Overview

- Panel consists of inside and outside counsel with widespread experience in litigation, regulatory, and compliance matters

- **Tracy Hannan**, Assistant General Counsel at Exelon

- **Paul Henmueller**, Chief Risk Officer, Americas, Aon Risk Solutions

- **Chris Stathopoulos**, Associate General Counsel, Grant Thornton LLP’s Risk, Regulatory and Legal Affairs Group

- **John Hamill**, partner in DLA Piper’s Litigation practice

- **Raj Shah**, Co-Chair of DLA Piper’s Class Action Litigation practice, Moderator
Recent 2016 ACC Chief Legal Officers’ Survey reports

- Litigation not at the top of the list but most likely service to be outsourced and high costs require effective management

The top issues of concern are:

- Ethics and Compliance
- Regulatory
  - 1/3 of respondents had been subject to some sort of regulatory investigation or enforcement action
- Data Breach and Protection of Corporate Data
  - Health care and education businesses prime targets
Overview

Panel asked to highlight 10 key trends for 2016:

1. Enhancements in Litigation Risk Assessment
2. Improvements in Litigation Processes
3. Advances in Litigation Cost Management
4. Changes in the ESI Discovery Battlefield
5. Expectations for 2016 Case Filings
6. Opportunities to Shape Effective Compliance Programs
7. Concerns About Data Security Rise
8. Upswings in Regulatory Actions
9. Prospects for State Regulators to Follow-Suit
10. Focus on Technical Statutory Violations
Enhancements in Litigation Risk Assessment

- Proactive departments
  - Departments compiling more data on litigation
  - Track and observe litigation patterns and trends
  - Nimble corrections
  - Data allows in-house departments to bracket and predict exposure and risk
  - In-house departments are getting better at identifying greatest areas of risk
- Industry tracking and data sharing—what types of exposure are competitors’ facing
- Rise of highly skilled legal operations professionals who manage various areas (e.g., fee arrangements, e-discovery, vendor relationships, conflicts)
(2) Improvement in Litigation Processes

- Litigation most commonly outsourced legal service
- Retention
  - Has the definition of “good lawyering changed”
  - Regional presence vs. national reputation
  - Panel counsel arrangements vs. niche expert
  - Rise of procurement departments
- Use of early case assessments and root cause analyses
  - Routine/recurring and low risk
  - High risk and complex
  - Threats to corporate mission or existence
- Emphasis on in-place processes that are repeatable and defensible (e.g., litigation holds)
(3) Advances in Litigation Cost Management

- More accurate budgeting and cost tracking techniques
  - Daily dashboards
- Resource allocation between inside and outside counsel
- Direct client-to-vendor outsourcing for litigation support
- Evolution in thinking about alternative fee arrangements
  - AFA teams increasingly sophisticated
  - Move beyond billing as a measure of success of AFA to include metrics like diversity, wins and losses, assessment of law firms vis-à-vis competitors
  - Continued move towards value and impact-based arrangements
  - In-house departments and law firms have data to assess the right fee arrangement for the right matter
  - Key to success is greater up-front transparency and data
Changes in the ESI Discovery Battlefield

- Advent of electronically stored data changed the landscape
  - Mobile devices, IM, and text are increasing areas of attention
  - Expect defendants to argue for limits on discovery under amended Federal Rules of Civil Procedure
  - Revived “proportionality” concept in Rule 26(b)(1)
  - Rule 37(e) “intent to deprive” required before loss of ESI leads adverse inference or dismissal
- Expect parties to test these amendments
  - Federal judicial training
- Technology continues to evolve
  - Beyond predictive coding to artificial intelligence
Predictions for 2016 Case Filings:

- Prediction that fewer cases will be filed overall, but some sense that volume of high stakes work may increase.
- Active regulators (see slides 13 and 14).
- Continued growth in data breach actions (see slides 11 and 12).
- More class actions, but key year in several ways:
  - *Spokeo:* No-injury classes?
  - *Gomez:* Can you pick-off a named plaintiff by depositing full amount of requested relief with court clerk?
  - *Tyson-Foods:*
    - Can plaintiffs use statistics to show all class members are identical ("trial by formula")
    - Can a class be certified when some members are not injured.
  - Evolution of "ascertainability" and circuit split (e.g., *Mullins*).
  - Impact of Judge Scalia’s passing.
Opportunities to Shape Effective Compliance Programs

- Board of Directors making compliance a focus
  - Even with tight budgets, strong case can be made for dedicating more resources to compliance, including hiring
  - Companies focused on creating a compliance structure that works for them with trend toward separating compliance from legal
  - **But**, should regulatory and compliance be viewed as separate and distinct issues or are they part of the same equation
    - Failed compliance can become a regulatory and litigation matter
- Periodic assessments of compliance policies and procedures particularly for high-risk functions and geographies
  - High risk areas: Foreign operations, IT operations, and suppliers
  - Who is best suited to conduct the assessment
Concerns About Data Security Rise

- Data security still among chief concerns for senior legal officers

- Threats are internal and external
  - Employees’ use of personal devices and cloud computing
  - Foreign attacks, including corporate espionage and theft of trade secrets

- Prevention not enough, with increased focus on crisis management to deal with data theft
Data breach class actions

- Initial battleground over standing is on-going
- But merits and class determinations will shape the 2016 landscape

Dealing with cross-border transfers of data and understanding global regulations are a must for global businesses

- Evolving regulations across the globe
  - E.g., EU regulations could impose penalty for certain violations of up to 4% of a company’s global revenues for US businesses doing business in Europe
(8) **Upswings in Federal Regulatory Actions**

- Federal
  - FCPA continues to be major risk
    - Focus beyond organization to its vendors and suppliers
  - False Claims Act (FCA”) litigation will continue to rise
  - DOJ/FTC will aggressively litigate antitrust violations
- In 2015, DOJ collected more than $3.5 billion in settlement and judgments
- Professional federal regulatory bodies are becoming more active
  - PCAOB (Sarbanes-Oxley)
  - Consumer Financial Protection Board (Dodd-Frank)
- Antitrust enforcement actions showing no slowdown
Prospects for State Regulators to Follow Suit

- Role of State AGs likely to grow
  - Struggling state economies provide impetus for activist AGs
- AGs have the power
  - Unfair and deceptive trade practice act statutes give AGs the ability to directly or indirectly impact matters related to consumers
  - States are enacting or considering enacting state equivalents to FCA
- Growth in collaboration amongst State AGs and with federal agencies such as the FTC, CFPB, etc., create a formidable force
  - Pharma traditional target (pricing is the topic of the day)
  - Data breach/ privacy/lending (student, auto)/daily sports fantasy sites
Focus on Technical Violations

- Greater attention by plaintiffs’ bar (and more attention required of in-house counsel) to statutes with potentially draconian remedies, such as:
  - Telephone Consumer Protection Act
  - Fair Credit Reporting Act
  - American’s With Disabilities Act (access to websites)

- Minimal defenses and huge statutory penalties
  - Stay tuned to Spokeo
  - Strong preventative compliance program required
Discussion

- Questions?
John Hamill, partner in DLA Piper’s Litigation practice, is a highly regarded first chair trial and appellate lawyer who has represented clients in complex matters in federal and state courts nationwide, as well as in many arbitrations.

Tracy Hannan, Assistant General Counsel at Exelon, a leading diversified energy company, is responsible for advising on and handling a wide range of litigation-related matters for Exelon and its family of companies. Prior to joining Exelon, Tracy was a litigation partner at Wildman Harrold.

Paul Henmueller, Chief Risk Officer, Americas for Aon Risk Solutions, works to achieve company-wide risk mitigation initiatives across a broad spectrum, enterprise risk management framework, including limitations of liability and errors and omissions root cause analyses. Prior to his CRO role, Paul spent 11 years as Assistant General Counsel for Litigation at Aon and an additional 10 years as a commercial litigator. Aon plc is the leading global provider of risk management, insurance and reinsurance brokerage, and human resources solutions and outsourcing services.

Raj Shah, Co-Chair of DLA Piper’s Class Action Litigation practice, litigates complex commercial disputes and counsels some of the leading global companies through strategic and multi-disciplinary matters.

Chris Stathopoulos, Associate General Counsel in Grant Thornton LLP’s Risk, Regulatory and Legal Affairs Group, manages litigation in various service lines and handles regulatory matters. He also advises the Grant Thornton on international matters as well as the impact of clients’ bankruptcies. Prior to joining Grant Thornton, Chris was a litigator at Winston & Strawn LLP.