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Civil Litigation Outlook For 2016

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The landscape of civil litigation is constantly changing, and staying ahead of the curve is a requirement for lawyers and businesses alike. Looking toward 2016, there are several significant civil litigation trends emerging. In this article we highlight a handful of them, including burgeoning antitrust litigation at the Department of Justice, growth in securities and consumer class actions, the changes to Federal Rule of Civil Procedure 26(b) and the potential for marked increases in patent litigation.

Antitrust: Increased DOJ Enforcement Efforts Will Spawn Increased Private Antitrust Litigation

Last year, the Department of Justice poured an enormous amount of resources into enforcing antitrust law, collecting a record $3.6 billion in criminal fines and penalties.[1] The DOJ investigations covered a wide range of industries, including automotive, financial services, electronic component, transportation, real estate and pharmaceutical.

This rising tide of federal antitrust enforcement inevitably spawns increased private antitrust litigation, as plaintiffs bring claims against companies that the DOJ prosecutes or investigates. Antitrust convictions by the DOJ, including those obtained through guilty pleas, constitute "prima facie evidence" in private antitrust actions against a company, rendering civil antitrust violations easier to prove and harder to defend. These private antitrust actions can be extraordinarily expensive for companies to defend and bring a risk of paying treble damages, costs and reasonable attorneys' fees under civil antitrust law.

Last year we saw some of the largest ever civil antitrust settlements, including a $1.86 billion settlement in a class action against major banks and other market participants for rigging the credit default swap market. As the DOJ continues its aggressive antitrust enforcement in 2016, companies will face even greater corollary civil litigation and substantial civil monetary resolutions.

Class Actions: The Continued Growth of Securities and Consumer Class Actions

Despite several U.S. Supreme Court decisions over the past five years that many expected to deter class action litigation, such litigation — particularly securities and consumer class actions — grew in 2015 and is poised to expand even further in 2016.

Plaintiffs' attorneys filed approximately 190 securities class actions in 2015, marking an 11 percent growth over 2014 and the third consecutive year of growth in securities class action filings.[2] Two drivers of this trend are worth noting. First, the uptick appears partially attributable to the elevated levels of initial public offering activity over the last three years.[3] As IPO activity has grown, so too have IPO-related securities class actions: In 2015, 29 IPO-related securities class actions were filed, a 70 percent increase over 2014.[4] Second, the increase reflects a swelling in the number of U.S. securities class actions brought against foreign corporations. In 2015, 34 securities class actions were brought against foreign corporations — well above the 1997-2013 annual average of 22.[5] Litigators and businesses —especially foreign businesses and businesses considering going public — should keep these trends in mind and expect securities class action litigation to increase in these fields in 2016 and coming years.

The past several years have also brought a proliferation of consumer class action lawsuits. Claims under the Fair Credit Reporting Act, Telephone Consumer Protection Act and Fair Debt Collection Practices Act have all increased substantially from 2014 to 2015, and a high proportion of these claims are brought as class actions.[6] Additionally, class action suits based on data security breaches have continued to rise, as the number of significant breaches, and the public attention they receive, continues to grow. As states continue to expand on the already complex patchwork of data privacy and consumer protection law, we expect litigation on data security breaches to continue to grow. For instance, California — whose robust consumer protection laws already provide fertile ground for litigious plaintiffs — is expected to pass legislation further expanding the definition of "personal information" that must be protected by persons or businesses who acquire such information. Given such developments, 2016 will bring a strong and continued focus on privacy protections and data breach prevention both in the class action context and otherwise.

Federal Rule of Civil Procedure 26(b): A Renewed Emphasis on Proportionality

On Dec. 1, 2015, changes to the Federal Rules of Civil Procedure took effect. Given the extensive discovery that inexorably abounds in complex civil litigation, the amendments to Rule 26(b)'s scope of discovery will be of particular interest to businesses and litigators in 2016 and should help limit the extent of discovery in certain cases, particularly as it relates to electronically stored information (ESI).

The amendments to Rule 26(b) come through both addition and subtraction. First, the amendments introduce the concept of "proportionality" to Rule 26(b)(1)'s scope of discovery, stating that parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*," considering: (1) "the importance of the issues at stake in the action"; (2) "the amount in controversy"; (3) "the parties' relative access to relevant information"; (4) "the parties' resources"; (5) "the importance of the discovery in resolving the issues"; and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefit." Proportionality and the above factors (save factor three) are not new to Rule 26; but previously, they resided in 26(b)(2)(C), serving as limits on discovery only upon a motion or court order. Proportionality's new, more prominent home within Rule 26(b)(1) makes clear that the principle dictates the scope of discovery from the outset in all cases. In certain cases, particularly those where the amount in controversy is cabined, the changes offer litigants the opportunity to save significant sums of client money and avoid costly review of ESI by pushing for early discovery limits.

Second, the amendments remove Rule 26(b)(1)'s language that information "need not be admissible at the trial if the discovery *appears reasonably calculated to lead to the discovery of admissible evidence*," replacing it with the simpler directive that "[i]nformation within this scope of discovery need not be

admissible in evidence to be discoverable." The Advisory Committee notes indicate that the deleted language had been "used by some, incorrectly, to define the scope of discovery," often "swallow[ing]" other limitations on discovery. Thus, the revised Rule 26(b)(1), and the stated intent of the change, will help confine discovery requests to their proper scope — evidence that is relevant, nonprivileged and proportional to the needs of the case — and ensure that parties requesting discovery cannot take refuge in the boilerplate argument that a broad discovery requested is "reasonably calculated" to lead to discovery of admissible evidence.

These changes to Rule 26(b) are geared towards restraining abusive discovery practices. Although the long term effects of these changes on discovery practices remain to be seen, they provide additional and immediate arguments to curb unreasonable discovery requests both at the outset of a case and as the case proceeds and the issues in controversy sharpen.

Patent Litigation: Patent Filings are up and Two 2016 Developments Could Further Elevate Them

Patent litigation increased substantially this past year, before both federal courts and the Patent Trial and Appeals Board, a creature of the 2012 America Invents Act. In fact, 2015 saw the second-most patent infringement filings in U.S. district courts ever, with 5,830 cases filed, a 15 percent increase over 2014, and with the PTAB seeing an even larger year-over-year increase.[7]

Two developments in 2016 could render this already active patent litigation environment even more dynamic. First, an impending Supreme Court decision could soften the standard for enhancing patent infringement damages, further incentivizing patent owners to bring suit to protect patents. The Supreme Court has granted certiorari in two cases, Halo Electronics Inc. v. Pulse Electronics Inc. and Stryker Corp . v. Zimmer Inc., to decide whether the Federal Circuit's current two-part test for enhancing patent infringement damages under 35 U.S.C. § 284 is appropriate. The court may jettison the Federal Circuit's current test, especially in light of its 2014 decisions in Octane Fitness LLC v. ICON Health & Fitness Inc. and Highmark Inc. v. Allcare Health Management System Inc., which rejected the Federal Circuit standard for imposing attorney fees in patent litigation under 35 U.S.C. § 285. In fact, two of the three Federal Circuit judges on the Halo Electronics panel questioned whether Octane Fitness required revisiting their standard, concurring in the opinion and urging (unsuccessfully) their colleagues on the Federal Circuit to take up the case en banc. If the Supreme Court were to reject the Federal Circuit's strict standard for enhancing patent infringement damages, patent infringement claims may well increase.

Second, a pending Federal Circuit case could curb the impact of a Supreme Court decision that limited the patentability of computer technology. In 2014, the Supreme Court held in Alice Corp. v. CLS Bank International that abstract ideas implemented using a generic computer are not patent-eligible. Since Alice, owners of software patents have increasingly faced challenges requiring them to show that their creations are in fact patent-eligible. This past December, the Federal Circuit heard oral argument in McRo Inc. v. Bandai Namco Games America Inc., an appeal of a decision of a California district judge who held that, under Alice, lip-sync animation technology was not patent-eligible. A decision in favor of the patent owner may assist patent holders looking to enforce similar patent infringement claims within the technology sector.

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[1] http://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts

[2] http://securities.stanford.edu/charts.html

[3] http://www.renaissancecapital.com/ipohome/press/ipopricings.aspx

[4] https://www.law360.com/articles/744983/the-top-10-d-o-stories-of-2015

[5] https://www.cornerstone.com/GetAttachment/52bfaa16-ff84-43b9-b7e7-8b2c7ab6df43/Securities-Class-Action-Filings-2014-Year-in-Review.pdf

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