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## For Litigators, a Different Kind of Recession

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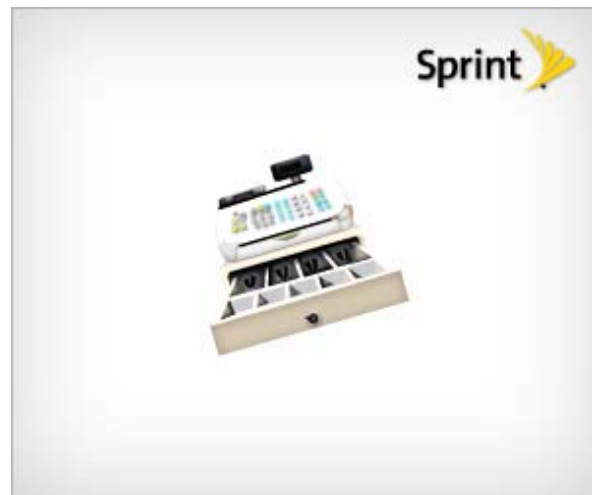
What happened to the wave of litigation that was supposed to swamp corporate America in 2009?

A year ago, as the economy began its freefall, corporate law departments were preparing for an all-out assault by plaintiffs. Some 34 percent of in-house counsel polled as part of Fulbright & Jaworski's annual Litigation Trends Survey said they expected to face more suits against their companies in the coming 12 months -- a significantly higher percentage than in the previous year. That result made sense: Recessions usually breed litigation.

The early numbers for this recession are showing something quite different. Litigation, a number of recent surveys show, isn't really all that more active than it was before the recession. The Hildebrandt International Peer Monitor Economic Index -- a quarterly survey of legal market conditions -- reported in May that demand for litigation services among Am Law 200 firms was flat during the first quarter of 2009 compared with the same period in 2008. A Hildebrandt study released in January found that demand for litigation services in 2008 dropped by 3 percent compared with 2007 -- a result the study's authors called "surprising." Boston-based BTI Consulting Group surveyed general counsel at *Fortune* 1000 companies in May and found that legal departments on average spent 1 percent less on litigation during the first half of 2009 compared with one year earlier.

Average spending on intellectual property litigation dropped even more, by nearly 8 percent, said BTI President Michael Rynowecer. BTI's findings were in line with recent data from the Stanford Law School IP Litigation Clearinghouse indicating that intellectual property litigation has dropped off. The clearinghouse reported that the total number of patent infringement filings fell by more than 8 percent in 2008 compared with 2007, and the decrease has been steeper so far in 2009.

New civil filings in U.S. district courts declined by more than 2 percent during fiscal year 2008, according to statistics from the federal court system. The number of new dockets opened with the U.S. Judicial Panel on Multidistrict Litigation -- which determines whether pending civil actions in more than one federal judicial district should be centralized under one judge -- fell slightly, from 98 in 2007 to 96 in 2008. Multidistrict litigation often includes big-



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Certainly, there have been exceptions -- bankruptcy and employment litigation are seeing strong growth, according to litigators at several firms. That said, several factors appear to be working against a major surge in suits. Tort reform and judicial scrutiny of multidistrict litigation have suppressed mass torts. And, in this recession, corporate bankruptcies have narrowed the chances of recovery from the target of a suit. ("It doesn't work as well when you are litigating someone who is bankrupt," said Harvard Law School professor Ashish Nanda, who studies the business of law.)

Most importantly, though, general counsel appear to be doing anything they can to avoid spending money on litigation. "Right now, general counsel are trying to operate in zero-risk mode, and this is something we have not seen in many, many years," Rynowecer said.

### **'MAKE THIS GO AWAY'**

A survey of general counsel by Altman Weil in late 2008 found that 75 percent of general counsel had their budgets cut in 2009. The average decrease was 11.5 percent. "It's not down 2 or 3 percent. It's double digits," said Susan Hackett, senior vice president and general counsel for the [Association of Corporate Counsel](#). "They can't afford litigation. There's a real sense of, 'Make this go away quickly and quietly.'"

Hackett has observed a greater reluctance by companies to initiate litigation or defend themselves in court. Instead, they are "looking to apply the least expensive Band-Aid" to their legal problems. "I'm seeing a greater focus on saying, 'We will try to make you whole somehow. What can we do? What do you want?' Sometimes money isn't the ultimate goal," Hackett said.

Hackett's point was echoed by Peter Sloane, a litigation partner at Cahill Gordon & Reindel in New York: "I see clients who are much more focused on the cost-benefit analysis before starting litigation. There's a much greater emphasis on thinking outside the box in approaching legal disputes."

The rising costs of electronic discovery have made the prospect of litigation even less enticing. Several attorneys interviewed for this article said that they believe the cost of e-discovery was the primary reason the volume of litigation has not increased in the way it did after the last recession.

"It's a much more expensive process than it was even a few years ago," said Elizabeth Scully, a partner at Baker Hostetler who has extensive experience in e-discovery matters. "It makes logical sense that the cost associated with e-discovery may be one of the things changing the numbers."

E.I. du Pont de Nemours and Co. corporate counsel James Shomper said that resolving disputes without resorting to litigation is a priority because it saves not only money but relationships. Nearly half the recoveries the company made in 2008 -- which are matters in which the company received money or other assets as the result of a dispute -- came through means outside litigation, he said.

"You save a lot of the cost, and you typically save time and internal resources," he said. "If you have litigation with a distributor, that relationship is pretty much done."

### **SLOWER GROWTH**

Although the numbers have been flat so far, the litigation practice hasn't fallen completely off a cliff. Mark Medice, national manager of the Hildebrandt Index, said that overall demand for legal services dropped by between 5 percent and 10 percent during April and May 2009 compared with the same period in 2008. By comparison, litigation's numbers, though flat, looked relatively strong.

"Litigation has stayed in a better place than other practice areas," Medice said. He noted that litigation had been growing steadily since the 2001 recession. Because the practice was already healthy and on the rise, there may be less capacity in the marketplace for a boom in activity, he said.

Major litigation firms experienced revenue growth in 2008, though they fell short of the gains made in 2003 as the last recession was coming to a close, according to financial data from *National Law Journal* affiliate *The American Lawyer*. Gross revenue at Los Angeles-based litigation firm Irell & Manella increased by 9 percent in 2003 and nearly 2 percent last year.

"The impact on litigation has not been uniform. It depends on the type of case, the industry of the combatants and the importance of the case," said Morgan Chu, an intellectual property partner with Irell & Manella. At Los Angeles-based Quinn Emanuel Urquhart Oliver & Hedges, gross revenue grew by nearly 21 percent in 2003 and 15 percent in 2008.

Partner John Quinn said that attorneys at his firm are staying busy on matters related to the credit crunch and bankruptcy litigation, among others.

Litigation is doing well but hasn't increased by as much as it historically has during down times, said Robert Abrams, co-chairman of the global litigation practice at Washington-based Howrey. Howrey's litigation revenue grew by 12 percent compared with 2002, when adjusted for changes in head count and billing rates. By comparison, adjusted litigation revenue was flat during 2008. Abrams said that Howrey has seen a "substantial increase" in litigation volume in recent months but that cases are being resolved more quickly than in the past. Moreover, potential litigants are carefully evaluating the value of their cases, what they want to accomplish and whether they can accomplish it cheaply.

"I suspect that companies that believe they have a cause of action nowadays will talk to the other company before they file a suit," Abrams said. "They are receptive to solving the matter without having to file a suit. I think that's happening to a greater extent."

For tort reformers, there's no such thing as a quieter-than-usual litigation season. Brian Quigley, a senior vice president of the Institute for Legal Reform, the U.S. Chamber of Commerce's anti-litigation arm, cited data from a study by consulting firm National Economic Research Associates that show a 172 percent increase in credit crisis-related securities litigation in 2008 versus 2007.

"Are we seeing an increase? Absolutely," said Quigley. "And this is the front end of the litigation stream. It typically starts in the securities arena and works its way throughout the rest of the economy in a financial crisis."

The report looked at litigation filings from late 2006 to March 2009 in which the defendants included asset management firms, mortgage lenders, insurers, securities issuers and home builders. Asset management firms increasingly have been targeted for litigation as the severity of the credit crisis increased in 2008, the report found.

It's not clear what effect litigation tied to the economic crisis is having. The Stanford Law School Securities Class Action Clearinghouse found that federal securities class-action filings increased by 19 percent in 2008 as investors rushed to sue financial services firms but has dropped off by more than 22 percent in 2009 -- a trend the clearinghouse attributes to fewer major targets in the financial sector and increased stability in the markets.

#### **'BULLISH ON LITIGATION'**

With plaintiffs and potential targets both feeling the financial pinch, what litigation may need to grow substantially is an economic turnaround. Stanley D. Bernstein, a partner in the New York-based plaintiffs' firm Bernstein Liebhard & Lifshitz, said that his clients remain keenly interested in litigation. Bernstein's clients include shareholders and public pension funds.

"I'm bullish on litigation," Bernstein said. "Everybody is trying to find an angle to recover."

However, Bernstein noted, litigation seems to be taking longer because defendants are delaying matters to push the related costs from 2009 into subsequent years. "You've got companies without money who want to make this a 2011 problem instead of a 2009 problem," he said. Delays aren't ideal, Bernstein said, but he is happy the work's still there.

Several legal consultants predicted that litigation will pick up during the second half of 2009 as companies rebuild their capital reserves. Clients that needed time to assess the damage they sustained during the financial sector meltdown will know where they stand.

Harvard's Nanda expects litigation to pick up in three or four months -- once the economy stabilizes, attorneys familiarize themselves with new regulatory requirements and litigants determine whom they can blame for losses.

"There's a feeling that people are holding back and that, once things settle down, those who have been standing on the sidelines will jump into the game," said Nanda, who also consults with law firms on business issues.

Not everyone sees blue skies for litigators. Hackett cautioned that litigation practices will never return to the status quo before the recession. Companies will continue to approach litigation cautiously, with an eye to the associated costs, she said.

"I don't think we're going to see surges [in litigation]," Hackett said. "We might see a slight uptick. We may see companies go forward with issues that they had set aside. But I don't think we will see numbers that move the graph line all that much. People just aren't going to go back to the way things were before."