
- Franchisors' control over the wages and working conditions at franchised entities, and indirect effects from franchisor business practices on franchisee labor costs.

The FTC received more than 5,500 public comments.

The National Labor Relations Board has again revised its standard for determining joint-employer status under the National Labor Relations Act.

In the FTC's March 10, 2023 Press Release, the director of the FTC's Office of Policy Planning signaled that significant changes are coming: "[t]his RFI will begin to unravel how the unequal bargaining power inherent in these contracts is impacting franchisees, workers, and consumers." While neither the FTC Act nor the Franchise Rule creates a private right of action, any new rule or policy statement by the FTC concerning the franchise relationship or franchisor business practices creates potential challenges for franchisors. The Franchise Rule prohibits practices the FTC has determined are unfair or deceptive, and franchisees will look to state statutes that prohibit unfair or deceptive practices to challenge conduct that violates the Franchise Rule.

NLRB Passes a Revised Joint Employer Rule

While the FTC is seeking comment on the control by franchisors over the wages and working conditions at franchised entities, effective December 26, 2023, the National Labor Relations Board has again revised its standard for determining joint-employer status under the National Labor Relations Act. With “control” being an essential consideration under the revised standard, franchisors should take a fresh look at their agreements, policies, and operating manuals to ensure that any franchisor control is over the brand and not actual franchise operations.

The new standard returns to the 2015 *Browning-Ferris* standard and significantly expands the definition of a joint employer. A franchisor may now be deemed the joint employer of a franchisee’s employees not only if it directly exercises actual control over the terms and conditions of their employment, but also where the franchisor’s putative control is indirect or even where such control is simply reserved but not actually exercised.

The NLRB describes the new definition as being more in line with common law and the text of the NLRA. It also emphasizes that, while the new rule creates a uniform joint-employer standard, cases before the Board will require a fact-specific, case-by-case analysis to determine joint employment.

DOL Continues Potential Revision to Independent Contractor Rule

In late 2022, the DOL published a notice of proposed rulemaking regarding employee/independent contractor classification under the Fair Labor Standards Act. As we reported last year, misclassification litigation is a growing challenge for some franchisors. In light of the proposed rule, franchisors must prepare for changes in the governance of franchise agreements and business practices, as well as inevitable challenges from franchisees.

As we reported last year, misclassification litigation is a growing challenge for some franchisors.

The proposed rule restores a totality-of-the-circumstances analysis which, in a franchise context, would consider factors such as: the franchisee’s opportunity for profit or loss based on managerial skill; the relative investments by the franchisee and franchisor; the nature and degree of the control by the franchisor; and whether the franchisee uses specialized skills in performing the work. According to the DOL, this multi-factorial approach is more consistent with longstanding FLSA precedent. The rule is expected to become official by the end of 2023.

This new rule is why the threshold question whether franchisees provide services to franchisors, as discussed in last year’s franchise outlook, will be significant. After a ruling by the Massachusetts Federal District Court, *Patel v. 7-Eleven Inc.* has been sent back to the Massachusetts Supreme Judicial Court for determination of whether 7-Eleven franchisees “perform any service” for the company.

The FTC’s RFI coupled with the recent NLRB and DOL actions reflect a significant regulatory effort to address what some claim to be labor and worker inequities resulting from the franchise model.

Key Trends in Commercial Litigation

Health Care Litigation

—By Jesse Coleman and Drew del Junco

Federal agencies that regulate health care in the United States have identified the implementation of proper procedures for data handling, patient rights, and effective security as top priorities for 2024.

On top of that, the Supreme Court recently issued a major decision that will impact False Claims Act cases in health care moving forward. And while artificial intelligence (AI) is not new to health care, emerging AI tools present a host of novel opportunities and challenges for the health care sector, with generative AI in particular likely to be instrumental over the next 12 months in many of the trends discussed here.

Enforcement of the Health Insurance Portability and Accountability Act (HIPAA) security rule will continue to be a high priority in 2024.

Government Agencies Increasingly Prioritize Health Privacy and Data Security

Enforcement of the Health Insurance Portability and Accountability Act (HIPAA) security rule will continue to be a high priority in 2024 for the Department of Health and Human Services' (HHS) Office of Civil Rights (OCR), as demonstrated by recent settlements and annual reports to Congress. OCR has acknowledged an ongoing need for covered entities to improve compliance with the HIPAA security rule, particularly in risk assessment and management, information system activity review, and audit controls. To that end, OCR enforcement actions in 2023 have often involved sanctions for insufficient security measures and risk assessments. For example, OCR reached a $1.3 million settlement with a health plan after member ID information was found to be vulnerable to unauthorized online disclosure for two days due to failure to perform periodic security testing. Similarly, OCR settled a HIPAA investigation with a health system for $1.25 million for failure to implement an authentication process to safeguard ePHI.

In addition to OCR, the Federal Trade Commission (FTC) likewise recognized protecting the privacy and security of personal health data as a main area of focus in 2023 and beyond. In May 2023, the FTC proposed amendments to modernize the Health Breach Notification Rule (HBNR), which requires vendors of personal health records and related entities that are not covered by HIPAA to notify consumers following a breach involving unsecured information. The amendments would extend the HBNR's reach to health apps and other evolving technologies, such as health information inferred from non-health-related data points and even AI. The proposed changes come as

business practices and technological developments increase both the amount of health data collected from consumers, and the incentive for companies to use or disclose that sensitive data for marketing and other purposes.

Two separate lawsuits alleging False Claims Act (FCA) violations by retail drug pharmacies reached the Supreme Court this term, both of which challenged the scienter standard for alleged violations.

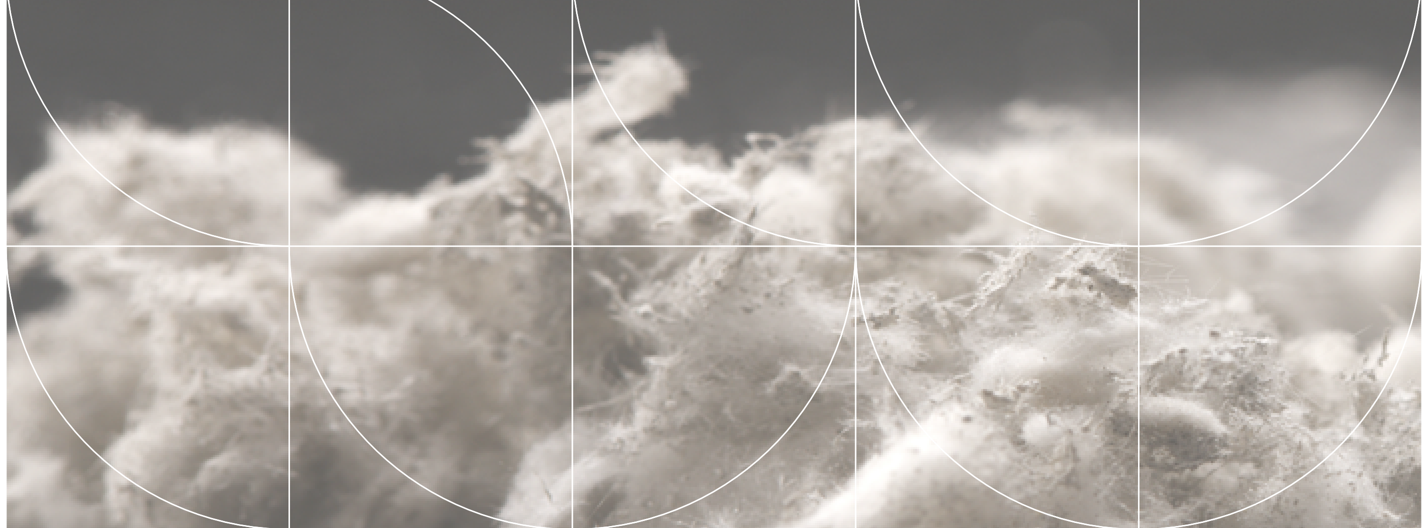
Supreme Court Clarifies Scienter Standards in False Claims Act Litigation

Two separate lawsuits alleging False Claims Act (FCA) violations by retail drug pharmacies reached the Supreme Court this term, both of which challenged the scienter standard for alleged violations. Specifically, the lawsuits decided whether the pharmacies could defeat these claims based on the FCA's scienter standard if they could point to an "objectively reasonable" interpretation of an ambiguous regulation supporting their approach, even if they did not believe the interpretation. The Court released its opinion in *U.S. ex rel. Schutte v. SuperValu Inc.*, in June and unanimously said no, ruling that the requisite scienter is present when an entity submits a claim that it subjectively believes is not permitted, even if the entity can point to another interpretation of the regulation that would allow the claim. While *SuperValu* is a significant decision that will make it more difficult for some defendants to achieve dismissal on the issue of scienter, whether a defendant acted knowingly has always been an element of proof that is more difficult than others to eliminate in motion practice because many courts hold that the issue is one that should be decided by the fact finder.

DOJ Announces Significant Changes to Corporate Compliance Policies

In early 2023, the Department of Justice (DOJ) announced a series of updates to existing policies relating to the prosecution of corporate crime and the evaluation of corporate compliance programs. Although these policies apply across industries, certain aspects are particularly noteworthy—and may raise unique challenges—for health care companies. Most notably, the DOJ has refined the circumstances under which a company can receive credit for self-disclosing identified violations of criminal law, and the DOJ has implemented corresponding voluntary self-disclosure policies. It has further clarified its expectations regarding incentive-based compensation measures and access to electronic communications.

Taken together, these updates make clear that the DOJ believes effective, well-integrated compliance programs should include compensation structures that tie compensation to compliance, consideration of whether self-disclosure is warranted when misconduct or mistakes are identified, and a risk-based approach to the use of personal devices and applications.



Key Trends in Commercial Litigation

Insurance

—*By Tom Locke and Rebecca Woods*

For decades, asbestos litigation involving billions in damages has been the subject of fraud allegations. In 2024, the US Supreme Court will decide an insurance case regarding the right to challenge allegedly fraudulent recoveries.

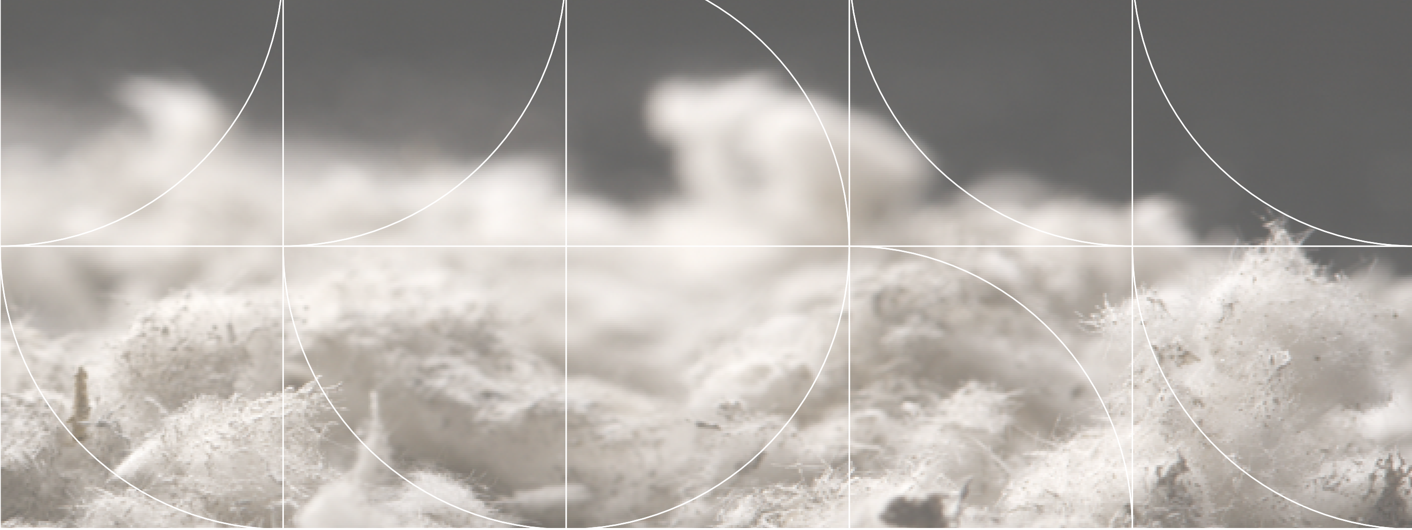
The Supreme Court's decision likely will have wide-ranging implications for all entities with potential asbestos liability, their insurers, and asbestos plaintiffs.

> Since 2000, over 70,000 people in the United States have been diagnosed with mesothelioma allegedly caused by exposure to asbestos.

Specifically, in *Trust Insurance Exchange v. Kaiser Gypsum Company*, No. 22-1079, the US Supreme Court will decide whether an insurer has standing to challenge asbestos bankruptcies that fail to include fraud prevention procedures. The Court's decision likely will affect how entities with potential asbestos liability will be able to negotiate bankruptcy plans that resolve liability, and the decision may affect the amount that those entities may need to contribute—in addition to insurance proceeds—to the bankruptcies.

Since 2000, over 70,000 people in the United States have been diagnosed with mesothelioma allegedly caused by exposure to asbestos. Personal injury asbestos settlements and judgments are estimated to exceed $250 billion. Scores of entities with asbestos liability have become insolvent or have sought bankruptcy protection to resolve their liability. Some of those entities were asbestos manufacturers or incorporated substantial amounts of asbestos in their products. However, a significant number of entities had only a tangential, if any, involvement with asbestos. Resolution of asbestos personal injury claims as to the latter entities presents opportunities for fraud. Plaintiffs and entities with limited asbestos exposure allegedly have agreed to increase substantially the liability of those entities and, in exchange for release of those entities, to force insurers to pay inflated damages.

The alleged fraud arises, in part, because plaintiffs often are exposed to asbestos-containing products manufactured or sold by myriad companies or at multiple premises. In the tort system, many jurisdictions address the issue of multiple potentially responsible entities by allocating liability across entities who caused the asbestos exposure. Defendants also can assert cross-claims and third-party claims against entities that may be responsible for damages. This allows a plaintiff to recover all of his or her damages and, in theory, ensures that each defendant pays only its share of a plaintiff's damages. In practice, however, a defendant frequently does not know the amount that a plaintiff has recovered from other defendants or whether a plaintiff even has sought recovery from all entities that may have contributed to the plaintiff's injury. A plaintiff typically is not required to file claims against all potentially liable



entities. In fact, a plaintiff can delay until after tort litigation is resolved (where recoveries typically are higher) filing claims against asbestos trusts created through bankruptcies. And asbestos trusts usually have procedures that prevent defendants from learning what claims have been made by, and paid to, each plaintiff. As a result, a plaintiff may recover all of his or her damages from select defendants and obtain additional recovery from bankruptcy trusts in excess of the plaintiff's total damages. Numerous commentators and a few courts have recognized this potential for fraudulent recovery at the expense of entities with limited asbestos exposure.

Some entities with limited asbestos exposure have negotiated bankruptcy agreements with plaintiffs' counsel that establish trusts funded in large part by insurance proceeds.

Arguably, the potential for fraud can be exacerbated for insurers when their policyholders seek bankruptcy protection to resolve asbestos liabilities. Some entities with limited asbestos exposure have negotiated bankruptcy agreements with plaintiffs' counsel that establish trusts funded in large part by insurance proceeds. Those trusts require the insurers to pay claims immediately without the benefit of asserting defenses to liability or the amount of damages awarded. Plaintiffs' counsel and a future claimants' representative may be granted sole control of trust procedures and payments. As a result, plaintiffs' counsel decide the criteria for, and amount of, payments to their own clients. Because policyholders are protected from future lawsuits by bankruptcy injunctions, they have little incentive to police trust payment procedures and amounts. However, the insurers who fund a substantial portion of the trusts often have no oversight over claim payouts. Consequently, no one verifies whether too much liability is allocated to entities with limited asbestos exposure who otherwise should have defended the asbestos claims in the tort system or whether plaintiffs are recovering more than their total damages from multiple defendants and asbestos trusts..

In *Trust Insurance Exchange v. Kaiser Gypsum Company*, No. 22-1079, the US Supreme Court should resolve whether plaintiffs' counsel and asbestos defendants need to negotiate bankruptcy trust claim payment procedures with insurers. Including insurers in plan negotiations should reduce bankruptcy trust plans from susceptibility to fraud. However, including insurers in negotiations could increase the often already lengthy time required for entities to resolve their asbestos liabilities.

Guarding Secrets: Navigating the Shifting Landscape of Restrictive Covenants in 2024

— By Dawn Mertineit, Michael Wexler, Robert Milligan, and Kate Perrelli

In 2023, restrictive covenants were subject to more scrutiny than ever, with multiple governmental agencies and state legislatures setting their sights on the enforceability of such contracts. We anticipate additional scrutiny and legislation in 2024, requiring employers to stay apprised of the latest developments—particularly as more states impose stiff financial penalties for failure to comply with the applicable laws.

Additionally, the lasting impact of remote and hybrid work has made it even more critical for employers to stay abreast of state-specific requirements and ensure effective protection of company trade secrets, particularly when onboarding and offboarding employees. In light of this challenging framework, employers should be more motivated than ever going into 2024 to identify and protect their valuable trade secrets.

Federal Attempts to Curb Non-Competes

2023 saw several attempts by federal legislators and agencies to crack down on non-compete agreements (and potentially other restrictive covenants). Most notably, in January 2023, the Federal Trade Commission (FTC) issued a proposed rule seeking to ban virtually all non-competes; the only exceptions under the proposed rule would be for non-competes that arise out of the sale of a business—although even then, the exception would *only* apply to individuals who owned at least 25% of the business sold—and non-competes in franchisor/franchisee agreements. The FTC received over 25,000 comments on this proposed rule, revealing the impact such a rule would have on businesses and individuals alike. We anticipate a final rule in spring of 2024 as the Presidential election heats up, although it is highly likely that any such rule will be quickly challenged based on the question of the FTC's authority to legislate on this topic, with an eventual showdown at the Supreme Court likely.

Not to be outdone, the General Counsel of the National Labor Relations Board (NLRB) issued a memorandum in May 2023 advising that non-competes in employment agreements and severance agreements violate the National Labor Relations Act (NLRA) except in rare circumstances. Specifically, the memorandum claims that such covenants interfere with workers' rights under the NLRA, which protects employees' right to self-organize, join labor organizations, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The exceptions to this blanket rule (as set forth in the memorandum) are, like the FTC's proposed rule, extremely limited—namely, the memorandum only notes restrictions on an individual's "managerial or ownership interests" in a competing business, and "true independent-contractor relationships" as being reasonable (although it concedes that there may be other circumstances in which a narrowly tailored covenant is "justified by special circumstances," but notably declines to give examples of such circumstances). The memorandum's stated reasoning for this position is dubious at best, and its impact unclear; it is not binding or precedential. However, it certainly signals a priority from yet another federal agency to target the use of what the government sees as overly broad covenants, and the NLRB has already filed a consolidated complaint alleging that certain restrictive covenants contained in offer letters and policies in an employee handbook violated the NLRA.

Federal agencies are seeking to undertake enforcement responsibilities aimed at curtailing the use of non-compete agreements that are perceived to limit workforce mobility and wage enhancement.

In sum, federal agencies are seeking to undertake enforcement responsibilities aimed at curtailing the use of non-compete agreements that are perceived to limit workforce mobility and wage enhancement.

State Initiatives

Unsurprisingly, state legislatures have also continued to crack down on restrictive covenants, maintaining a trend that we have seen over the past several years.

Most notably, California (already the vanguard of state legislation prohibiting restrictive covenants except in exceedingly rare cases) recently passed two laws that tighten the screws for employers even more, starting on January 1, 2024. First, in September 2023, Governor Newsom signed a law that provides that any contract that is void under California law is unenforceable regardless of where and when the employee signed the contract. Accordingly, employers can anticipate more disputes with former employees who flee to California at the behest of their new employer to avoid enforcement of their covenants by former employers. Under the new California law, an employee, former employee, or prospective employee may bring a private action

to enforce the law for injunctive relief or the recovery of actual damages, or both, and they are entitled to attorneys' fees and costs if successful. Expect more "races to the courthouse" as former employers try to secure a more favorable venue to enforce non-competes and similar agreements. We also anticipate potential constitutional challenges to this new law.

State legislatures and federal agencies are not the only places where non-competes are being scrutinized.

Next, Governor Newsom also signed a law that requires employers, by February 14, 2024, to notify in writing current employees, and former employees who were employed after January 1, 2022, whose contracts include a noncompete clause or who were required to enter a noncompete agreement that does not satisfy an exception to California law, that the noncompete clause or agreement is void. The law makes a violation of these provisions an act of unfair competition pursuant to California's unfair competition law. Needless to say, employers will need to consult with their counsel to carefully consider the best approach to avoid liability.

Minnesota also joined the list of states banning non-competes this year, with the sole exceptions being non-competes entered in connection with the sale of a business, or in anticipation of dissolution of a business. The new law also prohibits out-of-state choice of law and forum provisions in employment agreements containing non-compete provisions, a trend that we expect to continue in other states in 2024 and beyond.

New York's legislature tried to follow suit, passing a wholesale non-compete ban that was ambiguous as to its scope (for example, it was not clear whether it applied to non-solicits or even to "sale of a business" agreements). However, Governor Hochul opted not to sign, while indicating support for a pared-down version that would potentially include wage thresholds. We expect that a bill will be passed in 2024 that limits the availability of employers to use such covenants. Wisconsin's legislature has also proposed a complete non-compete ban. Employers can expect more legislation in 2024 in a variety of jurisdictions, underscoring the need to remain up-to-speed with the latest changes in this area of the law. Several states have implemented wage thresholds for the use of restrictive covenants, which increase at regular intervals. Employers need to be aware of such thresholds, which continue to rise. At least one class action was filed in 2023 based on an employer's alleged improper use of non-competes for employees that did not earn the statutory minimum in Washington.

Finally, state legislatures and federal agencies are not the only places where non-competes are being scrutinized. In Nevada, the Supreme Court recently held that Nevada courts are not required to blue pencil overly broad non-competes, despite a statute that seemingly mandates it, and only requires them to do so "when possible." In Delaware, long a preferred venue of employers, the courts are taking a dim view of overly expansive non-competes—even in the context of a sale of a business. Many of these cases even struck down the contractual choice-of-law provision designating Delaware law as controlling. And even when applying Delaware law (which permits a court to reform an overly broad covenant), several decisions refused to enforce agreements deemed overly expansive at all. We predict that courts out of Delaware—and elsewhere in the country—will continue to clamp down on agreements that arguably go beyond protecting an employer's legitimate business interests. Finally, we have seen increased scrutiny of allegedly overbroad confidentiality provisions, underscoring the need to narrowly tailor such clauses, which often are overlooked and misunderstood as being automatically enforceable; several court decisions have revealed that this is not the case.

In light of the ever-changing landscape of restrictive covenant enforcement, employers (particularly those with employees in different states) will need to carefully craft their restrictive covenants agreements to be mindful of what might be deemed an overbroad scope, as well as fee-shifting provisions (and other financial and potential criminal penalties) and choice-of-law forum selection requirements.

The heightened governmental and media focus on trade secret theft by competitors and overseas entities underscores the substantial risks associated with breaches, and emphasizes the necessity of safeguarding trade secrets.

Identifying and Protecting Trade Secrets Remains Paramount

Although companies employ restrictive covenants and conventional intellectual property safeguards such as patents, trademarks, and copyrights to protect specific assets and confidential data, there remains a wealth of crucial company information that could be classified as trade secrets that are not (and should not be) protected with tools requiring public disclosure. The heightened governmental and media focus on trade secret theft by competitors and overseas entities underscores the substantial risks associated with breaches,

and emphasizes the necessity of safeguarding trade secrets. Moreover, remote and hybrid work has made it even more challenging to ensure the effective protection of company trade secrets. The surge in trade secret theft, amplified by the rise of remote work, technological advancements, and intense global competition, imposes significant financial burdens on American companies, totaling hundreds of billions of dollars annually. Even the most prominent and sophisticated companies fall prey to these breaches. Therefore, companies need to take robust measures to protect their trade secrets, from understanding and identifying what constitutes a trade secret (and how, specifically, it provides value to the business by virtue of its secrecy) to deploying tools and strategies to protect them.

Indeed, eye-popping damages awards in cases involving misappropriation of trade secrets highlight the pivotal role these assets play within an industry and their critical importance to companies. Moreover, emerging court opinions acknowledge the broader spectrum of costs incurred by businesses in cases involving the theft of trade secrets, encompassing the benefits gained by an unlawful actor in reducing development expenses and expediting market entry by illicitly acquiring and deploying trade secrets. However, key decisions this year have highlighted the need for trade secrets plaintiffs to establish with concrete proof that the value of their trade secrets were diminished, in order to recover under an unjust enrichment theory of damages.

As a result, increasingly commonplace considerations for sophisticated businesses and their legal representatives include the identification of unlawfully acquired or utilized trade secrets, the expenses associated with their development, and the competitive advantages obtained by the wrongdoer. Particularly given the evolving landscape regarding non-compete agreements and similar restrictive covenants, this trend is expected to lead to a greater reliance on safeguarding trade secrets and pursuing claims of misappropriation through litigation. Consequently, companies must establish robust trade secret protection strategies to navigate these developments effectively. Proving that the property sought to be protected derives its value from its secrecy will continue to be critical.

Particularly given the evolving landscape regarding non-compete agreements and similar restrictive covenants, this trend is expected to lead to a greater reliance on safeguarding trade secrets and pursuing claims of misappropriation through litigation.

Key Trends in Commercial Litigation

Privacy

—By Jason Priebe

Consumer awareness of and media attention to individual data privacy rights are driving a notable rise in regulatory enforcement and litigation alleging violations of state and federal data privacy laws.

In 2024, litigation will increase as additional state laws pass in response to US residents becoming increasingly conscious of their personal data and privacy rights. The combination of heightened consumer sensitivity and awareness, along with opportunism and creativity on the part of plaintiff attorneys and privacy advocacy groups, will propel privacy litigation frequency and severity in coming years.

Twelve comprehensive state privacy laws have already been enacted, and the focus on corporate responsibilities and technical compliance is sharpening, as are the risks of noncompliance. While California's California Consumer Privacy Act (CCPA) had for years stood alone among the omnibus privacy laws in affording its residents a private right of action, Washington's *My Health My Data Act* stepped onto the scene in 2023. The Washington Act extends the "Regulated Entity" concept to include a broad spectrum of businesses. At the same time, "Consumer Health Data" for Washington residents is defined expansively to cover any information that can reasonably be linked to a consumer's physical or mental health. This includes a wide array of data, from prescribed medication to biometric and genetic data, and even extends to location information that could suggest or indicate health service usage. Washington's Act includes a private right of action, which will catalyze a wave of consumer-led lawsuits. It further grants more assertive rights to consumers, for example, by placing fewer restrictions on deletion rights—a stark contrast to other states' more conservative approaches.

Washington's requirement for explicit consent before data collection, as opposed to the "notice and objection" models used elsewhere, signals a stricter regulatory environment, one that is poised to challenge businesses and potentially spur litigation. Furthermore, the Washington Act's nuanced approach to geofencing and geolocation directly responds to states like Texas, which some feared would seek to prosecute women who seek or assist in the procurement of abortion services across state lines. The *My Health My Data Act* not only foreshadows a surge in privacy litigation within Washington, but also signals a potential shift in the national privacy landscape as other states may follow suit, crafting their own broad health privacy frameworks in response to the demand for consumer data protection, beyond what HIPAA affords.

Digital Privacy, Pixels, and New Routes of Enforcement

One of the newest battlegrounds in privacy litigation involves claims associated with the subtle use of website beacons to track online activity. Commonly referred to as "pixels" after the Facebook/Meta name for their web beacon tool, website beacons that monitor the impact of advertising and facilitate cross-site monitoring have become more controversial and create risk if not deployed properly. Pixels can be stealthier than cookies and evade many anti-tracking tools. Their placement and use have drawn heightened legal scrutiny, particularly from the FTC, which mandates clear disclosure of data collection and sharing practices. The recent rash of pixel lawsuits and regulatory attention highlights the growing risk and potential

liabilities for businesses involved in data handling and cross-contextual advertising based on online activity. Federal and state laws, including wiretapping protections, are being employed to target the covert data harvesting by web beacons, and creative attorneys are working to leverage traditional eavesdropping and privacy laws in claims for damages based on improper notice, use, or deployment of web beacon and similar code on local computers and web browsers.

Along a similar vein, because HIPAA provides medical data privacy standards without offering a private right of action, plaintiffs have instead turned to common law privacy claims to address grievances associated with alleged unauthorized information sharing or disclosure. At the same time, the Video Privacy Protection Act, (VPPA) and other federal statutes like the Computer Fraud and Abuse Act, the Federal Wiretap Act, and the Driver's Privacy Protection Act, are being leveraged by creative plaintiff attorneys in order to pursue new legal claims across sectors. The Boston Globe's recent $4 million settlement for alleged pixel privacy violations highlights some of the potential risks that businesses are facing.

AI and Biometrics

Increasing consumer attention to privacy has significantly reshaped societal attitudes towards the collection and use of sensitive categories of personal information, including biometric data, and the automated or AI processing or decisions some algorithms are making. Both consumers and workers are increasingly sensitive and vigilant about technology collecting immutable personal details, such as social security and biometric data. This heightened consumer awareness and sensitivity, combined with an availability of new and creative claims based on new and old legal theories, adds to the legal risks and potential liability for businesses.

This year the Illinois Biometric Information Privacy Act (BIPA) continued to be a focal point of privacy litigation, reflecting growing unease with data collection and artificial intelligence (AI) in the workplace, notably regarding voice and facial recognition technologies. The new workplace collection and processing concerns represent a shift from previous years, where privacy concerns were mainly associated with social media. The recent trend of biometric claims, like those against tech giants for unauthorized use of facial geometry, underscore the expansion of privacy debates to the employment arena. This surge in BIPA-based complaints—with over a third relating to workplace AI in the first half of 2023—suggests a broader concern on the part of employers utilizing any technology that is or could be even alleged to be collecting biometric information.

This surge in BIPA-based complaints throughout 2023 can be partly attributed to two decisions, *Cothron v. White Castle System Inc.*, 2023 IL 128004 and *Tims v. Black Horse Carriers Inc.*, 2021 Ill. App. 200563 (Ill. App. Ct. 2021). These decisions provided plaintiffs an easier path to assemble claims for damages and supercharged the value of damages claimed under the BIPA statute. In the two months following the White Castle decision, there was a 65% increase in BIPA claims filed. *White Castle* established that each biometric data collection or disclosure incident could lead to a separate claim. *Tims* further emboldened plaintiffs by setting a 5-year catch-all statute of limitations for BIPA claims and eliminating arguments that a shorter limitation period should be applied. This means that a business defending a claim must show no biometric information was taken from an individual plaintiff without proper notice, consent and other compliant measures at any time over the prior five years. It is easy to argue that the recent BIPA lawsuit trends signal a potential threat to commerce in Illinois and a further windfall for trial attorneys. However, we interpret the decisions as a clear and unmistakable obligation for businesses to adapt and align their use of biometrics with evolving privacy standards or face unpleasant and expensive litigation.

2023 saw some significant settlements of suits alleging non-compliance with BIPA's stringent consent and policy requirements, primarily in the retail employer spaces. Even beyond retail, complaints span a variety of AI applications in employment settings, from sales associates' voiceprints to delivery drivers' identity verification selfies being collected without proper consent. This trend points us to a broader concern on the part of employers utilizing any technology that is or could be alleged to be collecting and using information someone may argue is "biometric," even if the information collected does not fall within the BIPA definition. After the bonanza of easy claims and attorney fee rewards in 2023, BIPA lawsuits are steadily gaining momentum and expected to continue growing in 2024.

Conclusion

Now more than ever, businesses and organizations need to navigate an increasingly vigilant consumer base and an expanding web of state privacy laws. Texas warrants particular attention, with its broad omnibus law that takes effect on January 1, and generally covers any company that does not qualify as a "small business" and that processes personal information for *any* Texas resident.

Robust compliance frameworks and preemptive risk assessments continue to be critical in mitigating litigation threats, especially as private rights of action become more common. Smart businesses are building documentation and internal processes in order to demonstrate compliance with applicable privacy laws. And it is appearing that claims or at least allegations of privacy law violations are becoming more common, regardless of a company's industry, location, or consumer interactions. Recent developments have led to a new warning for businesses: even supposedly anonymized or aggregated data demands careful handling and considerations. Strategic legal defense of future privacy claims will hinge on documentation and internal processes that keep pace with evolving privacy law requirements and regulations, which based on current trends, are changing on an almost monthly basis.

Key Trends in Commercial Litigation

Real Estate Litigation

—By Elizabeth Schrero and Mark Johnson

With the effect of COVID-19 era reprieves, financial assistance, and landlord-tenant disputes tailing off in 2023, we expect a return to more traditional real estate litigation in 2024, particularly commercial landlord-tenant disputes, foreclosure, bankruptcy and workout litigation, as well as growth in cannabis business-related disputes.

Commercial Landlord-Tenant Disputes

We have seen disputes arising from delay in complying with deadlines for alteration work and opening for business under lease agreements, as well as guaranty litigation in the retail sector. We also saw increasing pressure in the commercial office space arena in 2023, which is expected to continue in 2024. Many companies have shifted to hybrid work arrangements, and some have entirely given up physical office space. Many office and some retail tenants seek to reduce their leased footprints. This trend is expected to result in more tenant defaults in circumstances where the parties are unable to agree on appropriate lease modifications and tenants opt to simply not pay rent or not renew leases. In turn, landlords will need to undertake mitigation efforts and pursue evictions, while taking steps to lessen risk of default on mortgage and tax obligations.

Over the next year, we expect to see continuation of the recent trend of national discount and low-cost retailers moving into more rural areas to cater to that historically underserved market segment. We anticipate an uptick in commercial and retail landlord-tenant disputes, including matters involving tenant-defaults where stores fail to perform at forecasted levels and claims arising from delays in the build-out of leased-premises or construction of new buildings.

Over the next year, we expect to see continuation of the recent trend of national discount and low-cost retailers moving into more rural areas.

The Tension Between Federal Law and States' Laws Legalizing Cannabis

The majority of states now permits some form of cannabis use. Specifically, 22 states and the District of Columbia permit both recreational and medical uses of cannabis, while 16 states limit the use to medical purposes only. Against that backdrop, landlords and tenants have to navigate state and local laws and regulations while being mindful of the prohibitions that remain under federal law. For example, the Controlled Substances Act (CSA) categorizes cannabis as "a Schedule 2 substance" and, accordingly, cannabis-related businesses technically operate in violation of the CSA and other federal laws.

That means that landlords and tenants must ensure that cannabis businesses strictly comply with local laws and that their leasing and financing documents contain appropriate federal law carve-outs. Preexisting financing documents may not permit cannabis-related businesses due to the current status of federal law. For shopping

centers, landlords must be particularly mindful of prohibited use and co-tenancy provisions in other tenants' leases. Cannabis use is frequently prohibited by such provisions, requiring landlords to seek modifications of those other leases prior to leasing to a cannabis-related business in order to avoid potential disputes.

On the federal level, there may be some hope for cannabis businesses, with the recent advancement of the Secure and Fair Enforcement Regulation Banking Act (SAFER Banking Act) by the Senate Banking Committee. While the SAFER Banking Act would not legalize cannabis at the federal level, it would create a "safe harbor," offering protections from civil, administrative, and criminal penalties for those in the financial industry that provide services to state-sanctioned cannabis businesses or service providers. This also may be a harbinger of significant changes that will ease the restrictions and concerns of banks, insurers, lenders, and other businesses within the financial industry.

Real Estate Finance Disputes, Distress Litigation, and Purchase Disputes

Changes in borrowers' and occupants' uses of properties and other factors have resulted in changes in lenders' valuations of properties, which, in turn, may trigger remedies and disputes under loan agreements.

We have seen an increase in mortgage foreclosures and UCC foreclosures on affected office, mixed use and hotel properties, as well as guaranty litigation and hotel and retail franchise disputes. We expect this trend to continue in 2024, in addition to further increased foreclosures, work-out related disputes and bankruptcy filings. For example, non-renewal of office leases and tenant defaults are impacting building owners' ability to pay their mortgages, while forbearance and refinancing options are less available due to high interest rates, stricter lending requirements, and decreased valuations, leading to mortgage defaults. In addition, we have seen owners abandon previously valuable properties, with lenders unwilling to accept returned keys, preferring instead to proceed with foreclosures.

Preexisting financing documents may not permit cannabis-related businesses due to the current status of federal law.

The United States Supreme Court recently resolved a jurisdictional dispute of a bankruptcy provision that relates to approval of a debtor's sale or lease of property to another entity. At issue was a landlord's objection to a big-box retailer/debtor's assignment of a substantially below market rent lease ($10-per year) for retail premises at the Mall of America on the grounds that the debtor failed to provide adequate assurances of future performance as required by the Bankruptcy Code. The Bankruptcy Court overruled the landlord's objection and the US District Court for the Southern District of New York reversed. The debtor then appealed to the Supreme Court on the ground that Section 363(m) of the Bankruptcy Code, which otherwise protects such a transfer made in good faith, divested the District Court of appellate jurisdiction to re-consider the Bankruptcy Court's approval. A unanimous Supreme Court ruling disagreed with the debtor and ruled that the District Court was not divested of jurisdiction. The decision resolves a jurisdictional debate regarding review of Bankruptcy Court decisions made under Code Section 363(m) that will affect the assignment of commercial leases in bankruptcy cases going forward.

In sum, as COVID-era financial assistance, forbearance agreements, and default litigation fully trail off, we anticipate a fertile an active real estate litigation landscape in 2024 across all sectors.

Key Trends in Commercial Litigation

Securities, Fiduciary Duty, & Derivative Litigation

—By Greg Markel and Will Prickett

In 2024, we think it is likely we will see significant developments in the securities, derivative, fiduciary, and SEC litigation world.

Securities Litigation and Enforcement

In 2023, there was an increase in the combination of continued SEC enforcement and litigation as well as an increase in other new types of cases and subject matters. There was a modest (approximately 7%) increase in newly filed securities class actions from 2022, but both 2022 and 2023 were still below the number of filings from prior years. For 2023, this most likely was driven by fewer market price declines in the latter half of the year, and the pace of new filings after June slowed. In line with rising markets, in 2023 we also saw an increase in a variety of enforcement matters by the SEC, including not just market manipulation, insider trading and other traditional cases, but also an increase in cryptocurrency and cybersecurity related cases. Outside of the SEC, there was an increase in derivative cases filed and in the size of their settlements.

For 2024, we may well see similar trends. Below are some of the types of matters and issues we expect will result in a number of cases in the securities litigation and derivative area:

Derivatives and Insight Claims

Arguably the most interesting and significant developments in securities, fiduciary duty and derivative litigation are in enforcement by the SEC and the significant increase in derivative claims. Many of the derivative cases end up parallel actions alongside securities class actions and have resulted in a number of large settlements of those actions. Another area of growth for plaintiffs is the larger number of oversight claims against directors and officers which further clarify the interpretation of the 2019 Marchand case. Moreover recent cases from Delaware add to the likelihood of oversight claims even against corporate officers.

Class Actions Lawsuits

Traditional shareholder class actions alleging securities fraud, or false and misleading statements in offerings, may well continue at a 2023 pace in 2024, including those related to alleged improper accounting practices, financial restatements and other misstatements or omissions. These actions frequently 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 the relevant company's stock declines more than the overall average in the market, making it easier for plaintiffs to allege the decline was "caused" by the individual defendants misstatements, and not by general factors affecting the market as a whole. The pace of new cases filed this year will depend in large part on the volatility of issuers' stock prices, and whether the market trends down over the year.

One notable case to watch is *Macquarie Infrastructure v. Moab Partners LP*. The Supreme Court heard oral argument on January 16, 2024. A decision would resolve a circuit spit on whether shareholders have a private right of action to assert federal securities fraud claims if it was based solely on an alleged omissions by defendants under Item 303 of Regulation S-K. Plaintiffs frequently allege that material omission in violation of Item 303 caused their injury whether or not they to assert a Section 10(b) or Rule 10b-5 claim. The Third and Ninth Circuits have rejected that argument, holding that only the SEC can enforce an omission claim under Item 303. The Second Circuit repeatedly has taken the opposite view (including in Macquarie), allowing private stockholders to base their fraud clams on an alleged Item 303 omission. A Supreme

Court decision reversing the Second Circuit's view would reduce somewhat, the exposure for issuers and their officers and directors in the relevant circumstances.

Cryptocurrency and Blockchain-Related Cases

We anticipate this area will continue to be near the top of the SEC's enforcement priority list, including continuing litigation over the definition of a "security" with respect to these products, the expansion of oversight duties of directors and officers and other claims of fraud or "Ponzi schemes" in Initial Coin Offerings and that of (ICOs), market performance estimates, and other misstatements or omissions made to prospective investors. Unregistered sales claims are likely to continue as well. While we may not see another massive case in 2024 like the FTX meltdown, cases based on the same theory seem likely to continue at a substantial rate as promoters and sponsors of new products and exchanges seek to cash in on this growing space.

ESG-Related Litigation

In 2023, ESG (environmental, social and governance) litigation continued to generate some litigation. In 2024, issuers will continue to await final rule making from the SEC on ESG disclosure obligations for registrants, with only proposed rules issued so far and only as to environmental disclosures. Until those rules come into effect, and/or Congress is able to agree on any ESG-related legislation, public issuers will continue to be in a "voluntary" disclosure mode for ESG factors. We expect there will be continued securities litigation risk from newly filed cases for those who do disclose ESG factors (such as carbon emissions, human capital statistics, or governance enhancements) which end up being incorrect or are alleged to be "greenwashing."

Data Breach and Cybersecurity Lawsuits

Data breach and cyber-crime have increased over the past few years, allowing both the plaintiffs' bar and regulators to follow up with more cases and enforcement. We expect this trend to continue, with more shareholder cases alleging failure to disclose cyber risks, or misstating the level and quality of cybersecurity controls and protection in place, and more SEC enforcement claims of a similar nature. In addition, new SEC rules (an expansion of Regulation S-K Items 1.05 and 106) went into effect on September 5, 2023, for annual reports for fiscal years ending on or after December 15, 2023. They require public companies to disclose the policies and procedures, if any, for the identification and management of cybersecurity threats, the members of management or the board responsible for oversight, and types of risk, including operational risk, intellectual property theft, fraud, extortion, harm to employees or customers, violation of privacy laws and other legal and reputational risk. The rules also require companies to disclose material cybersecurity incidents within 4 business days on a Form 8-K. Failure to adequately follow these rules will create another target for the SEC.

SEC Enforcement

The Commission has made repeated public statements that it intends to continue with aggressive enforcement of the Federal Securities Laws in 2024. We expect the SEC will be true to its word on this issue, including pursuing claims for, among other things, insider trading, market manipulation, misstatements, omissions, executive accounting controls, record keeping, too many whistleblower claims, and misleading statements about AML compliance. These are in addition to the other priorities discussed above, including ESG, cybersecurity and crypto-related cases-related cases. One important case to watch is *SEC v. Jarkesy*, which is a challenge to the constitutionality (under the 7th Amendment and nondelegation doctrine) of the SEC's in-house current status of being able to elect to use its own in house resolution process using its own administrative law judges. The Supreme Court heard the case on November 29, 2023 and the decision is expected this term. A ruling against the SEC would likely have a significant and adverse impact on the agency's discretion in deciding between federal court proceedings and hearings before SEC administrative judges, which are often perceived as favoring the SEC.

M&A-Related Litigation

In 2024 we expect to see more developments in several areas, including what level of control a shareholder must have to constitute having control of a corporation. This year we will likely see the Delaware Supreme Court's decision in the *Match.com* case, in which the appellant seeks to continue to water down the use of independent special committee review (to avoid the higher 'entire fairness' standard of review) established in 2014 in *Khan v. M&F Worldwide Corp.* We may get more clarity in whether there will be a new standard established in *Match.com*.

Another notable case addressing the definition of 'controlling stockholder' is *Tornetta et al. v. Elon Musk et al.*, which is a shareholder derivative challenge to the board's approval of a stock-based compensation plan for Mr. Musk. In addition to claiming inadequate disclosure of the plan's details, the plaintiffs allege that Musk exerted undue influence on the members of the committee who considered the plan, even though Mr. Musk's stake in the company was far below 50%. On January 30, 2024, Chancellor McCormick issued a 200-page decision, granting the stockholders' request for complete recission of the compensation plan. The court found that although Mr. Musk only owned 21.9% of the company, he so dominated and controlled the directors' process in approving the plan that he should be deemed a controlling stockholder agency which use administrative judges. Moreover, certain material information was not disclosed to the stockholders who voted to approve the plan, the court applied the entire fairness of the deal standard – one which the defendants were unable to meet.

A third case challenging independence, albeit in a non-merger context, is *Dennis Palkon et al. v. Gregory B. Maffei et al.* There, a proposed class of shareholders of TripAdvisor, and its holding company Liberty TripAdvisor Holdings, seek to stop the companies from changing their state of incorporation from Delaware to Nevada. The plaintiffs allege that a controlling shareholder, Greg Maffei, exerted undue influence on the boards of both companies and that the reincorporation was to take advantage of Nevada's recent change in laws reducing board members exposure to certain forms of liability. Plaintiffs assert that the move is a 'conflicted transaction' because Maffei stands to benefit from reduced liability. The shareholders allege that unless enjoined, the move would be against the interests of the common stockholders. Defendants argue that the move is in the best interest of the stockholders, including greater protection from unmeritorious litigation against directors and officers and increased corporate flexibility in connection with certain corporate transactions.

Key Trends in Commercial Litigation

Trial Outlook

—By Christopher Robertson and Jessica Berk

As the country emerged from the restrictions implemented during the pandemic, courts continued to evaluate which aspects of pandemic-era changes might be made more permanent, whereas others would be withdrawn.

Consequently, 2023 ushered in updated and new rules in both federal and state courts concerning more permanent use of virtual hearings and access, as well as more refined rules relating to virtual trials and depositions.

Federal and State Courts Embrace Remote Procedures

Most federal courts have continued to hold non-evidentiary scheduling and motion hearings remotely, which has been uniformly deemed within the court's discretion. The main concern arising during the pandemic with regard to remote trials and evidentiary hearings concerned public access to such proceedings. In September, the Judicial Conference—the policy-making body of the federal court system issued new guidelines allowing audio access for federal civil and bankruptcy proceedings. The revised policy permits judges presiding over civil and bankruptcy cases to provide the public live audio access to non-trial proceedings that do not involve witness testimony. A subcommittee of the Judicial Conference is also considering ways to expand remote access to the public for civil and bankruptcy proceedings with particular focus on whether remote public access to proceedings involving witness testimony would (1) increase the potential for witness intimidation or make witness sequestration less practicable, and/or (2) affect the truth-finding mission of the courts by altering testimony if the witness is aware that his/her testimony proceeding is being heard in real-time to individuals who cannot be seen in the courtroom. Criminal proceedings are not implicated by these remote access proposals, as most of the changes implemented during the pandemic have been rescinded in federal criminal matters in favor of in-person proceedings where there will be witness testimony.

In many states' courts, virtual hearings are becoming permanent. Arizona, Illinois, Georgia, Maryland, Massachusetts, Michigan, New York, North Carolina, and Texas have all incorporated some form of remote operations into their state court systems. For example, after Michigan's court rules were amended in 2022 to permit courts to use videoconferencing technology if requested by a participant, they were updated again in 2023 to provide that, while trials are still "presumed" to be conducted in-person, videoconferencing is actually "preferred" for non-evidentiary proceedings. Likewise, the Florida's Supreme Court has instructed judges to "take all necessary steps to support the remote conduct" of court proceedings where there is no reason to be in person so as to "maximize the availability of facility space for trial court proceedings that must be conducted in person."

Massachusetts has adopted rules that make certain proceedings either "presumptively" remote or in-person. For example, the following proceedings are expected to be handled by videoconference: (i) initial case management conferences; (ii) discovery disputes, (iii) motions to compel, (iv) motions for protective order; (v) scheduling conferences; (vi) final pretrial conferences; (vii) motions to dismiss; (viii) motions to amend complaint; (ix) motions for default judgment; and (x) motions to set aside default. On the other hand, the following proceedings are expected to be held in person: (i) injunction hearings, including ex parte motions for injunctions; (ii) hearings on equitable motions, including motions for attachment, trustee process, reach and apply; (iii) proceedings involving credibility determinations; (iv) motions for summary judgment; (v) Daubert-Lanigan hearings; (vi) final trial conferences, including motions in limine; and (vii) trials. California similarly enacted a

new rule governing remote appearances, in order to make more consistent "the practices and procedures relating to remote appearances and proceedings in civil cases." The rule, which became effective August 4, 2023, aims to "improve access to the courts and reduce litigation costs to the extent feasible" and instructs courts "to permit parties to appear remotely at conferences, hearings, and proceedings in civil cases consistent with Code of Civil Procedure section 367.75."

In many states, the discretion to decide what proceedings can occur virtually lies—whether explicitly in rules and guidelines or implicitly—with the judge.

Effective March 2023, the Georgia Supreme Court issued new rules governing "virtual events." Georgia Uniform Superior Court Rule 9.2 addresses court proceedings, which have traditionally been held in-person, and depositions. In order to be held remotely, both proceedings and depositions must now meet certain minimum procedural requirements such as: (i) secure breakrooms and chatrooms to maintain attorney-client confidentiality; (ii) sufficient video quality that enables those participating to both see others' nonverbal communications and also see and hear evidence and exhibits; and (iii) the ability for those participating to communicate with one another in real time.

Other state courts, including in Maryland, Arizona, Minnesota, and Connecticut, have released guidelines for conducting virtual hearings consistent with the National Center for State Courts' (NCSC) Remote Proceedings Toolkit. In response to NCSC's 2021 survey highlighting the challenges associated with in-person court proceedings, the Toolkit provides a blueprint for state courts to implement equitable and consistent policies for remote hearings with a focus on the following key principles: equal access, due process, transparency, standardization, safety and fairness. For those states that have not yet enacted official rules relating to virtual proceedings, efforts to do so are underway. A task force was established in Iowa earlier this year for the purpose of exploring ways to permanently implement and standardize remote hearings in their courts, including utilizing remote technology in criminal cases.

Judges Retain Discretion

In many states, the discretion to decide what proceedings can occur virtually lies—whether explicitly in rules and guidelines or implicitly—with the judge. Recent rules in Michigan, Illinois, Texas, and Ohio provide safeguards for judges to deny a virtual appearance should it impede a party's rights or be otherwise impracticable. Generally, consideration should be given to whether a hearing is evidentiary, its expected length and complexity, the distance that attorneys and parties would need to travel to court, and whether the expense of appearing in-person is justified. Ultimately, however, the decision will be up to the particular judge involved.

Greater Use of Technology Is Welcomed

Consistent with the use of such technologies outside of the courtroom, the legal community appears to be embracing an increased use of technology generally, including in the context of virtual proceedings and hearings. In its 2023 State of the Courts Survey Report, the Thomson Reuters Institute revealed that 76% of judges and court professionals believe that conducting court proceedings virtually increases access to justice for the litigants. Likewise, a 2023 survey found that more than three quarters of the 3,300 hearing participants responded that they would prefer remote to in-person hearings. Participants appreciated that they had fewer difficulties attending the proceeding and shorter wait times. Interestingly, they also felt as though their case was treated with the seriousness and time necessary.

While 2023 saw further refinement with regard to the use and scope of virtual proceedings and hearings, we expect this to continue into 2024, with additional rulemaking and clarity as to which proceedings will be presumptively remote and which will be presumptively in person. Of course, any such presumptions are ultimately within the discretion of the judge presiding over the matter. The more counsel can agree in advance on how future proceedings will be conducted, the fewer surprises are likely in store for counsel, parties and witnesses.

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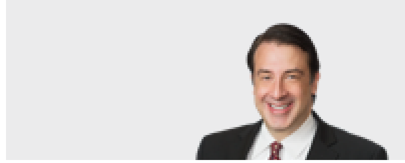

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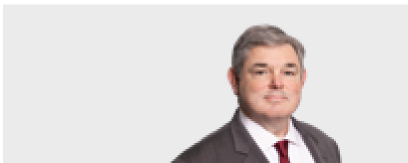

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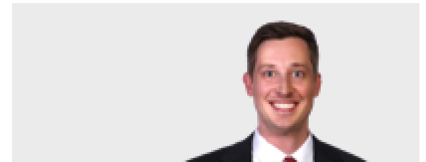

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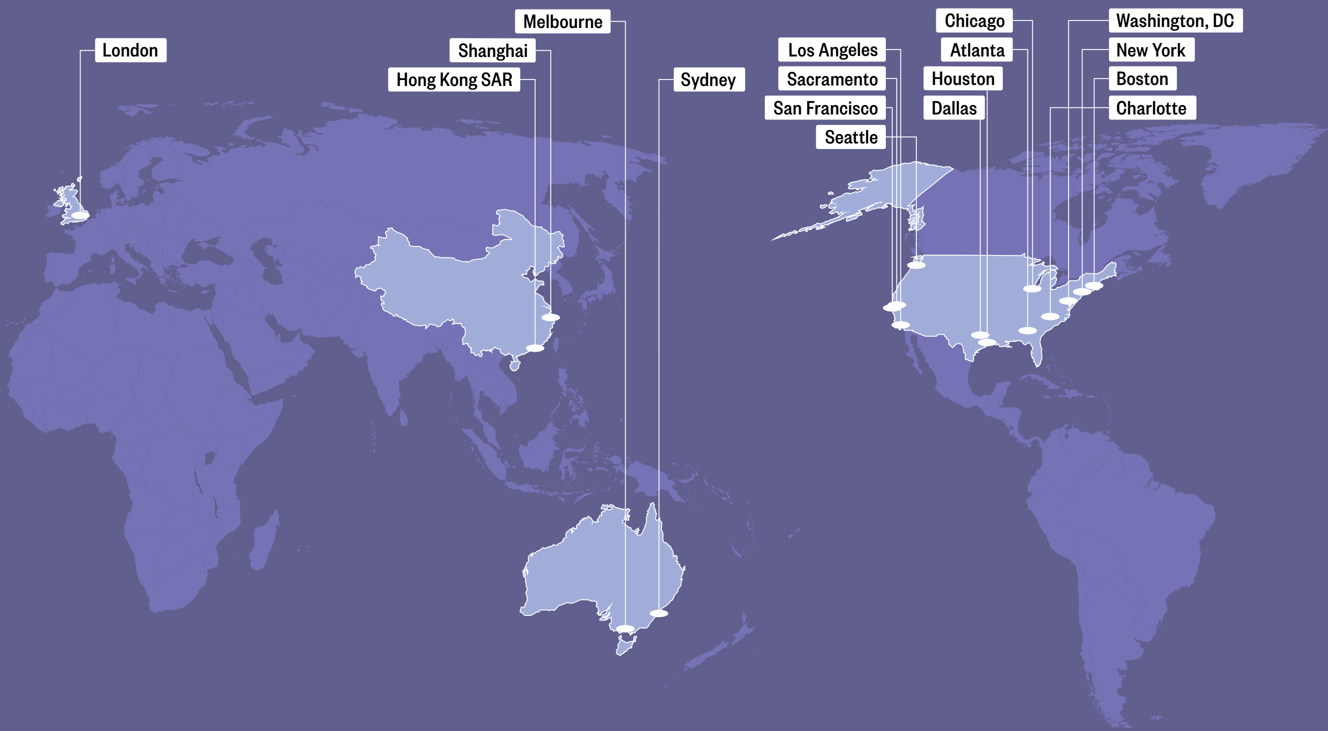

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