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Traditional litigation on the rebound as economy recovers

Commentary by
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Predicting trends in litigation is speculative, but with an economy recovering slightly, and state and federal governments looking for sources of revenue, a few trends appear to be emerging.



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The first, as evidenced by the headlines of any major newspaper, is that regulatory litigation likely will continue to be a hot topic in 2012. For instance, an increasingly globalized economy, together with aggressive prosecution by government agencies, has put Foreign Corrupt Practices Act enforcement actions on the radar of corporate counsel — and for good reason.

Although 2011 was not as active as 2010, the Department of Justice and the Securities and Exchange Commission instituted 16 corporate cases and 18 cases against individuals. Of those 18 proceedings, the majority named non-U.S. citizens

or people holding dual U.S.-foreign citizenship.

In the financial services realm, important developments include the creation of the Consumer Financial Protection Bureau, required under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The existence of the new regulator will ensure that corporate and external counsel pay close attention to financial services litigation and compliance issues.

We also are seeing continued industrywide investigations. One example is the ongoing investigation of officers, directors and employees of medical-device manufacturers for violations of anti-kickback statutes and the False Claims Act.

For the litigator, it is critical to assist corporate clients with investigating allegations of potential regulatory violations.

A thorough and robust analysis of the suspected violations will determine the appropriate response. This may include having the client self-report to the agency in question to try to negotiate a beneficial resolution of the problem.

Failure to treat suspected violations of these laws with the appropriate care can lead to massive sanctions. For FCPA violations alone, a total

of \$1.72 billion in criminal and civil fines was assessed in 2010, and approximately \$508 million was levied in 2011. There may also be prison sentences for those involved.

RETURN TO NORMALCY?

Coupled with this is the Justice Department's practice of seeking deferred prosecution agreements with companies that have violated federal laws and insisting the companies submit to monitoring to ensure compliance. Such monitorships can last from one to five years. The authors have had the privilege of serving as DOJ-appointed monitors.

Recent surveys have found that the budgets for corporate litigation departments likely will continue to increase in 2012. This is a signal that corporations finally may be dusting off claims they have held off asserting until now.

Therefore, 2012 may signal a return to a normalcy of sorts for standard commercial litigation. Whereas corporate clients may have preferred to sit on the sidelines and not assert their claims during the Great Recession, now we are hearing them express more interest in pursuing claims that accrued during that period.

As the applicable limitations periods approach expiration, clients will be forced to make decisions about which causes

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of action to assert. It will be crucial for the litigator to counsel them on these tough choices.

But the return to normalcy does not mean law firms can go back to what many considered the go-go days of the mid-2000s: Corporate clients continue to be pressed for cost savings and will look to their external counsel to help them keep litigation costs down.

Requests for alternative fee arrangements will force law firms to rethink how they staff cases and to look to outsource services that once were offered in-house. Two examples are hiring contract attorneys for document review, and retaining e-discovery vendors to assist with the processing of

electronically stored information.

Many firms also are employing Legal Project Management techniques in an effort to make the practice more efficient while still maintaining high-quality services.

Overall, the trends for 2012 ap-

pear to be positive. Litigators will have more opportunities to represent their clients in active litigation before courts and arbitral tribunals. Also, they will be counseling clients through an increasingly aggressive regulatory environment.

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COST OF FCPA VIOLATIONS

	2011	2010
Criminal and civil fines	\$508 million	\$1.72 billion