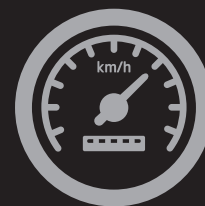




FOLEY & LARDNER LLP

Prepared by Foley's Automotive Industry Team

Top **Legal Issues** Facing Suppliers in 2014



Top Legal Issues Facing Suppliers in 2014

In a constantly changing and dynamic marketplace, suppliers must stay on top of business trends and challenges. They also need to keep up with the changing legal landscape and its implications for their business. Because of its wide breadth of experience and depth of knowledge of the manufacturing space, Foley & Lardner LLP prepared this overview of the top legal issues facing the industry in the coming year.

This report focuses on what suppliers need to know now, to ensure a successful 2014 and beyond. While not exhaustive, this report covers a comprehensive list of legal areas, including: [Antitrust](#); [Commercial Litigation](#); [Compliance](#); [NHTSA and Automotive Safety](#); [Data Security and Privacy](#); [eDiscovery](#); [Environmental](#); [Labor and Employment](#); and [Patents](#).

In the various sections, our experts explore recent changes and continuing trends. For instance, our [Commercial Litigation](#) section explores the implications for suppliers of new terms and conditions. We provide an update on antitrust activities, and our [Compliance](#) section covers international as well as domestic issues, while delivering insight into recent aggressive enforcement trends and ways to mitigate risk. We included a special focus on [NHTSA and Automotive Safety](#), which explains the various areas in which the agency is poised to push forward with rulemaking and enforcement. The [Data Security and Privacy](#) section highlights closed computing and big data initiatives, while the [Patents](#) section addresses, among other

things, recent developments concerning the award of fees in baseless suits. Discovery challenges facing litigants in the world of big data are addressed in the [eDiscovery](#) section. The remaining sections of [Environmental](#) and [Labor and Employment](#) highlight recent developments impacting those substantive topics.

Armed with the knowledge of the 2014 legal landscape, suppliers will be better positioned to make informed business decisions to ensure a successful year ahead. For more information concerning any of the topics, contact your Foley representative.



Antitrust

Executive Summary

Recent U.S. and European antitrust developments will have important implications for suppliers in the motor vehicle industry. U.S. antitrust developments include, in particular, 1) the April 2013 U.S. Supreme Court decision on class action standards; 2) the ongoing and expanding criminal antitrust investigation of the auto parts industry; and 3) challenges to mergers (large and small, non-reportable) underscoring continued tough and aggressive enforcement of the merger laws. There have been important developments affecting automotive suppliers in the international sector as well, for example: 1) European legislation that would facilitate collective redress of damages through class actions; 2) the availability in the European Union of the so-called “failing company” defense to otherwise potentially anticompetitive mergers; and 3) Europe’s intensifying fight to eradicate cartel activity, like in the United States.

Antitrust Legal Issues

1. U.S. SUPREME COURT RESTRICTS CLASS CERTIFICATION IN ANTITRUST TREBLE-DAMAGE ACTIONS

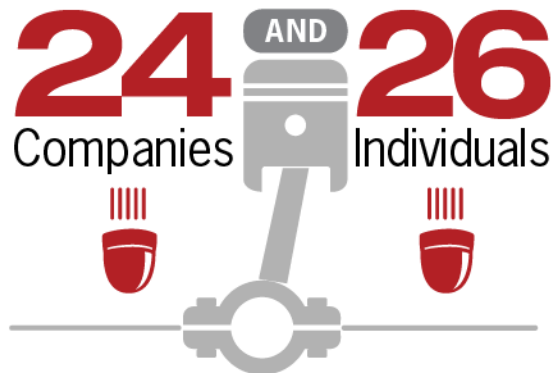
In April 2013, the U.S. Supreme Court ruled in *Comcast vs. Behread* that plaintiffs in antitrust treble-damage actions will have, henceforth, to satisfy much more demanding criteria in order to obtain class certification. The Court decided that plaintiffs must establish, to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, evidentiary proof that damages can be measured on a “class-wide” basis. The Court stated that lower courts must bar certification where individual damage calculations are required. This criterion replaces a longstanding rule that had permitted class certification on a much more flexible basis. The Court ruled further that the class determination may require examination of the merits of the plaintiffs’ claim to insure that the proposed theory of damages fits the underlying substantive merits theory and is not arbitrary. It will be important to see

how this decision will be implemented in the future. Suffice to say, this *Comcast* decision may prove very significant for automotive suppliers, if the decision effectively eases the burden, costs, and risks associated with treble-damage antitrust actions.

2. U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION CONTINUES ITS BROAD AND AGGRESSIVE CRIMINAL ANTITRUST INVESTIGATION OF THE AUTO PARTS INDUSTRY

For several years, the Antitrust Division of the U.S. Department of Justice has been conducting an ever-expanding criminal investigation of the auto parts industry.

Recent number of **guilty pleas** to charges of price-fixing and market allocation involving more than **30** different auto parts sold to major motor vehicle manufacturers.



The DOJ has used its leniency and leniency-plus programs to effectively expand the enforcement net. Fines totaling more than \$1.6 billion and substantial jail time for convicted individuals have been recorded so far. It should be clear that automotive suppliers must make antitrust compliance a high priority to avoid the serious consequences that can come from antitrust violations.



3. MERGERS AND ACQUISITIONS CONTINUE TO BE SUBJECT TO REVIEW AND CHALLENGE, WHETHER THEY ARE LARGE AND WELL-PUBLICIZED DEALS OR SMALL UNREPORTABLE DEALS THAT RAISE SERIOUS ENFORCEMENT CONCERNS

The FTC and the DOJ, which share merger enforcement responsibility, continue to emphasize investigation and prohibition of anticompetitive acquisitions. The regulators may go to court to try to block the transaction or demand that the competitive problems posed by the transactions that they view as problematic be resolved before granting clearance. Thus, there have been well-publicized challenges to large deals like American/US Airways and InBev/Grupo Modelo. At the same time, the enforcement agencies have increasingly challenged small, non-reportable transactions, even years after consummation, if the acquisitions raised significant anticompetitive risks for the markets involved. Thus, automotive suppliers must be proactive in vetting in advance their potential deals even if the size of the proposed transaction would not be reportable under HSR rules.

4. ON THE INTERNATIONAL FRONT, THE EUROPEAN COMMISSION IS PUSHING LEGISLATION TO ESTABLISH EU-WIDE REGIMES TO FACILITATE RECOVERY OF LOSSES DUE TO RESTRICTIVE TRADE PRACTICES

In June 2013, the European Commission proposed legislation (a “directive”) that would require all EU member states to enact national laws that would help persons injured by violations of EU antitrust laws (e.g., cartels and abuses of dominant positions) to recover damages for their injuries. The proposal seeks to harmonize and liberalize current national rules on damage actions, particularly with regard to discovery of evidence, statutes of limitations, measure of damages, consensual settlements, and presumptive effects of national determinations of injury. There is a parallel effort to establish an EU-wide system of “collective redress.” While eschewing any desire to adopt what the European Union sees as the “punitive” and “unfair” U.S. treble-damage system, the proposals reflect the increasing priority to redress the perceived ongoing failure of the EU member states to protect persons injured from antitrust violations.

5. ON THE MERGER FRONT, THE EU HAS ADOPTED AN EXCEPTION TO ITS STRICT MERGER LAWS, PERMITTING “FAILING COMPANIES” TO BE ACQUIRED BY COMPETING ENTERPRISES

While long recognized in the United States, the “failing company” exception to EU merger control regulation was only recently explicitly sanctioned. In October 2013, the European Commission approved the acquisition of Olympic Air by Aegean Airlines, Olympic’s only direct competitor. The Commission found, after an intensive eight-month investigation, that Olympic was likely to exit the market because of its grave financial condition, leaving the Greek market in the hands of Aegean with or without the merger. Entry by a third-party airline, which might have otherwise served as a market discipline to Aegean, was considered highly unlikely. Under the circumstances, the acquisition was deemed to be without any substantial anticompetitive effect. In the United States, the “failing company” defense is very difficult to establish. It remains to be seen whether this EU exception will, as in the United States, be available only in rare circumstances. If the policy has greater flexibility than in the United States, it may facilitate EU or EU member state approval of acquisitions of distressed automotive industry competitors and create previously unavailable market investment opportunities.

6. EU CARTEL PROSECUTION REMAINS, LIKE IN THE UNITED STATES, A HIGH ENFORCEMENT PRIORITY

While EU competition rules are not criminal, unlike their U.S. counterparts, the EU Commission has used its sweeping powers to detect, investigate, and prohibit cartel activity.



The European Union has an aggressively enforced system of leniency and leniency-plus, like the U.S. Department of Justice, to incentivize whistleblowers to alert the Commission to cartel activity. The Commission regularly engages in so-called “dawn raids” to gather evidence from company records. It actively cooperates with other enforcement agencies, like the DOJ, to further strengthen its enforcement leverage. Thus, as with the United States, EU cartel enforcement underscores the need for strict compliance efforts.

Content for this section contributed by [Howard W. Fogt](#).



Commercial Litigation

Executive Summary

Recent developments in commercial contracting and commercial law will have important implications for the automotive industry in 2014. Original equipment manufacturers such as General Motors as well as suppliers continue to make changes to terms and conditions of sale that have important implications for all companies in the automotive supply chain. Companies at all levels of the supply chain must take care to evaluate their own terms and conditions and business practices to ensure that they are in compliance with their customers' requirements and account for new risks. In addition, as volumes continue to increase and production ramps up industry-wide, warranty issues will continue to be highly important. Increasing numbers of class actions for breach of warranty have been brought in recent years, and recent decisions highlight issues and strategies that suppliers may use to protect themselves against such claims.

1. GM NEW TERMS AND CONDITIONS

General Motors (GM) has issued new general terms and conditions (Terms) for direct material, customer care and aftersales, and tooling purchases effective for requests for quotation issued on or after July 15, 2013. Suppliers at all levels of the supply chain must be aware of how these changes will affect them. Even those suppliers at the Tier 2 and Tier 3 levels, who may not contract directly with GM, must take notice of the new terms and conditions, as suppliers from the upper tiers will flow these obligations down throughout the supply chain.

While some of the new provisions in GM's revised terms and conditions merely codify or clarify rights and remedies that already exist under the Uniform Commercial Code (UCC), many other provisions impose substantial new obligations on suppliers. Among other things, GM's new terms and conditions impose new obligations on suppliers to: 1) report deficiencies in GM's own specifications; 2) self-report any breaches of

the contract, quality problems, or delays in delivery; 3) provide GM with greater access to suppliers' books and corporate information; 4) grant GM licenses for all background intellectual property rights relating to the goods or services in question, including those developed prior to the contract; and 5) name GM as an additional insured or beneficiary on all liability policies.

Suppliers at all levels of the supply chain must take care to evaluate their own terms and conditions and business practices to ensure that they are in compliance with their customers' requirements and to ensure that they have adequately accounted for new risks and obligations to which they may be subject.

2. WARRANTY ISSUES

As volumes increase and productions ramps up across the automotive industry, warranty issues are likely to be another critical issue. Increasing numbers of class actions for breach of warranty have been brought in recent years. *See, e.g., Keegan v. American Honda Motor Co. Inc., et al.*, No. 2:2010-cv-09508 (C.D. Ca.) (class certified for breach of express warranty and consumer protection laws for alleged defect in rear suspension of Honda Civics). However, recent decisions have made clear that plaintiffs continue to face significant obstacles in obtaining class certification in automotive breach of warranty actions. In order to certify a class in federal courts, plaintiffs must show that there are questions of law or fact common to the class, and typically must also show that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy. The commonality, predominance, and superiority requirements have served as key hurdles for plaintiffs in recent putative breach of warranty class actions, allowing defendants to stave off certification of potentially large classes of warranty claimants. *See, e.g., In re Ford Motor Co. E-350 Van Prod. Liab. Litig. (No. II)*, No. 03-4558 (D. N.J.)



(class certification denied for warranty claims based on alleged high center of gravity in vehicles); *Daigle v. Ford Motor Company*, Case. No. 09-cv-03214 (D. Minn.) (class certification denied on warranty claims for allegedly defective torque converters); *Burton v. Chrysler Group LLC*, Case No. 8:10-00209-MGL (D.S.C.) (class certification denied for warranty claims based on allegedly defective exhaust system); *Martin v. Ford Motor Co.*, No. 10-2203 (E.D. Pa.) (class certification denied based on warranty claims based on alleged defect due to a poor design, causing premature metal fatigue).

Class certification for express warranty claims generally hinges on questions of when each class member purchased the vehicle, the mileage on the vehicle, service records, maintenance history, and whether the vehicle has performed satisfactorily. Implied warranty claims involve similar facts, in addition to questions of whether the vehicle is fulfilling its ordinary purpose. These individualized facts can stand in the way of meeting the commonality and predominance requirements necessary for certification of warranty claims. The substantive differences in states' interpretation and implementation of the UCC have also served as an obstacle to class certification. See, e.g., *Burton v. Chrysler Group, LLC*, Case No. 8:10-00209-MGL (D.S.C.) (noting the "variances, nuances, and state-specific defenses (i.e., privity of contract, notice of breach, and waiver) and case-law interpretations which may come to be applicable in this case"). Courts also strongly consider the impact of voluntary recalls in denying class certification under the "superiority" requirement under Rule 23(b)(3). See, e.g., *Daigle v. Ford Motor Company*, Case. No. 09-cv-03214 (D. Minn.) (Ford's voluntary recall provided most of the putative class the relief it sought in the case). Despite these hurdles, however, courts will nonetheless grant class certification in certain circumstances, including where all class members had the same design defect, the same warranty, and the same class of vehicles. See, e.g., *Keegan v. American Honda Motor Co. Inc., et al.*, No. 2:2010-cv-09508 (C.D. Ca.).

If a manufacturer, distributor, or supplier is faced with a breach of warranty lawsuit or putative class action, key questions to consider include: 1) whether the claims fall within the statute of limitations; 2) the states covered by the putative class, and key differences between the states' adoption and interpretation of the UCC (including privity, reliance, and notice requirements); 3) whether the plaintiffs have adequately alleged a specific defect; and 4) whether the manufacturer, distributor, or supplier have taken steps which provide all or most of the relief sought by the putative class action, for example through a voluntary recall.

Automotive manufacturers and suppliers must also be cognizant of drafting their own warranty provisions in a manner that helps to ensure that the goods being sold meet performance requirements. The key to drafting warranty provisions is using language that establishes objective performance criteria for the goods being purchased. The criteria can only be developed after understanding the end-use performance expectations for the goods. Objective criteria (e.g., "10 cycles per minute"), as opposed to subjective criteria (e.g., "free from defects"), provide a bright-line test for the question of whether the goods conform to the contract. Clarity, specificity, and precision in this regard are critically important.

Content for this section contributed by [Mark A. Aiello](#), [Nicholas J. Ellis](#), [Lauren M. Loew](#), and [Adam J. Wiener](#).



Compliance

Domestic & International Compliance

Executive Summary

The aggressive enforcement of U.S. laws governing exports and international conduct has special resonance for automotive supply chain companies. Illustrated by the recent enactment of special sanctions targeting Iran's auto industry, and several high-profile Foreign Corrupt Practices Act (FCPA) investigations involving prominent OEMs, these trends underscore the risks that automotive suppliers incur when doing business overseas. Similar developments are evident in the domestic domain as well, where the growing frequency and intensity of antitrust, False Claims Act, and Government Contract investigations present new challenges for manufacturers, suppliers, and service providers of all kinds. Managing these issues on a piecemeal basis is a recipe for failure and frustration. Instead, companies can better manage their risk and mitigate costs by adopting a risk-based approach to compliance tailored to their unique method of operations, risk profile, countries of operation, and products sold.

1. EXPORTS AND INTERNATIONAL COMPLIANCE

U.S. laws governing exports and international conduct pose unique risks for the automotive sector. From the FCPA to ever-tightening sanctions and export controls, companies involved in the automotive supply chain face an increasing complex universe of requirements governing how and where they conduct business overseas. These regimes also shape business decisions at home, with the so-called "deemed export" rule compelling exclusively domestic companies to seek export licenses before disclosing controlled articles, data, and technology to their non-U.S. employees. Combined with new disclosure requirements for listed companies and government contractors, the regulatory environment grows more complicated with each passing day.

Enforcement trends amplify these risks. In recent years, U.S. Government agencies have targeted a variety of automotive and automotive supply chain companies under a number of different regulatory regimes. Notable examples include FCPA enforcement actions against AB Volvo, Daimler AG, Fiat, Iveco, Ingersoll-Rand, and Renault. Other companies, such as Bridgestone and United Defense Industries, Inc., have stated that FCPA investigations are ongoing. Sanctions enforcement is also on the rise, with Toyota Motor Credit Corporation and Volvo Construction Equipment North America both targeted by the U.S. Treasury Department's Office of Foreign Assets Control. Automotive companies like GM-Daewoo have even faced government enforcement actions in relatively obscure areas like anti-boycott violations — a little-known legal regime that has both export and tax implications.

These trends show no sign of changing. From improved databases and forensic tools, to enhanced collaboration between law enforcement, licensing, and intelligence agencies, enforcing these laws is now second only to fighting terrorism in terms of U.S. Government enforcement priorities. FCPA, sanctions, and export control violations resulted in more than \$3 billion in civil and criminal penalties in 2012 alone.



Many companies in the automotive sector have attributes that contribute to elevated risk. Chief among them are large global supply chains, downstream manufacturing by worldwide affiliates, and frequent international trade in U.S.-origin goods, services, and technologies. Multinational business practices also raise concerns, with sales, operations, and joint ventures reaching into countries known for high levels of corruption, industrial espionage, and illegal export diversion. With U.S. companies increasingly liable for the actions of their overseas agents and affiliates, a risk-based, integrated approach to international compliance offers the best means of identifying, managing, and mitigating these risks.

2. MITIGATING RISK

Faced with these challenges, automotive companies should carefully consider how U.S. laws impact foreign behavior. This means identifying and addressing the risks that are likely to arise based on the nature of their business, the places where they conduct business, and the customers they serve. It also means evaluating the degree to which foreign parties — whether subsidiaries, joint ventures, or even contractors — engage in activities that expose their U.S. counterparts to civil and criminal liability. Managing these issues in piecemeal fashion is a recipe for failure and frustration. Instead, companies can best manage their risk and mitigate costs by conducting periodic risk assessments, crafting tailored internal controls, conducting frequent training, and coordinating common standards across their entire organization.

The same principles apply in the domestic compliance context. Suppliers need to understand their areas of risk and rigorously monitor and enforce their compliance policies, procedures, and codes of conduct. Conducting periodic internal reviews, reviewing and updating written policies and procedures, and updating and enhancing training programs are all components of a robust compliance program. Encouraging your employees to report any improper, unethical, or illegal conduct is critical to uncovering any potential fraud within your organization. Clearly delineating responsibility for compliance with various policies and internal controls ensures accountability.

Content for this section contributed by [Gregory Husisian](#), [Christopher M. Swift](#), and [Brandi F. Walkowiak](#).



NHTSA and Automotive Safety

Executive Summary

We expect 2014 to be a busy year in the area of NHTSA rulemaking and enforcement. The agency is set to push forward on a number of fronts, including: 1) development of policy and rulemaking in the areas of advanced crash avoidance technologies, autonomous vehicles, and driver distraction, and 2) implementing recently adopted enhancements to its recall processes. Moreover, we expect the agency to continue its aggressive enforcement posture, buoyed by the recent doubling of the statutory civil penalty maximum. As a consequence, manufacturers are urged to review and update (or adopt) safety compliance policies to help reduce their compliance risk. Manufacturers are encouraged to implement regulatory monitoring programs to ensure they are up-to-date on the latest agency regulatory and enforcement activities.

We expect to see significant activity in the areas of driverless/autonomous vehicles and crash avoidance technologies, distracted driving, enhancements to recall processes, and aggressive enforcement.

1. DRIVERLESS/AUTONOMOUS VEHICLES AND CRASH AVOIDANCE TECHNOLOGIES

Over the last several years, NHTSA has been carefully studying the safety benefits of various advanced crash avoidance. The agency has been particularly focused on warning technologies, such as blind spot detection and advanced lighting; intervention technologies, such as lane departure prevention, crash imminent braking (CIB), and dynamic brake support (DBS); and automatic pedestrian detection and braking. Agency research has been focused on light vehicles (passenger cars and light trucks) and heavy-duty trucks and buses.

The agency has also been studying vehicle-to-vehicle (V2V) and vehicle-to-infrastructure (V2I) communications as a way to improve the effectiveness and availability of these safety systems. The agency will assess the research data, technologies, and potential

countermeasures and is expected to decide on next steps during the next year. If cost-justified, the agency could propose to require that vehicles be equipped with one or more of these technologies.

NHTSA also has been actively researching autonomous vehicles in an effort to position itself to regulate them if (when) they become commercially available. The agency will continue to devote substantial resources in this area during the next year and beyond.

Suppliers should be following these developments closely. Those that may be impacted by the adoption of safety standards in any of the above areas must be prepared to comment on agency proposals and to meet with NHTSA staff to share their views. In fact, manufacturers need not wait for a proposal before providing input, as the agency would welcome pre-rulemaking (research stage) input from manufacturers.

2. DISTRACTED DRIVING

In April 2013, NHTSA adopted the first phase of its three-phase federal guidelines intended to address driver distraction from in-vehicle electronics. The first phase applies to original equipment in-vehicle electronic devices used by the driver to perform secondary tasks (e.g., communications, entertainment, information gathering, navigation tasks, etc.) through visual manual means. During 2014 and beyond, we expect the agency to proceed with its planned subsequent phases, which will cover: 1) portable and aftermarket devices and 2) auditory-vocal interfaces. Although these are “voluntary” federal guidelines, they are expected to strongly influence the design and performance of such systems in future model years. Therefore, suppliers whose products could be impacted should monitor the agency’s activities in this area and be prepared to comment on any proposals.

3. ENHANCEMENTS TO THE RECALL PROCESSES

The next year will also bring enhancements to NHTSA’s recall processes and procedures, which are contained



in an August 20, 2013 final rule. Some of these were mandated by Congress in the MAP-21 amendments to the Safety Act, and others were prompted by NHTSA's review of its recall management processes. Upcoming changes include:

- » Electronic submission of all defect/noncompliance notifications through a NHTSA-operated web-based portal. This should significantly streamline the NHTSA review process and expedite public dissemination of recall information by the agency.
- » All larger-volume vehicle manufacturers — 25,000 or more per year for light vehicles and 5,000 or more per year for motorcycles — must provide a VIN-lookup tool on their websites (or on a third-party website) to enable consumers to determine the recall status of their vehicles.
- » Updates to defect notice and owner letter content and new markings on envelopes used for owner notifications.

4. AGGRESSIVE ENFORCEMENT

NHTSA has been aggressively enforcing its recall regulations these past few years and we expect this to continue. Effective July 2013, the statutory civil penalty maximum for violating NHTSA's recall regulations has doubled to \$35 million. The agency has asserted the previous maximum penalty at least five times since 2010 (from \$16,375,000 to \$17,350,000, depending upon the year).



Since 2010, NHTSA settled allegations of untimely recalls at least eight times, imposing the maximum penalty against Toyota four times and Ford once, and settling for less than the maximum, but still in substantial amounts, with Volvo, BMW, and Prevost

(\$1.5 million, \$3 million, and \$1.5 million, respectively).

To reduce compliance risks, all vehicle and parts manufacturers should have in place safety compliance policies that provide internal guidance to company personnel for identifying and investigating potential safety defects or noncompliances, and for complying with all associated NHTSA reporting requirements (e.g., safety recall reporting, early warning reporting, and monthly submission of certain communications sent to two or more customers, manufacturers, dealers, and distributors). It is also critical that relevant personnel are trained to the policy.

Content for this section contributed by [Christopher H. Grigorian](#).



Data Security and Privacy

Executive Summary

Data Security and Privacy are top of mind for many businesses, and auto suppliers are no different. With continuing advances in technology such as Cloud Computing and Big Data initiatives, this area is only increasing in importance. In 2014, suppliers are wise to spend time focusing on these issues and considering the implications of their current policies and procedures. As the amount of data companies collect, store, and use continues to grow, careful examination of the issues outlined below as well as the company's particular needs can mitigate risk in this area.

1. DATA SECURITY

Auto suppliers, not unlike other businesses, maintain highly confidential and sensitive business information and personal data electronically. Businesses are networked not only internally but to outside companies through the Internet or other telecommunications connectivity. As such, auto suppliers need to have robust information security practices properly documented in information security policies. Businesses with good policies need ensure that the actual practices utilized by the organization comply with its data security policies. Failure to do so can result in an unreasonable risk of loss of company trade secrets, confidential business information, and personal information.

2. CLOUD COMPUTING

Cloud computing is the practice of using vendors to host and remotely store software applications and company data. This raises the same data security issues as discussed above, with the added complexity and risk that the company's confidential information and personal information is in the hands of its third-party service provider. Accordingly, companies that use cloud computing solutions must have robust vendor due diligence practices and policies, as well as effective procedures for ensuring appropriate

contractual protections are obtained in agreements between the company and its cloud vendors.

3. BIG DATA INITIATIVES

Big Data is commonly understood to be the use of large amounts of data to derive value from complex data analytics — predicting outcomes and behavior based on very large volumes of data collected from various sources — very often relating to numerous data subjects. Big Data initiatives utilizing consumer data or other personally identifiable information result in unique compliance challenges. Often, the intended use of the data for Big Data purposes is different than when the data was originally collected from the consumer. This raises the issue of whether the consumer was clearly and properly notified of the intended purpose for using the personal information when it was collected. Failure to properly notify and obtain consent from consumers for use of their personal data can result in regulatory enforcement actions and private/class-action lawsuits. Accordingly, companies utilizing personally identifiable information in connection with Big Data or other data initiatives must ensure compliance with applicable data privacy laws and regulations, as well as industry guidelines and standards.

4. CROSS-BORDER TRANSFERS

Auto suppliers that receive personally identifiable information from a country located in the European Union must comply with special rules in order to lawfully receive the information. This would apply to companies in the United States with affiliates in the European Union, or companies in the United States that receive personal information from customers, suppliers, or other vendors located in the European Union. In order for the company located in the European Union to comply with applicable law, the U.S. organization must: 1) be certified under the Safe Harbor program operated by the U.S. Department of Commerce; 2) enter into model contracts that have been approved by the EU; or 3) adopt binding corporate



rules that have been approved by the European Union. Failure to do so can result in the EU company being in breach of EU law, and claims being asserted against the U.S. company by its trading partner in the European Union.

Content for this section contributed by [Chanley T. Howell](#).



eDiscovery

Executive Summary

With the explosion of data in the last few years, suppliers need to think about creative new ways to preserve, collect, and review data for litigation. Ninety percent of all data in the world was created in the past two years, per IBM Analytics. For about \$90, you can purchase a two Terabyte hard drive, which holds 2,048 Gigabytes. One Gigabyte can contain any number of pages of text (depending on the file types), but one Gigabyte will typically hold the equivalent of 20,000 to 700,000 printed pages of text. Assuming that one Gigabyte holds about 100,000 printed pages of text (a conservative estimate), this \$90 hard drive can easily hold 204,800,000 pages of text.

Assume that a lawyer can review one page a minute — a brisk pace. It will take this lawyer 20 years of daily eight-hour days (including weekends) to review! This is the root of the problem litigants face in the discovery process — dealing with volume. Old methods of handling discovery no longer work when handling electronic discovery, because those old methods are no longer cost efficient.

1. PRESERVATION

The preservation of electronically stored information is the first part of the challenge. A litigant typically has a duty to implement a litigation hold to preserve information related to the litigation, and failure to preserve information once this duty has triggered can lead to a variety of sanctions against counsel and client. It can be challenging to identify what needs preserving, and to take the necessary steps to preserve quickly, when a typical employee will have multiple computers, smartphones, email accounts, and more.

2. NEEDLES IN HAYSTACKS

Search is the next challenge — but there is a growing acceptance of technology-assisted review (TAR). TAR is a process by which lawyers can essentially create the equivalent of a spam filter for relevance or privilege

tailored to a specific case. This acts as a force-multiplier where the judgment of a senior attorney can be extrapolated to a large document set using TAR technology. TAR isn't necessarily easy, and it doesn't work well in every case. Cases with lots of graphics, audio, or video do not jive well with the technology. Plus, given the effort it takes to get it right, human eyes may be cheaper in small-document cases. But TAR is the evolving norm on large-document cases.

3. PRODUCTION

Production of large volumes of electronically stored information can also cause issues related to privilege. When producing millions of emails, it is common for a potentially privileged document to be inadvertently produced. Clawback orders are an effective tool to protect against such waiver, and a clawback order is a privilege-waiver prophylactic. Federal Rule of Evidence 502(d) gives a federal court the power to enter a clawback order that protects privilege in the result of inadvertent waiver, and as the advisory committee notes to 502(d) indicate, the parties do not even have to agree on the clawback order for the court to enter it. The Federal Rules advisory committee also correctly pointed out that such orders “are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery[.]”

Suppliers need their lawyers to utilize the newest technology for handling their Big Data litigation while at the same time still getting great results in the litigation.

Content for this section contributed by [Adam C. Losey](#) and [Brandi F. Walkowiak](#).



Environmental

Executive Summary

Like any other part of the manufacturing sector, auto suppliers face a number of challenges complying with environmental regulatory requirements, in particular managing and monitoring development of greenhouse gas emissions limits in the United States, European Union, and elsewhere, and chemical and hazardous waste management and disposal requirements that directly impact the sector. Unlike other industrial sectors, auto parts manufacturers face unique environmental pressures from OEMs and competitors to develop and maintain certain environmental practices such as “sustainability” programs, targeted waste reductions, and policing of the supply chain for particular hazardous materials.

1. SUSTAINABILITY

Sustainability remains an aspirational concept with widely varying benchmarks for implementation and achievement. Nevertheless, the race to declare one’s supply chain as “sustainable” or “most green” is keen. Achieving sustainability benchmarks that satisfy OEM requirements, support consumer advertising “green” claims, and comply with developing regulatory standards is no easy task. Making sure that self-imposed “sustainability” requirements are consistently achievable and accurate is also not without regulatory risk. In many cases, achieving “sustainability” requires some degree of documentation and disclosure of environmental management that may not always be favorable. Therefore, the development and management of any sustainability initiative requires regulatory vigilance and honest self-evaluation in an ever-changing regulatory landscape.

2. SUPPLY CHAIN CERTIFICATION REQUIREMENTS

Auto suppliers face a myriad of challenges maintaining extra-regulatory compliance with contractual clauses requiring that they certify manufactured parts as “asbestos-free,” “lead-paint-free,” “chromium-free,” free of so-called “blood minerals,” and so forth.



This can be particularly challenging where parts are made in jurisdictions with loose regulatory standards or enforcement and are then shipped for assembly in countries with more exacting standards. Failing to properly police such requirements exposes parts suppliers not just to regulatory enforcement in a variety of jurisdictions but the perhaps greater risk of economic damages from customer claims and recall liability.

3. REGULATORY COMPLIANCE

Navigating various regulatory requirements remains challenging for parts suppliers whose products end up in jurisdictions with a crazy-quilt set of environmental standards. From the continuing requirements of the EU REACH programme to the evolving greenhouse gas emissions requirements in the European Union and elsewhere, the challenge of monitoring and then implementing effective compliance programs is ongoing.

4. LEGACY ENVIRONMENTAL CLEANUP LIABILITY

For the many suppliers and their successors who have emerged from bankruptcy or other corporate reorganization, planning for potential legacy environmental cleanup liabilities requires continued close monitoring of U.S. court cases. Recent case law both in the bankruptcy context (e.g., *In re Bos. & Me. Corp.* 2013 BL 264416, (D. Mass.)) and those relating to liability apportionment post *Burlington Northern* have particular relevance to the auto industry and legacy suppliers and will no doubt continue to evolve in 2014.

Content for this section contributed by [Linda E. Benfield](#), [Brian H. Potts](#), and [Gary S. Rovner](#).



Labor and Employment

Executive Summary

Manufacturers often employ thousands of workers. Many employment-related issues face suppliers in 2014. Some include finding qualified employees, properly classifying workers, and preventing retaliation claims. The risk in each area can be reduced through the creation and implementation of proper policies and procedures and ensuring that managers and employees are regularly trained and reminded of their employer's expectations.

1. FINDING QUALIFIED EMPLOYEES

Many suppliers are having difficulty finding qualified individuals to fill skilled manufacturing positions. It is a good problem to have, but a problem nonetheless. Part of the issue may stem from the fact that, because the resurgence of manufacturing was not widely predicted, the message to young people entering the workforce was to look elsewhere. Additionally, the high-skilled positions needed by next-generation manufacturers demand college degrees, sophisticated technical training, and/or apprenticeships. Educational institutions have not necessarily equipped potential employees with the skills to meet the needs of the evolving, and increasingly high-tech, manufacturing sector.

To combat this problem, employers must develop a long-term employee strategy that includes identifying future needs, developing a plan to meet them, and sticking with the strategy in spite of short-term pressures. Manufacturers must adapt their recruiting methods to today's environment, leveraging social media and recruiting talent overseas. New graduates need to be convinced that manufacturing offers a long-term career path. Creating a positive and high-energy work environment that encourages innovation and addresses generational changes will go a long way toward attracting and retaining key talent. Ensure that your hiring practices comply with the law.

Employers should also do their best to resist regular, demoralizing reductions in workforce to meet short-term profit goals. And when reductions are necessary, they must be done carefully with an eye on preserving human capital needs. The culture should reward achievement through compensation and intangible recognition, and make quicker, but fair, decisions to end the employment of non-performers.

2. WAGE AND HOUR ISSUES

The Internal Revenue Service and U.S. Department of Labor – as well as plaintiff's attorneys – continue to focus on wage- and hour-related issues. For manufacturers, these issues can stem from a wide variety of areas. For example, employers may classify workers as independent contractors when they actually qualify as employees. Employers may be responsible for, among others, unpaid unemployment insurance premiums, workers' compensation premiums, and overtime if it is determined that such workers were improperly classified. There are many factors to evaluate when classifying workers, but, at its most basic, the more the employer controls about the relationship, the more likely it is that the worker should be classified as an employee. Audit your workforce regularly to ensure proper classification.

The second common wage and hour issue for manufacturers is off-the-clock work. Employers can be on the hook for additional wages, overtime, and applicable penalties should employees perform more than *de minimus* work during periods for which they receive no pay. These issues arise when non-exempt employees, for example, work during an unpaid lunch period or respond to emails after work hours. Often, such claims center around donning and doffing issues – the time spent putting on protective clothing before work and removing it after work. Enforcing strict policies and procedures regarding all such activities can lessen the risk.



3. RETALIATION CLAIMS

Employees who engage in protected activity — essentially complaining about conduct they reasonably believe is illegal — may perceive that they are treated worse or targeted after making such complaints. Retaliation claims from these employees continue to rise. Recent U.S. Supreme Court decisions have expanded the definition of protected activity, who is protected, and what constitutes retaliation. Manufacturers must adopt no tolerance policies, making it clear that they prohibit retaliation in any form. Train managers about what constitutes retaliation and how to avoid it. Limit those who know about the protected activity to the extent possible. And remember, taking adverse action against a person who is not a whistleblower, but is close to a whistleblower, will likely still be considered unlawful retaliation.

Content for this section contributed by [Jennifer L. Neumann](#).



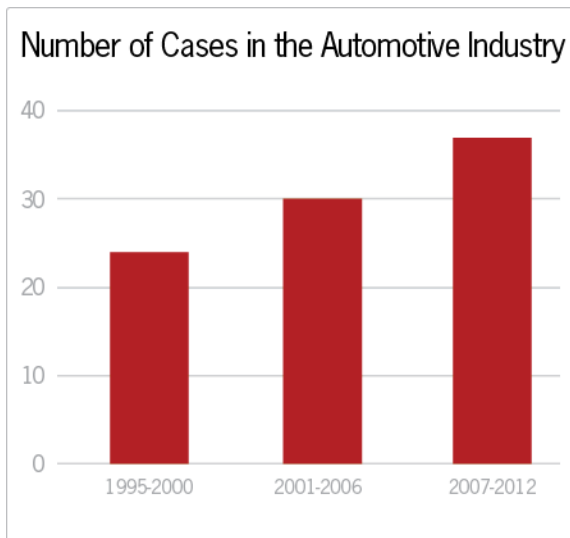
Patents

Executive Summary

Patent litigation case filings by non-practicing entities (NPEs) against practicing entities (manufacturers of products) continue to increase. Although the legislature has enacted reforms in new legislation, businesses still face substantial problems. Various inexpensive methods exist that may be used by practicing entities to defend against and deter non-practicing entities. One method is to seek attorney's fees from non-practicing entities in exceptional cases. Other patent litigation concerns include avoiding suit from subcontractors by obtaining appropriate licenses. We are at the forefront of developing innovative techniques to handle patent litigation issues, in a cost effective manner.

1. INCREASED PATENT LITIGATION

The number of patent litigation suits continues to increase. The chart below is data from a PricewaterhouseCoopers Patent Litigation Study released in 2013.



Given the proliferation of software in the modern automobile, and the frequency of NPE suits involving

software-related patents, however, the increase in patent litigation is likely to accelerate further.

Some actions that automotive suppliers may take to stem the onslaught of patent litigation include clearing products prior to manufacturing or release. Other preventative measures may include increasing patent filings where the patent applications are published in 18 months. Further, each company should adopt innovative litigation strategies involving immediate actions to resolve patent litigation suits.

2. SEEKING ATTORNEY'S FEES FROM NON-PRACTICING ENTITIES

The Federal Circuit recently affirmed an award of \$1.6 million in attorney's fees to the defendants in a patent suit in *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306 (Fed. Cir. 2013). Attorney's fees may be awarded to a defendant in patent cases when the litigation is objectively baseless and is in subjective bad faith. To be objectively baseless, the patentee's assertions, whether manifested in its infringement allegations or its claim construction positions, "must be such that no reasonable litigant could expect success on the merits." *Id.* at 1309.

A. OBJECTIVELY BASELESS

In *Taurus*, the Federal Circuit ruled, "Taurus [the non-practicing entity] improperly asserted and maintained its positions in the litigation." The Federal Circuit reasoned "no reasonable litigant in Taurus's position [after the claim construction] could have expected a finding that a web surfer accessing the accused external websites satisfied the requirement for a 'user,' as recited in claim 16." The court also stated, "when patentees have sought unreasonable claim constructions divorced from the written description, the Federal Circuit has found infringement claims objectively baseless." According to the Federal Circuit, "the specification and prosecution history clearly refute [the patentee's] proposed claim construction. Thus, the



patentee's infringement claims were objectively baseless."

B. SUBJECTIVE BAD FAITH

The Federal Circuit ruled that the patentee's proposed claim construction ignored the entirety of the specification and the prosecution history, was thus unsupported by the intrinsic record, was frivolous and supported a finding of subjective bad faith. The Federal Circuit reached a conclusion that Taurus subjectively knew that the DaimlerChrysler patent suit lacked a reasonable basis and was, therefore, pursued and maintained in bad faith.

3. AVOIDING PATENT SUITS FROM SUBCONTRACTORS

When an automotive supplier negotiates intellectual property rights, the automotive supplier might not focus on obtaining rights from its subcontractors. Instead, the focus of intellectual property rights negotiations may be between the automotive manufacturer and the automotive suppliers. Automotive suppliers may use subcontractors to manufacture the parts for an automotive manufacturer or a parts store.

The subcontractor may develop various intellectual property rights (e.g., patents) as the subcontractor solves the problems related to assembling the manufacturing equipment and method for manufacturing a part. In particular, the problems that are solved in order to manufacture the part may be appreciated only by the subcontractor. In some instances, the subcontractors may file patent applications based on the methods and systems for assembling the part.

When the subcontractor fails to grant the automotive supplier the appropriate intellectual property ownership or licenses, the automotive supplier may be exposed to liability. For example, when the automotive supplier changes subcontractors, the original subcontractor may assert its intellectual property rights against the automotive supplier. The intellectual property rights may include patents that are directed to the method or apparatus of manufacturing the part. The method or apparatus may have been invented based on the requirements of the automotive supplier.

Accordingly, when negotiating with the subcontractor, the OEM may want to include contractual provisions that include an assignment or license for any intellectual property rights that are developed in connection with the subcontractor's work for the OEM. Moreover, an automotive supplier may wish to have the intellectual property licenses for a combination of all parts that are manufactured by the subcontractor in each contract.

Content for this section contributed by [Victor de Gyarfas](#) and [Kumar K. Maheshwari](#).

