Litigation Trends for 2019

Robert S. Want, Esq., Posted May 27, 2019

Prepared for the
Civil Courts and Litigation Committees
New York City Bar Association

The law firm of Weil, Gotshal & Manges has recently released Litigation Trends 2019, in which the firm offers assessments and predictions in various areas of litigation for the coming year.

Weil Gotshal issues these litigation-trend reports each year covering a number of areas including: Antitrust, Complex Commercial Litigation, Employment Litigation, IP/Media, Product Liability, and Securities Litigation.

The discussion that follows offers condensed highlights of the comprehensive Weil report. It is highly recommended that those seeking additional information (and case citations) refer to the full report.

Antitrust Enforcement

On the merger front, the Weil report said it expected the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice Antitrust Division (DOJ) to continue to thoroughly investigate M&A transactions raising competition concerns and aggressively challenge deals where they believe enforcement action is warranted. In line with recent years, the report said, the average duration of significant merger investigations continues to exceed 10 months.

Despite some renewed discussion at the DOJ about efforts to streamline the U.S. merger review process, Weil said it did not expect to see a major reduction in the review timeline or depth of investigation for difficult cases any time soon.

Federal Trade Commission. The report noted that there have been significant changes in leadership at the FTC, with last year marking the first time an entire new slate of commissioners was nominated at the same time by the same President. These five commissioners, comprising three Republicans and two Democrats, have been in place for several months, and already, Weil said, it saw signs of division among the new slate on certain merger-related issues.

As perhaps the most prominent example of this split, in January 2019 the FTC voted 3-to-2 along party lines to accept a proposed settlement to allow a combination of office supply companies Staples and Essendant. This transaction, Weil said, raises vertical merger concerns, adding that it expected the next year to be a period of continued uncertainty with a greater prospect for split decisions than in previous years.

(*Continued on next page*)

Department of Justice. The DOJ has also been busy regarding mergers, the report noted. As widely publicized in the press, the DOJ challenged AT&T's proposed acquisition of Time Warner in federal district court. After a lengthy trial in early 2018, the trial judge was unpersuaded and issued a decision rejecting the DOJ's theory that the vertical merger would enhance the bargaining leverage of AT&T and enable it to raise costs or otherwise deprive its rivals' access to critical Time Warner content, such as CNN.

The DOJ then appealed the decision to the D.C. Circuit Court of Appeals, which affirmed the lower court decision, while offering little new guidance regarding the legal standard for evaluating vertical mergers. The DOJ has already indicated that it does not intend to appeal to the U.S. Supreme Court.

The DOJ may be shifting its sights to new sectors and theories of anticompetitive behavior. The DOJ, the report said, is expected to increase its focus on unfair competition practices by technology companies, particularly regarding the use of algorithms used to engage in alleged anticompetitive coordination. Additionally, Weil said, the DOJ has indicated its intent to move forward with criminal prosecutions of certain so-called "no poach" and wage-fixing agreements.

Complex Commercial Litigation

Class Certification. On May 3, 2018, in *Sali v. Corona Reg'l Med. Ctr.*, the Ninth Circuit reversed a district court's denial of class certification in a putative employment class action, in part because the district court abused its discretion in refusing to consider evidence proffered in support of certification on inadmissibility grounds.

The Weil report said that although the U.S. Supreme Court has made clear that a district court must conduct a "rigorous analysis" to confirm that the requirements of Fed. R. Civ. P. Rule 23 are met and that a plaintiff seeking class certification must "affirmatively demonstrate" compliance with the Rule, the Ninth Circuit lowered the bar for the type of evidence that a plaintiff may rely upon to support a class certification motion.

The *Sali* decision, the report said, deepened the existing circuit split regarding the admissibility of evidence at the class certification stage. The Fifth, Sixth, Seventh and Eleventh Circuits have all previously held that evidence submitted in support of a class certification motion must be admissible, while the Ninth Circuit now joins the Eighth Circuit on the other side of the split.

Similarly, the Third Circuit requires that expert evidence submitted in support of a class certification motion must satisfy Federal Rule of Evidence Rule 702 – the federal standard expert witnesses must meet – when introducing experts at the class-certification stage. Weil believes that *Sali* may ultimately prompt the Supreme Court to grant certiorari and resolve the split regarding the proper evidentiary standard for class certification.

(*Continued on next page*)

Cy Pres Settlements. The Weil report noted that practitioners have long waited for the U.S. Supreme Court to weigh in on the propriety of *cy pres* class action settlements. But while the Court granted certiorari in *Frank v. Gaos*, (April 30, 2018), which teed up the issue, from the Justices' questions during oral argument, the report said, it appears the Court may decide the case on Article III standing grounds instead.

The *cy pres* doctrine, commonly used in trust law, permits the redirection of funds when the intent of a trust is no longer possible to fulfill (e.g., the named charity no longer exists). In this manner, parties to class actions sometimes agree to *cy pres* settlements where the defendant pays funds to a charity or non-profit whose mission relates to the subject matter of the lawsuit when it is administratively infeasible, impractical to pay class members directly, or the per-member award would be de minimis.

This type of settlement is often approved by courts by reference to the *cy pres* doctrine. However, Weil noted, the Supreme Court has never addressed the issue of whether these types of settlements can comport with Fed. R. Civ. P. Rule 23(e)(2), which requires class action settlements be "fair, reasonable, and adequate."

Employment Law

According to the Weil report, the past year ushered in a range of impactful legislative, judicial and social developments affecting employers. A few of these developments are discussed below.

Sexual Harassment. The legislative response to the #MeToo movement gained additional momentum in 2018, the report said, as revelations about sexual harassment claims against dozens of high-profile figures continued to fill headlines. At least 125 bills addressing #MeToo issues were introduced across the country in 2018, and at least 11 states enacted legislation targeting employer practices, such as mandatory arbitration, non-disclosure requirements, and investigations relating to sexual harassment claims, as well as anti-sexual harassment workplace policies and training.

At the federal level, Weil said, 2018 was the first calendar year in which legislation (enacted in December 2017) became effective, legislation that denied employers a tax deduction for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney's fees related to such a settlement or payment." 26 U.S.C. § 162(q). To date, however, there has been no definitive guidance as to how the federal government defines such settlements, according to the report.

Several states also enacted legislation regulating settlements of workplace sexual harassment claims. The report notes that these laws are far from uniform, so employers that operate in multiple jurisdictions may be required to navigate many disparate requirements.

(*Continued on next page*)

Mandatory Waivers in Arbitration Agreements. The Weil report said that as a result of the U.S. Supreme Court's May 2018 decision in *Epic Systems Corp. v. Lewis* rejecting a challenge under the National Labor Relations Act to mandatory class-action waivers in individual arbitration agreements, more employers are adopting such individual arbitration agreements, including a class-action waiver. According to current estimates, approximately 60 million employees in the United States are covered by arbitration agreements. A countervailing force to this trend, however, is the increased public scrutiny of mandatory arbitration of certain types of employment claims in the wake of the #MeToo movement, in addition to the high cost of arbitration, the report said.

Weil predicted that any federal legislative attempts to undo the holding in *Epic Systems* will likely be unsuccessful in a divided Congress.

State Pay Equity Legislation. The Weil report said that the pay equity movement aimed at closing the wage disparity between men and women will continue to have an impact on virtually all employers in 2019.

In 2017 and 2018, several state and local jurisdictions introduced legislation banning salary history inquiries in an effort to avoid perpetuating pay disparities or gender-based wage discrimination that may have affected female applicants in their prior work experiences. Some of these laws also prohibit an employer from using pay or salary history to determine a new hire's pay, even if the employer has obtained the information inadvertently or the applicant has volunteered the information, the report said.

Weil recommends that employers should continue to be vigilant about reviewing their hiring procedures and documents, and properly training individuals with hiring responsibilities to ensure that they do not violate any prohibitions on inquiries and use of compensation history. Employers also should continue to evaluate and identify, where appropriate, any pay disparities impacting protected groups, as robust private and governmental enforcement efforts in this area will undoubtedly continue and possibly increase in frequency.

In addition, the report said, employers also should take steps to conduct such pay audits under the protection of the attorney-client privilege, which privilege will also provide employers with more flexibility to communicate regarding relevant issues and solutions stemming from the pay audit.

Intellectual Property/Media

Copyright Liability re Imbedded Content. The Weil report notes that since the 9th Circuit's 2007 decision in *Perfect 10 v. Amazon.com Inc.*, copyright liability for the infringing public display or performance of photographs and videos has been commonly accepted as resting on the entity that hosts and serves the offending content.

(*Continued on next page*)

For example, the report said, it is common for third-party websites to embed YouTube videos, which users can view though a player embedded or framed on the third-party site; while viewers may access the video from that third-party site (and remain on that site while they view the video), the legal consensus, according to Weil, has been that it is *YouTube* that actually performs the video for the user, even if the third-party website developer caused the video to play for the user by incorporating instructions to fetch and embed the video in the HTML code of the third-party web page.

According to Weil, such "inline linking" between and across websites is in many ways the lifeblood of the modern internet: social media sites are filled with embedded content from third-party sites – much viewable without leaving the social media platform – and news organization regularly include embedded content in their online stories.

The decade-long acceptance of that practice, the report said, was starkly challenged in 2018 when Judge Forrest refused to apply the so-called "server test" in a high-profile case in the Southern District of New York. Recognizing the potential seismic impact of her holding, Judge Forrest quickly certified the defendants' request for an interlocutory appeal to the Second Circuit. Surprisingly, however, the Second Circuit rejected that application. As a result, there is now conflicting authority in the circuits regarding the server test, and the copyright and larger online media community – owners of photographs and videos, social media platforms, news sites – are left with unanswered questions.

If an online service's potential liability is now expanded to include embedded as well as hosted content, such litigation is likely to become even more common in the year ahead, the report said.

Music Industry Adjusts to New Legislative Landscape. On October 11, 2018, President Trump signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the MMA). Widely hailed as the most significant copyright legislation in decades, the MMA ushered in sweeping changes to the music licensing landscape that will take shape over next several years and alter music-industry litigation in a number of ways.

Chief among the MMA's innovations, the Weil report said, was the creation of a blanket license for the so-called "mechanical rights" on-demand streaming services like Spotify and Apple Music need to offer musical works on their services. Digital music providers that comply with the payment and reporting terms of the blanket mechanical license will be shielded from infringement liability for reproducing or distributing musical works on their services.

Under the MMA, in any infringement suit filed after January 1, 2018, the copyright owner's remedy shall be limited to the recovery of royalties due, provided the music service has made ongoing good-faith efforts to identify and pay for all works used on its service, and has otherwise accrued payments for unidentified works.

(*Continued on next page*)

This "good faith" clause, the report said, effectively puts an end to lawsuits like those that have bedeviled Spotify, Rhapsody, and other on-demand streamers, each of which has, in recent years, been accused of failing to secure necessary mechanical licenses in advance of offering certain songs, and faced class actions alleging billions of dollars in infringement penalties.

Products Liability

For years, it has been black letter law in products liability cases that a company should only be liable for injuries caused by a product it had designed, manufactured, or sold. However, according to the Weil report, recent court decisions have begun to challenge this black letter law.

Responsibility for Another's Product. In *Quirin v. Lorillard Tobacco Co* (2014) and *Chesher v. 3M Company* (2017), the U.S. district courts in Northern Illinois and South Carolina, respectively, found that a defendant could be found liable under certain circumstances for another company's product when it was used with defendant's Products, the report said.

Similarly, the New York Court of Appeals in 2016 held that the manufacturer of a product has a duty to warn of the foreseeable danger arising from the use of its product with another company's defective product in affirming a consolidated appeal holding a gasket manufacturer liable for failure to warn about later-added asbestos packing and insulation.

.

Weil noted that liability for another company's product has also been brought to the pharmaceutical world. In 2017 California Supreme Court found in *T.H. v. Novartis Pharmaceutical Corporation* that a brand name drug manufacturer had a duty to warn generic drug consumers of side effects – even though it had not manufactured the generic drug – because it is foreseeable that the failure to warn could harm the generic consumer. The Court reasoned that since U.S. Food & Drug Administration regulations require generic drug labels to mirror exactly their corresponding brand-name version, brand-name drug manufacturers are the only entities with the ability to strengthen a warning label, and thus should be considered liable for a generic consumer's harm caused by a failure to adequately warn of risks.

In 2018, the Massachusetts Supreme Court followed California, finding in *Rafferty v. Merck & Co.* that brand-name drug manufacturers had a duty not to act recklessly in causing harm to others, including "intentionally fail[ing] to update the label on its drug, [or] knowing or having reason to know of an unreasonable risk of death or grave bodily injury associated with its use."

Case Pending in U.S Supreme Court. The Weil report notes that the U.S. Supreme Court now has the chance to weigh in on this issue. In *In Re: Asbestos Products Liability*, the Third Circuit in 2017 found that Defendants may be liable for injuries caused by others' products.

(*Continued on next page*)

The case, according to Weil, concerns metal parts manufactured for Navy ships that, during the relevant times, required asbestos insulation to operate effectively. As time passed, the asbestos insulation degraded and was replaced, causing sailors to be exposed to inhalable asbestos. Over time, some of the seamen on the ships went on to develop asbestos related diseases. The court found that a manufacturer may be held liable for a plaintiff's injuries suffered from later-added asbestos if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a "reasonable and adequate warning."

The Supreme Court granted certiorari and heard oral argument on October 10, 2018. The oral arguments, the report said, suggest that this maritime law case may have far-reaching implications for all products liability litigation.

Since the manufacturing company did not manufacture or install the asbestos installation, it argued that its product is not the product that caused the harm, it is not in the best position to issue a warning about the asbestos, and that the company providing the actual asbestos should be responsible.

Both the attorneys and the justices, the report said, seemed more interested in product liability and tort law as it currently exists across the nation than in the maritime law under which the case originated. Thus, the decision could have a broad impact on the circumstances in which manufacturers can find themselves on the hook.

The Weil report recommends that companies should continue to monitor the case to see how the Supreme Court decides, and how that decision may impact the duty to warn in products cases across the nation. The case could become, the report said, an important tool for defendants to fight this trend of courts allowing companies to be held liable for products they never designed, manufactured, or sold.

Securities Litigation

The Weil report notes that securities class action filings "remained at near record levels" in 2018. While the increased number of filings continues to be attributable, in part, to a significant increase in federal court merger-related securities class actions, the number of non-merger-related cases increased year-over-year in 2018, continuing a recent trend and marking the highest number of filings since the financial crisis in 2008.

Weil says it expects the high volume of filings to continue in 2019.

Increased Risk of Securities Litigation in State Courts. Federal and state courts have concurrent jurisdiction over claims arising under the Securities Act of 1933, which generally prohibits false and misleading statements in connection with securities offerings. In 2018, the U.S. Supreme Court held in *Cyan Inc. v. Beaver County Employees Retirement Fund* that Securities Act claims filed in state court are not removable to federal court under the Securities Litigation Uniform Standards Act.

(*Continued on next page*)

As a result, recent data already indicates an uptick in the number of Securities Act filings in state court. The Weil report said that the *Cyan* decision also engendered renewed interest in a long-debated question: can a corporation adopt a forum selection provision in its certificate of incorporation or bylaws to steer securities litigation into a particular venue? In December 2018, however, the Delaware Court of Chancery held that Delaware corporations do not have the power to regulate the forum where federal securities law claims may be filed.

Absent new federal legislation, Weil said, expect to see an increase in Securities Act cases filed in state courts.

M&A Litigation in Federal Courts. Since 2015, the report said, the number of merger suits filed in state court, particularly Delaware, has declined dramatically due to a number of Delaware law developments that have discouraged the filing of such actions – most notably, Delaware's condemnation of the practice of "disclosure-only" settlements to resolve merger litigation.

At the same time, Weil said, there has been a sharp increase in such filings in other jurisdictions, particularly in federal courts. These cases, according to Weil, typically assert disclosure claims under Section 14 of the Securities Exchange Act of 1934.

While the U.S. Supreme Court has recently agreed to hear an appeal regarding the pleading standards in merger-related class actions under Section 14(e) of the Exchange Act, Weil said it expected federal court merger litigation to continue at recent levels.

M&A Appraisal Litigation. Over the past decade, the Weil report said, there has been a substantial increase in the number of M&A transactions subject to appraisal proceedings – actions seeking a court determination as to the "fair value" of a stockholder's shares in a cash-out merger transaction.

In late 2017, the report said, the Delaware Supreme Court issued two decisions emphasizing that, in appropriate cases, "market-based indicators of value" – such as the merger price – have "substantial probative value" in determining "fair value" under Delaware's appraisal statute.

These decisions, Weil said, have led to a decline in the number of appraisal actions filed in Delaware. Also, in 2018, the Delaware Court of Chancery concluded that a target company's unaffected stock price – a nearly 31% discount to the deal price – was the best evidence of fair value in an appraisal action. Though this case is presently on appeal to the Delaware Supreme Court, Weil said it expected that market evidence will continue to receive significant consideration and weight in Delaware appraisal proceedings.