

Antitrust

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PREDATORY PRICING

Intel Is Sued for Predatory Pricing

New York ex rel. Cuomo v. Intel Corp., No. 1:09-cv-00827, complaint filed (D. Del. Nov. 4, 2009).

Intel Corp. used predatory pricing against Dell and other PC manufacturers to keep them from buying faster, less expensive microprocessors from archrival Advanced Micro Devices, according to a complaint filed by the New York attorney general.

The company stands accused of violating the Sherman Antitrust Act, 15 U.S.C. § 2, and New York Exec. Law § 63(12).

New York Attorney General Andrew Cuomo filed the suit in federal court in Delaware, where Intel is incorporated.

"Rather than compete fairly, Intel used bribery and coercion to maintain a stranglehold on the market," he said in a statement. "Intel's actions not only unfairly restricted potential competitors, but also hurt average consumers who were robbed of better products and lower prices."

New York's allegations closely mirror the European Competition Commission's findings against Intel earlier this year. The agency found that Intel paid one European vendor to sell AMD-based desktop computers only to small or medium-sized enterprises and then only through direct channels.

The commission further found that Intel directly paid European consumer electronics chain Media Markt not to sell computers equipped with AMD chips.

The agency's findings resulted in a record \$1.5 billion fine against Intel. The company has appealed the fine to the European Court of First Instance.

According to Cuomo's complaint, filed in the U.S. District Court for the District of Delaware, Intel began abusing its dominant position in the microprocessor market to block a looming competitive threat from AMD in 2001.

At that time, the suit says, AMD's then-new Athlon processor had proven far superior to any of Intel's offerings. The Athlon was reportedly hundreds of times faster than Intel's Pentium IV processor.

Intel responded to this threat by paying "rebates" to computer manufacturers that either dropped AMD outright or severely limited their AMD offerings, the complaint says.

The personal computer market is highly competitive, and most PC vendors operate on a very low margin. Intel's rebates therefore could make the difference between a profitable quarter and a losing one for the likes of Dell, Hewlett-Packard and IBM, the suit says.

Vendors became so dependent on the rebate payments that they became known as the "cocaine of the industry," the complaint says.

So effective was Intel's campaign that Dell, which had at one point seriously considered dropping Intel for AMD, agreed not to sell any AMD-based systems between 2001 and 2006, according to Cuomo.

Hewlett-Packard, which had actually begun advertising its AMD product line as offering consumers a choice, agreed that no more than 5 percent of the computers it sold would have AMD processors installed, the suit says.

According to the complaint, IBM agreed to only offer one AMD-based server for sale on its Web site that would not be branded as an IBM product and for which its sales force would not receive commissions.

"Intel has engaged in a systematic worldwide campaign of illegal, exclusionary conduct to maintain its monopoly power and prices in the market for microprocessors," the complaint says.

"By exacting exclusive or near-exclusive agreements from large computer makers in exchange for payments totaling billions of dollars and threatening retaliation against any company that did not heed its wishes, Intel robbed its competitors of the opportunity to challenge Intel's dominance in key segments of the market," it says.

Cuomo is seeking treble damages, costs, injunctive relief and attorney fees.

RESTRAINT OF TRADE

United States Seeks to Narrow Ruling in NFL Licensing Dispute

***American Needle Inc. v. National Football League et al.*, No. 08-661, amicus brief filed (U.S. Sept. 25, 2009).**

The Justice Department has filed an *amicus* brief the U.S. Supreme Court, seeking clarification of a federal appeals court's ruling that the National Football League and its teams act as a single entity when licensing team logos and therefore cannot violate antitrust laws.

The government says the 7th U.S. Circuit Court of Appeals' ruling should be vacated because its broad-brush approach could affect antitrust enforcement beyond the sports-league context.

American Needle Inc., a manufacturer of caps and other headwear, once held licenses with individual teams to market NFL products.

The company sued the league and its teams in 2001 after Reebok won an exclusive licensing agreement from NFL Properties Inc., a jointly owned affiliate of the teams, to sell headwear with team logos.

American Needle alleged the exclusive license was an illegal restraint of trade in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and that there was an illegal agreement among the teams to collectively market their intellectual property.

Judge James B. Moran of the U.S. District Court for the Northern District of Illinois granted the defendants summary judgment and dismissed the claims.

He said the defendants individually are incapable of conspiring to violate antitrust laws because they "act as a single entity in licensing their intellectual property."

American Needle appealed, and the 7th Circuit affirmed the District Court's judgment last year. *Am. Needle v. NFL et al.*, No. 07-4006, 2008 WL 3822782 (7th Cir. Aug. 18, 2008) (see *Antitrust LR*, Vol. 16, Iss. 6).

The Supreme Court granted American Needle's *certiorari* petition June 29.

The company says the 7th Circuit's decision conflicts with the high court's ruling in *Radovich v. National Football*

League, 352 U.S. 445 (1957), that the NFL was subject to Section 1 of the Sherman Act.

The plaintiff says the 7th Circuit's ruling "threatens to cause major disruption in the heretofore consistent application of the Sherman Act to professional sports."

Even though they won on the appellate level, the defendants asked the Supreme Court to grant *certiorari* to American Needle. They are seeking a ruling that would recognize the single-entity nature of integrated, joint ventures and eliminate the uncertainty caused by conflicting rules about the issue among the circuits.

The NFL and its teams say they should be considered a single entity because, while separately owned, they collectively produce a product, NFL football, that no member team could produce on its own.

The Justice Department, filing an *amicus* brief at the court's invitation, says the 7th Circuit's ruling was "flawed and incomplete."

Single-entity treatment for the NFL and its teams is appropriate only under narrow circumstances, the government says. The area of operation (in this instance the use of logos on headwear) must be effectively merged so there is no competition among the teams in that sphere, the Justice Department says.

"Only a limited range of conduct would qualify for single-entity treatment under this standard since most forms of collaboration are not equivalent to an effective merger," the brief says.

While the teams must cooperate to produce football games, they could act independently with regard to licensing their intellectual property, making too broad an exception to antitrust laws problematic, the agency argues.

The government wants the Supreme Court to remand the case and direct the lower court to focus on just the facet of NFL operations that deals with the licensing of team marks and logos.

American Needle is represented by Meir Feder and Andrew D. Brandt of Jones Day in New York and Glenn D. Nager and Joe Sims of the firm's Washington office.

The defendants are represented by Eugene E. Gozdecki of Gozdecki & Del Giudice in Chicago and Gregg J. Levy, Derek Ludwin and Leah E. Pogoriler of Covington & Burling in Washington.



See Document Section A (P. 23) for the *amicus* brief.

STANDING

5th Circuit Says Would-Be Competitor Lacks Standing

***Jebaco Inc. v. Harrah's Operating Co. et al.*, No. 08-30289, 2009 WL 3491611 (5th Cir. Oct. 30, 2009).**

A company that claims it lost fees from tenants that allegedly conspired to monopolize the casino market in Louisiana has not claimed an injury sufficient to bring an antitrust claim, the 5th U.S. Circuit Court of Appeals has ruled.

The landlord plaintiff was neither a consumer nor a competitor of its tenants, and they could not have caused it any antitrust injury, the panel said.

Plaintiff Jebaco Inc. leased two berths in Lake Charles, La., to Harrah's Operating Co., which ran riverboat casinos. Harrah's paid Jebaco rent based on a per-patron fee.

Hurricane Rita hit the area in September 2005 and damaged the riverboats and the docking area.

Harrah's then stopped operating the casinos, stopped making payments to Jebaco, and solicited bids for the riverboats and the gaming licenses associated with them.

Jebaco placed a bid but Harrah's sold the riverboats and licenses to Pinnacle Entertainment. The plaintiff said the \$70 million Pinnacle paid was much greater than the assets' value.

Harrah's and Pinnacle then cooperated in petitioning the Louisiana Gaming Control Board for permission to transfer the licenses from the berths in which Jebaco had an interest.

Jebaco alleged the two companies violated the Sherman Act, 15 U.S.C. §§ 1 and 2, by dividing the Louisiana casino market between themselves and conspiring to monopolize it.

The plaintiff said the two companies hold six of the 15 riverboat gambling licenses allowed in Louisiana and earn about 60 percent of all gaming revenue generated in the state. Jebaco alleges the defendants' actions deprived it of both the revenue from the use of its berths and the ability to purchase the Harrah's assets.

The U.S. District Court for the Eastern District of Louisiana found the suit barred because the defendants' activities

were regulated by the state gaming board, and the state-action doctrine provided immunity. *Parker v. Brown*, 317 U.S. 341 (1943), held that state-mandated restraints, such as strict regulation of casinos, provide exemption from antitrust liability.

Jebaco appealed, and the 5th Circuit affirmed the dismissal, but on the grounds the plaintiff lacked standing. The court did not address the immunity issue.

The unanimous three-judge panel said antitrust injury must be established for a party to have standing under the Sherman Act.

Jebaco's alleged loss of per-patron fees is not the type of injury antitrust law was designed to prevent, the court said.

"Had Pinnacle remained at Jebaco's preferred berths and kept paying the fees, the alleged market division would still have occurred and Jebaco would have been uninjured," the panel said.

However, if a different firm had purchased the Harrah's assets and decided not to use Jebaco's berths, no antitrust violation would have occurred, but the plaintiff would have suffered the same injury, the court found.

The plaintiff also was not injured from alleged anti-competitive conduct, the panel added.

"Any conspiracy between Harrah's and Pinnacle to dominate the casino market operated independently of Jebaco's interest," which was only as a potential competitor, the appeals court said.

The panel affirmed the District Court's judgment.



See Document Section B (P. 38) for the opinion.

BUNDLING

9th Circuit Affirms Verdict for Tyco Health On Bundling Charges

***Masimo Corp. v. Tyco Health Care Group LP et al.*, No. 07-55960, 2009 WL 3451725 (9th Cir. Oct. 28, 2009).**

Tyco Health Care did not violate the Sherman Act by offering customers bundled discounts on its high-tech medical equipment, the 9th U.S. Circuit Court of Appeals has ruled, affirming a trial court's decision to vacate a verdict by a jury that found the practice illegal.

The panel said courts should show “a measured concern” to not disturb pricing practices that might benefit consumers when there is no clear showing of harm to competition.

“Tyco’s bundled discounts cannot, as a matter of law, violate Section 2,” the appeals court held.

Plaintiff Masimo Corp. makes pulse oximetry products used in hospitals to measure patients’ oxygen levels. The company claimed Tyco maintained a monopoly in the market by offering hospitals deep discounts on unrelated products that were conditioned on buying its pulse oximetry devices.

Masimo said this practice excluded it from the market as hospitals that would have bought its product faced a severe financial penalty if they stopped buying Tyco’s pulse oximeters.

A jury in the U.S. District Court for the Central District of California agreed that Tyco’s practice amounted to bundling prices in violation of the Sherman Act, 15 U.S.C. § 2.

However, U.S. District Judge Mariana R. Pfaelzer vacated the verdict, ruling that Tyco’s conduct was not covered by the Sherman Act.

Masimo asked the 9th Circuit to reinstate the verdict, but the appeals court said the District Court did not err.

A claim under Section 2 cannot be satisfied by reference to bundled discounts unless the discounts result in prices that are below an appropriate level of a defendant’s costs, the panel said.

As Masimo did not allege anti-competitive tying or pricing, “Tyco’s bundled discounts cannot, as a matter of law, violate Section 2,” the appeals court held.

Judge Carlos T. Bea concurred in the judgment but said the majority reached the right result for the wrong reason. He said the majority found that Judge Pfaelzer overturned the jury verdict because Masimo had not shown the bundling arrangement foreclosed competition in the relevant market.

However, she actually vacated the verdict because some of the bundled contracts included products from manufacturers other than Tyco, Judge Bea said. This arrangement meant the element of exclusivity was absent from the bundling arrangement, he concluded, and those contracts could not constitute illegal “exclusive dealing arrangements.”

The plaintiff is represented by Stephen E. Morrissey and Stephen D. Susman of Susman Godfrey LLP in Los Angeles and M. Lawrence Popofsky, Deborah K. Coryle and Scott A. Westrich of Orrick Herrington & Sutcliffe in San Francisco.

The defendant is represented by Theodore J. Boutrous and Christopher D. Dusseault of Gibson Dunn & Crutcher in Los Angeles.

 **See Document Section C (P. 45) for the opinion.**

PRICE-FIXING

Alleged Price-Fixing Targeted Only Overseas Travel

McLafferty v. Deutsche Lufthansa AG et al., No. 08-1706, 2009 WL 3365881 (E.D. Pa. Oct. 16, 2009).

A Pennsylvania federal judge says he lacks jurisdiction to decide whether several foreign airlines conspired to fix the prices for air transportation between Europe and Japan because the alleged scheme did not affect U.S. commerce.

U.S. District Judge Louis H. Pollak of the Eastern District of Pennsylvania dismissed the putative class action brought by Mieko McLafferty against carriers Air France, Lufthansa, KLM, Alitalia and others.

Judge Pollak held that he lacked subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.

The FTAIA, an amendment to the Sherman Act, provides the criteria for determining whether the Sherman Act can apply to conduct involving non-import trade or commerce with foreign nations.

McLafferty brought her proposed class action on behalf of those who directly purchased European-Japanese airline tickets from the defendants. She claimed the airline representatives met in person to fix the prices and used electronic means to communicate information about price-fixing and to monitor cartel members.

She also claimed that there were related government investigations of the alleged antitrust activity and consent agreements between Lufthansa and South Africa regarding price-fixing.

Judge Pollak said the alleged conduct constituted as trade or commerce with foreign nations under the FTAIA but that purchasing airline tickets in the United States did not qualify as "import commerce" under the act.

"The service whose price the defendants allegedly fixed is only provided wholly outside the United States," the judge said. "Thus, the court lacks subject matter jurisdiction unless the plaintiff can meet the 'effects' exception to the FTAIA's jurisdictional bar."

That exception, Judge Pollak continued, addresses whether the alleged conduct had a direct, substantial and reasonably foreseeable anti-competitive effect on U.S. commerce that would give rise to a Sherman Act claim.

Nothing in the record suggests such an effect, the judge held.

"In evaluating the geographic target ... it is apparent that the conspiracy's target was Europe and Japan and passenger air travel between the two," he wrote.

The fact that the prices were paid by people in the United States does not establish or even intimate that the alleged conspiracy directly affected U.S. commerce, the judge concluded.

 See Document Section D (P. 49) for the opinion.

RACKETEERING

Court Dismisses Racketeering Class Action Over Lung Test

***Peoples v. Reynolds American Inc. et al.*, No. 1:08-CV-3558-CC, 2009 WL 3365663 (N.D. Ga., Atlanta Div. Sept. 11, 2009).**

A federal judge in Atlanta has dismissed a class-action lawsuit accusing the country's major tobacco companies of participating in a scheme to prevent smokers from receiving a certain lung cancer screening test.

U.S. District Judge Clarence Cooper of the Northern District of Georgia found that the lawsuit fell short of stating a valid claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961.

Steven Peoples sued R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., American Tobacco Co., Altria Group Inc., Philip Morris Cos. and Lorillard Tobacco Co.

They are the same defendants named in the medical monitoring class action *Scott v. American Tobacco Co.*, 949 So. 2d 1266 (La. Ct. App., 4th Cir. Feb. 7, 2007).

Peoples alleged that the tobacco companies engaged in a RICO conspiracy by influencing one of their expert witnesses in *Scott* to discourage spiral CT screening for lung cancer.

As a result, the National Cancer Institute "has not recommended spiral CTs to screen for lung cancer as public policy and the medical standard of care," he said.

A spiral CT scan entails taking a detailed picture of certain areas inside the body. The pictures are created by a computer linked to an X-ray machine that scans the body in a spiral path.

The lawsuit claimed that spiral CTs can detect lung cancer in its early stages.

Peoples, who is above age 50, allegedly smoked a pack of cigarettes a day for more than 20 years.

According to the complaint, Peoples' physician told him he would have ordered a spiral CT but his health insurer told the doctor it would not pay for the test because the NCI does not recommend it to detect lung cancer.

The defendants' conduct constitutes a "pattern of racketeering activity" in violation of RICO, the suit said.

The class was defined as all Georgia residents who were at high risk for lung cancer in June 2000, when the defendants' expert witness testified against spiral CT screening.

At the time, the class members were at least 50 years old, had long-term cigarette smoking histories and were covered by a third-party insurance company.

The suit sought recovery of the "economic cost of the loss of the spiral CTs" that should have been covered by insurance if the expert witness and the NCI had recommended such CT scans as a matter of public policy.

In their motion to dismiss, the tobacco companies said Peoples' action fails because the "elaborate series of events leading from defendants' alleged misconduct (hiring an expert to testify in a case in Louisiana to his doctor's medical decision not to prescribe a CT scan) is too attenuated, speculative and implausible to satisfy RICO's direct-injury requirement."

Further, any loss is tied to an alleged personal injury, and RICO only allows recovery for an injury to business or

property, they Judge Cooper agreed that Peoples' complaint lacked the necessary element of proximate cause.

Peoples' theory is too flimsy to establish that the companies' dealings with an expert witness directly caused his insurer to deny payment for spiral CT scans, the judge said.

He noted that Peoples failed to explain how the tobacco companies influenced the witness or note that the witness had recommended spiral CT scans prior to her interactions with the defendants.

Even if Peoples had succeeded on the issue of causation, his RICO claim fails because he is seeking personal injury damages instead of damages for a business or property loss, Judge Cooper said.

 **See Document Section E (P. 54) for the opinion.**

PRICE-FIXING

Egg Farm Says Insurers Must Defend It In Price-Fixing Case

***Rose Acre Farms Inc. v. Columbia Casualty Co. et al.*, No. 4:09-cv-00135, complaint filed (S.D. Ind. Oct. 15, 2009).**

An egg farm facing numerous price-fixing lawsuits says its two insurers have failed to provide the defense they promised in their policies.

The allegations against Rose Acre Farms Inc. involve the company's use of its alleged co-conspirators advertising ideas, thus triggering coverage under the policies' advertising injury provisions, Rose Acre says in a lawsuit filed in the U.S. District Court for the Southern District of Indiana.

Rose Acre, other egg farms and their trade association, United Egg Producers, are named as defendants in numerous lawsuits alleging they conspired to keep prices for eggs artificially high. The suits have been consolidated in the U.S. District Court for the Eastern District of Pennsylvania for pretrial proceedings.

According to the underlying complaints, UEP created a certification program, purportedly based on animal welfare concerns, that allows UEP members to display a logo on their packaging and in ads. The logo states that the eggs are "United Egg Producers Certified" and were

"Produced in Compliance with the United Egg Producers' Animal Husbandry Guidelines."

However, the complaints say, the program was really just a front for "naked price-fixing" and restrictions on the supply of eggs.

Rose Acre held insurance policies from Transcontinental Insurance Co. covering March 1, 1999, through March 1, 2000, and from Columbia Casualty Co. covering March 1, 2000, through March 1, 2001.

In 2007 Transcontinental merged with its parent, National Fire Insurance Co., and National Fire thus assumed the obligations under the Transcontinental policy, the suit says.

Both insurers have improperly refused to defend Rose Acre in the underlying antitrust lawsuits, the company says.

The underlying complaints accuse Rose Acre of employing the same advertising ideas as its competitors: falsely telling customers its prices were "fair and competitive" and that prices increases were due to factors beyond Rose Acre's control. The complaints also focus on Rose Acre's use of the UEP certification and logo in ads and packaging.

The underlying plaintiffs "specifically alleged that Rose Acre 'marketed' these false ideas and included them in public statements to its customers, *i.e.*, in press releases, trade publications, newspapers and other advertising," Rose Acre says.

The complaint seeks an order that the insurers defend Rose Acre in the underlying cases.

Rose Acre is represented by Jeffrey D. Featherstun of Plews, Shadley, Racher & Braun in Indianapolis and David A. Gauntlett and Brian S. Edwards of Gauntlett & Associates in Irvine, Calif.

 **See Document Section F (P. 57) for the complaint.**

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MONOPOLY

Feds' Scrutiny Scuttles Settlement in Google Books Case

Authors Guild Inc. et al. v. Google Inc., No. 05-CV-8136-DC, government's statement of interest filed (S.D.N.Y. Sept. 18, 2009).

Because of objections from the Justice Department's Antitrust Division, a landmark settlement of a lawsuit between Google Inc. and an author's group over the scanning of mostly out-of-print books onto Google's search engine must be revisited.

The development follows a Justice Department recommendation that the court not approve the settlement. As a result, the parties agreed to cancel an Oct. 7 hearing to finalize the deal.

The Justice Department says the settlement would hand Google a virtual monopoly over books whose chain of title is not easily ascertainable.

In addition to the Justice Department, parties as diverse as Microsoft, the Electronic Frontier Foundation, the Washington Legal Foundation and numerous individual authors have roundly criticized the proposed deal.

The Justice Department and other critics say the settlement will hand Google a virtual monopoly over so-called "orphaned works," or books whose chain of title is not easily ascertainable. The settlement will make a competing service noneconomical because a competitor will not enjoy the same liability protections that the settlement affords Google, they add.

The Justice Department also said the proposal would cause a "horizontal agreement," or promote price-fixing between authors and publishers.

Late last year U.S. District Judge Denny Chin of the Southern District of New York preliminarily approved a deal in which Google agreed to pay at least \$45 million in compensation to authors and publishers to settle a copyright infringement lawsuit filed by the Authors Guild.

Google's Print Library program scans books from the New York Public Library, Harvard University and other institutions to make the texts searchable online.

Google launched the program three years ago, hailing it as a digitized and convenient alternative to visiting the library.

However, amid a flurry of criticism from the Association of American Publishers and other trade organizations, the search engine announced shortly thereafter that it would temporarily stop scanning copyright-protected books into its database.

Google said it would take a couple of months to add new features that would allow publishers to submit a list of books they wanted to be included in the program as well as a list of books they did not want included.

The Authors Guild, which represents more than 8,000 published writers, sued the search engine in the District Court, saying it unlawfully reproduced public-domain works and works that still enjoy copyright protection.

The plaintiff sought damages, injunctive relief and attorney fees.

The AAP, a consortium of major book publishers, including McGraw-Hill, John Wiley & Sons, Simon & Schuster and Penguin Group USA, joined the suit as plaintiffs.

The now-defunct settlement established the Book Rights Registry, which Google would have funded with a minimum of \$67.5 million.

The search engine also would have handed over at least \$45 million to pay authors at least \$60 for complete works that have been scanned and uploaded to Print Library.

Google would also have paid another \$34.5 million in administrative expenses and a maximum of \$30 million in plaintiffs' attorney fees.

The agreement provided that books not under copyright would be fully available and searchable online. Users would be able to view 20 percent of the contents of books that are under copyright but out of print, unless the publisher chose to block access.

Users would not have been allowed to view the contents of books currently in print, but would have been able to buy access to full-text versions of the books.

 See Document Section G (P. 68) for the Justice Department's statement of interest.

PRICE MANIPULATION

FTC Rule on Petroleum Price Manipulation Takes Effect

A new Federal Trade Commission rule carrying a \$1 million-per-day fine for manipulating price information in the petroleum industry went into effect Nov. 4 and could bring big changes in how companies deal with news services covering the field, an antitrust attorney said.

Gerry Alexis, a partner at **Perkins Coie** in San Francisco who focuses on antitrust and trade regulation issues, said companies will be more cautious in their dealings because the penalties are so stiff.

The new rule applies to information petroleum producers supply to news services, such as the Oil Price Information Service, or OPIS, that report on prices and supplies related to petroleum products.

Alexis said she expects the FTC will enforce the rule through its administrative proceedings apparatus but that there may be private suits brought under various states' "little FTC acts."

The new rule stems from Congress' concern in 2007 about the rising cost of gasoline at the pump and allegations that market manipulation by some oil and fuel traders was partly to blame.

The FTC said in a press release that the rule covers false public announcements of planned pricing or output decisions and false statistical or data reporting by anyone involved with the purchase or sale of crude oil, gasoline or petroleum distillates at wholesale.

The agency promulgated the rule under the authority of the Energy Independence and Security Act of 2007.

For now the rule lacks guidelines from the FTC, Alexis said. In their absence, companies have to operate without examples from the agency about what exactly constitutes a violation of the rule.

The industry is especially concerned that the omission of information about petroleum prices constitutes a violation under the rule, and companies are worried about a possible requirement to disclose competitive information, Alexis said.

The rule is available at http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf.

MERGER

Antitrust Regulators Order Health Care Firm To Divest Clinics

In the Matter of Carilion Clinic, No. 9338, settlement reached (F.T.C. Oct. 7, 2009).

A health care company in Virginia has agreed to sell two outpatient clinics it bought last year to settle Federal Trade Commission charges that the acquisitions were anticompetitive.

In an administrative complaint the agency said Carilion Clinic's purchase of the Center for Advanced Imaging and the Center for Surgical Excellence in Roanoke, Va., violated federal antitrust laws because it would likely increase out-of-pocket expenses for consumers by 900 percent.

Carilion has more than 500 physicians and owns eight not-for-profit hospitals in Virginia.

According to the complaint, the company's purchase of CAI and CSE reduced the number of outpatient imaging and surgical services providers in the Roanoke area from three to two.

Because of the acquisitions, Carilion now faces competition from only one other provider, HCA Virginia Health System, the other major hospital system in the region, according to the FTC's complaint.

Higher prices for outpatient imaging and surgical services may also lead to higher premiums and reduced coverage for necessary services, the agency said.

Carilion agreed to sell the clinics within three months to a buyer or buyers approved by the FTC.

The consent order also requires Carilion to divest all the assets necessary to allow the new owners to operate the centers independently and to "compete effectively in the marketplace."

Once the sales are complete, Carilion also will be barred from soliciting for employment any physician or physician practice that has referred patients to CAI since Jan. 1, 2008.

This requirement will allow the new owner to "develop and re-establish its referral base," according to the FTC.

MERGER

FTC Looks at Dow Chemical's Bid to Sell Business Assets

In the Matter of Dow Chemical Co., No. 081-0214, public comments sought (F.T.C. Oct. 2, 2009).

The Federal Trade Commission has been looking into possible antitrust issues related to Dow Chemical Co.'s petition for approval to sell some of its business lines to a competitor.

Earlier this year the FTC told Dow to divest the assets before the agency would sign off on the company's bid to buy rival chemical manufacturer Rohm & Haas Co. for \$18.8 billion.

The FTC alleged in an administrative complaint that the concessions were necessary because the companies' relevant product markets are highly concentrated and the proposed acquisition would lead to fewer competitors in each market.

According to the agency, Dow has asked to divest its "hollow sphere particle" business to OMNOVA Solutions Inc. The particles are used in the manufacture of coated paper.

The FTC accepted public comments on the proposed divestiture until Nov. 3.

The Midland, Mich.-based Dow agreed in July 2008 to buy all outstanding shares of Rohm & Haas' common stock for \$78 per share in cash.

In a consent decree reached with the FTC in January Dow also agreed to divest its assets relating to the production of acrylic monomers, which are used in numerous personal hygiene products.

The company also said it would put procedures in place to ensure it does not have access to "competitively sensitive nonpublic information" obtained from the businesses and facilities to be divested.

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EUROPEAN UNION

EU Seeks Input on Proposed Settlement With Microsoft

European regulators have sought the public's input on a proposed settlement of antitrust charges against Microsoft over the alleged "tying" of its Internet Explorer browser to the Windows operating system.

The European Union Competition Commission's solicitation of public comments may signify a change of heart as the commission previously vowed to press its antitrust case regardless of any changes instituted by Microsoft.

The softening of the agency's position appears to be motivated by Microsoft's offer to make changes to a browser "ballot screen" to allow users to install one or more competing Web browser programs.

Under the proposal, users would not be required to install or use Internet Explorer, unlike all previous versions of Windows. This represents a reversal of Microsoft's long-standing position before U.S. courts and European antitrust regulators. The company has long maintained that removing Internet Explorer from Windows is impossible and would render Windows inoperable.

The company's proposal is in line with what the EU said it intended to do if its investigation revealed that Microsoft's practices violated European antitrust laws.

The controversy began Jan. 15, when the commission served a "statement of objections" on Microsoft after receiving a complaint from Norwegian Web browser maker Opera Software.

According to published reports, Opera, which makes an eponymous Web browser, wanted the commission to order Microsoft to bring Internet Explorer into compliance with Web standards and to make the browser an optional install instead of bundling it with the Windows operating system.

The proposed sanction for Microsoft's noncompliance is similar to one the EC imposed with respect to the company's Media Player in 2004.

Opera says Microsoft's browser uses undisclosed proprietary extensions to HTML and other Web languages that make Web sites incompatible with the Opera browser and

other competing browsers such as Firefox and Google's Chrome.

Since Internet Explorer, as the only browser on the Windows desktop, has more than 90 percent of the browser market, Web developers are forced to create sites that only work with IE, Opera complains.

Microsoft said its proposed reforms will give consumers choices and restore competition to the browser market.

In its latest proposal, the company said it will offer users a "ballot screen" of browser choices and provide more information to allow consumers to make an unbiased decision on which browser to download. It also said it will allow PC manufacturers to disable Internet Explorer in favor of a competing browser if they wish to do so.

The EU may give the proposal the force of law after the comment period.

Interested parties have been directed to send comments to http://ec.europa.eu/competition/contacts/antitrust_mail.html.

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COMMENTARY

Fulbright & Jaworski 2009 Litigation Trends Survey: U.S. Companies Experiencing New Litigation Wave, Anticipate More to Come

Companies are seeing a litigation wave that corporate counsel expect to swell in the coming year, according to respondents of the 2009 Fulbright & Jaworski LLP Litigation Trends Survey.

Corporate counsel say they are steeling themselves for a big year of litigation with 42 percent of U.S. respondents anticipating an increase in legal disputes their companies will face in the next 12 months. That is up from 34 percent of last year's respondents. The expectation comes during a year when 83 percent of U.S. respondents reported that new litigation has been commenced against their companies in the past year, up from 79 percent last year.

In the year to come, respondents from large-cap companies reported the highest expectation of litigation, with 52 percent forecasting an increase in legal disputes, while 47 percent of public company respondents foresee a jump in disputes. The economy was cited as the primary reason for these expectations by 38 percent of U.S. respondents and 34 percent of U.K. respondents.

More than one-third of companies say the economic downturn has resulted not only in an increase in their litigation caseloads, but also their use of alternative fees. Tighter cost control, more than anything else, is the most important way in which the economic crisis has affected litigation management, respondents say.

"Generally, litigation rises in an economic downturn as regulators tend to step up enforcement, laid-off workers head to court and companies need to file more suits in order to collect on money owed," said Stephen C. Dillard, head of Fulbright's global litigation practice. "Perhaps most telling about this year's results is that companies

across the spectrum expect no substantial decreases in any area of litigation."

This is the sixth year that Fulbright has polled corporate law departments in the U.S. and U.K. on the state of global litigation. The survey, initially launched by Fulbright in 2004, is the largest canvas of corporate counsel on litigation issues and trends.

Litigation: Where Has It Gone? Where Is It Going?

Companies agree on what is bothering them most. From small-cap to large-cap, from private to public, from the U.S. to the U.K., the main problems are the same: In light of the downturn, companies face big increases in bankruptcy, contracts and labor/employment litigation. More modest increases have been cited in intellectual property, insurance and regulatory actions.

Yet, while contracts and labor/employment actions affect companies across industries, the bankruptcy ground swell has left one industry — healthcare — relatively untouched, with only 6 percent of healthcare respondents reporting a rise in bankruptcy and reorganization litigation.

What may lie ahead? Regulatory investigations and whistleblower allegations are expected to eat up litigation resources in the year ahead. Looking to 2010, 16 percent of all respondents (and 23 percent of large-caps) say they expect the number of internal investigations involving their company to increase. Industry-wise, approximately 20 percent each of financial services, insurance and technology companies expect internal investigations to rise in the coming year. This tracks expected increases in whistleblower cases: 24 percent of all respondents and 31 percent of large-cap companies expect the number of claims brought by whistleblowers in their industries to go up.

A Brief Look Back

In both Fulbright's 2006 and 2007 survey respondents reported declines in actual litigation filings. Then, in last year's survey, corporate counsel anticipated an uptick in new actions and government probes.

Founded in 1919, Fulbright & Jaworski LLP is a leading full-service international law firm, with nearly 1,000 lawyers in 16 locations in Austin, Beijing, Dallas, Denver, Dubai, Hong Kong, Houston, London, Los Angeles, Minneapolis, Munich, New York, Riyadh, San Antonio, St. Louis and Washington. Fulbright provides a full range of legal services to clients worldwide.

Last year's predictions were right. Large-cap companies took the brunt of big cases during the past 12 months, with 39 percent reporting having faced one or more \$20 million-plus suit last year, and a striking 54 percent of large-caps reporting having a case go to trial in the past 12 months. (In fact, large portions of companies across industries faced trial last year, with the exception being real estate companies, of which 13 percent went to trial.)

With bigger size sometimes comes bigger payouts: Of the 97 large-cap companies that had a case go to trial last year, 15 percent report higher damage awards than prior periods versus 2 percent of large-caps reporting lower awards.

On the regulatory front, one-third of respondents report increases in external regulatory inquiries in the past three years. However, nearly half of U.S. companies (47 percent), report having retained outside counsel for assistance in government and regulatory investigations. When broken down by size and industry, 50 percent of large-cap companies and a notable 62 percent of healthcare companies report retaining outside counsel for assistance in government and regulatory investigations. The rate of regulatory actions and investigations was far lower on the other side of the Atlantic.

"Given the overall climate, and the down market's uncovering of fraud cases, it is no wonder in-house counsel report seeing more active regulators and an expectation that the number of investigations will increase," Dillard said.

The Department of Justice, the Environmental Protection Agency and state attorneys general have been particularly active. Over the past year, 19 percent of respondents retained counsel for investigations by the Securities and Exchange Commission.

Gearing Up for Litigation

What have in-house counsel done to gird their companies for legal battle? Hire and budget.

This year, 48 percent of large-cap respondents indicate they now employ six or more in-house lawyers to manage or conduct litigation, up from 26 percent last year. It appears, however, that in-house hiring will cool. Only 11 percent of respondents forecast an increase in the number of in-house litigators over the next 12 months.

With litigation on the rise and resources on the wane, Fulbright asked in-house counsel about their planned budgets for the coming year. Budget increases largely track anticipated areas of concern: 18 percent of respondents say they plan to increase their budget for labor/employment

litigation; 15 percent will spend more on bankruptcy; and 14 percent will up the amount spent on contract disputes. Meanwhile, 11 percent say they will spend more on regulatory and investigations work, while 16 percent are planning to spend more on e-discovery.

Where will all this money come from? Not necessarily from other areas of litigation. Only 6 percent of large-cap companies plan to decrease their budgets in other areas, such as antitrust and trade, personal injury and environmental litigation. Slightly more public companies than private companies expect to decrease their litigation budgets. However, when taken by industry, planned decreases are most prominent in healthcare, with 12 percent of respondents planning to lower their spending on personal injury cases and 15 percent planning decreases in the area of professional malpractice.

"While companies aren't necessarily spending less on litigation, in-house counsel are finding other ways to cut costs," Dillard said.

Cost-cutting measures include in-sourcing e-discovery, using law firms with specialized e-discovery practices and outsourcing certain e-discovery functions through preferred provider relationships. Stricter document retention policies, such as systematic destruction, also help keep discovery costs down.

The 2009 survey asked companies to consider, among other things, what types of cases they fear most, where they are spending their budgets and how they are adjusting their approaches to litigation management in light of the downturn.

What follows is a bulleted summary from the 2009 Fulbright & Jaworski Litigation Trends Survey.

For a link to a descriptive "white paper" go to: <http://www.fulbright.com/litigationtrends05>.

Survey Note

The 2009 Fulbright & Jaworski Litigation Trends Survey was conducted from May through July by Greenwood Associates, a business research firm in Houston that has produced previous editions of the report. The survey, launched by Fulbright in 2004, is the largest polling of corporate counsel on litigation issues and concerns.

The 2009 survey asks companies to consider, among other things, what types of litigation most concerns them, where they're spending limited budgets and how they're adjusting approaches to litigation management in light of the downturn. This year's survey also delves into

special topics, such as how companies are dealing with rising e-discovery costs and employee use of social media Web sites, such as Facebook and Twitter.

The survey reflects information collected from 408 company lawyers — 13 percent more respondents than last year — most of whom identify themselves as either general counsel or head of litigation. Companies polled are both public and private, and span industry groups, from education to energy, engineering, financial services, healthcare, insurance, manufacturing, real estate, retail and technology.

A quarter of respondents do business in at least 11 countries. Companies in the survey also are well-represented by size: 16 percent report revenues of under \$100 million, while 31 percent have revenues between \$100 and \$999 million, and another 53 percent are at \$1 billion and above.

Managing Litigation in an Economic Crisis

The Money Situation: How Much? Litigation costs are on the rise this year: 53 percent of all respondents say their annual litigation cost (excluding cost of settlement) exceeds \$1 million, a marked increase from last year, in which 43 percent of companies said their annual litigation cost exceeded the \$1 million mark. Nearly one-third of health-care companies in the survey broke the \$10 million mark.

The Money Situation: Budgeting. Given that 28 percent of respondents say tighter cost control is the most significant way in which the crisis has affected their company's litigation management, Fulbright asked how companies are doing more with less. Overall, slightly more companies (19 percent) are decreasing their litigation budgets than increasing them (15 percent). U.K. companies appear to be budgeting more liberally, with 22 percent reporting that budgets are increasing, while only 8 percent say they are decreasing. For large-caps, the numbers go both ways: 21 percent are increasing budgets while 23 percent are decreasing. In light of the fact that public companies are more likely to face litigation than private companies, about twice as many public companies as private companies are increasing their budgets. Meanwhile, nearly one-third of all retail companies report budget increases.

The Money Situation: Where? Those budget increases will go primarily toward bankruptcy litigation, e-discovery, labor/employment, regulatory and contracts cases. Planned budget decreases are far less common: 5 percent of respondents report decreases in class action work, while a mere 4 percent of respondents report decreases in the areas of personal injury, e-discovery, contracts, regulatory and intellectual property.

The Money Situation: Spending. Fulbright's findings on litigation spending tell a similar story. More U.K. respondents (34 percent) report increases than U.S. respondents (17 percent). This comes after three straight years of steady spending decreases. While retail companies lead the pack for litigation budget — perhaps because that industry has more litigation pending — they also lead in the category of litigation spending, with 39 percent of those companies reporting increases.

The Rise of Alternative Fees: With litigation spending up as the result of the crisis, company lawyers want to fetch competitive rates and get a better sense, ahead of time, of what their litigation bill will be. Fulbright found that 35 percent of all respondents say the economic crisis has led to an increase in the use of alternative fees, with their rate of use being higher in the U.K. and among large-cap companies.

- **Why?** Sixty-three percent of U.S. respondents and 74 percent of U.K. respondents say the primary reason for choosing alternative fee arrangements is lower costs. But in addition to cost efficiency, alternative fee arrangements can incentivize outside counsel and promote better interaction between outside and inside lawyers. Forty-five percent of respondents report using some kind of alternative fee arrangement, including a balanced mix of blended rate, capped fee, conditional or contingent fee, fixed fee and performance-based arrangements.
- **Who Uses Them?** Public companies are more likely to use alternative fees, with 18 percent of public company respondents reporting that anywhere from one-fourth to one-half of litigation work is being billed via alternative fee arrangements. The survey results also show that the engineering, construction and technology industries have utilized alternative fees more often than industries such as financial services, healthcare, insurance and manufacturing.
- **But the Billable Hour Still Rules:** Reports suggesting that the death of the billable hour is nigh may be exaggerated. Despite the rise of alternative fee arrangements over the past year, 52 percent of U.S. respondents and 61 percent of U.K. respondents say their companies do not use alternative fees. It is also worth noting that 69 percent of respondents say that, of the money spent on outside counsel, only 25 percent or less is billed via alternative fee arrangements.

Litigation Is Up: More than one-third of all respondents say litigation caseload is up as a result of the crisis. Nearly half of large-caps report a rise in caseload (versus 12 percent of small-caps), and 43 percent of public companies report a rise (versus 26 percent of private companies).

- **So Where Are the Cases?** Which areas of litigation are seeing the most action? Corporate counsel report big jumps in litigation related to bankruptcy (a practice area that had remained relatively dormant over the previous three years), contracts (which has been consistently prevalent since at least 2005) and labor and employment (which, though still prevalent, came down significantly from last year). Other types of litigation have seen more modest rises, such as intellectual property, regulatory, class action and malpractice cases.
- **Healthcare Relatively Unscathed:** Healthcare has remained unscathed, with only 12 percent of healthcare respondents reporting a rise in litigation (versus, for example, 42 percent each of financial services and insurance companies and 55 percent of retail companies). And while nearly every sector polled is seeing a bump up in bankruptcy cases, only 6 percent of healthcare companies say they have seen increases in bankruptcy. Similarly, only 12 percent of healthcare companies surveyed say they have seen a rise in contracts cases, compared with an overall rate of 28 percent of companies that say they have experienced more contracts litigation.

Regulatory Investigations: A Broad New Landscape

More Regulators, More Investigations: Regulatory proceedings, internal investigations and external inquiries — all of which had been steadily on the wane since 2006 — are back up. The DOJ, EPA, states attorneys general and the SEC account for much of the regulatory action in the U.S. More than 31 percent of respondents report an increase in inquiries and investigations over the past three years, including requests from the FDA, OSHA, the IRS, U.S. Attorneys offices and the FTC.

More Internal Scrutiny at Large-Caps, Healthcare and Manufacturing Companies: Large-cap companies are twice as likely as mid-caps, and four times as likely as small-caps, to commence investigations on their own initiative. And large-caps also are more likely to self-report a matter to a regulatory agency following investigation. Meanwhile, 47 percent of healthcare companies and

41 percent of manufacturing companies say they have commenced investigations on their own initiative in the past year, compared with an average of about 20 percent for other sectors.

Cooperation Among Regulators: Owing, perhaps, to the rise in corruption investigations among multi-national companies (see below), 12 percent of respondents say they have seen an increase in the level of cooperation between regulatory agencies in different countries over the past three years. Only 3 percent say they have seen a decrease in cooperation. In the context of FCPA violations, some say the current level of international governmental cooperation is unprecedented.

Government, Corporations and the Privilege Waiver: Sen. Arlen Specter, the former ranking member of the Senate Judiciary Committee, has famously taken a stance against attempts by the U.S. Department of Justice to measure cooperation by waiver of the attorney-client privilege. In last year's survey, 10 percent of respondents said their companies had actually waived privilege — at least occasionally — in hopes of avoiding government prosecution or an enforcement action. That was down from 21 percent of respondents in 2007 who reported their companies occasionally waived in hopes of avoiding government action. So this year, with a bill wending its way through Congress, Fulbright asked in-house lawyers whether they favor a prohibition that prevents government lawyers from asking corporations to waive the privilege. There is nearly a 50/50 split across the board — by company size and by industry — suggesting that perhaps many in-house counsel believe that privilege waiver does not always gain much of an advantage for the government.

Whistleblowers

More Employees, More Whistleblowers? A surprisingly large portion — 21 percent — of respondents say their companies have been subjected to whistleblower allegations in the past three years. But the percentage goes up to 30 percent for large-caps (versus 8 percent for small-caps) and 28 percent for public companies (versus 14 percent for private companies). Whistleblower allegations result in a mix of internal investigations, regulatory investigations and third-party proceedings.

Whistleblowers and the Healthcare Industry: Whistleblowers are particularly prominent in healthcare, which could account for the fact that healthcare companies tend to initiate more investigations on their own. Nearly 40 percent of in-house counsel at healthcare companies report a whistleblower allegation in the past three years. More whistleblowers, however, could also mean less litigation. The healthcare industry saw only modest rises in any given area of litigation last year.

Anticipated Rise: Twenty-four percent of all respondents expect the number of claims brought by whistleblowers in their respective industries to rise in the coming year.

Bribery Cases on the Rise

Corruption: While the FCPA statute has been on the books for more than 30 years, enforcement of the law has only really taken off in the last four years, with the SEC and DOJ expressing renewed interest in cracking down on foreign corruption. Overall, investigations are on the rise, according to the Fulbright survey: In last year's survey, 7 percent of all respondents reported having engaged outside counsel for such investigations versus 12 percent in the 2009 survey. Billion-dollar companies had a higher incidence of bribery investigations last year, with 17 percent engaging outside counsel to assist with an investigation, versus 11 percent of mid-cap companies and just 2 percent of small-caps. Public companies are investigated about three times as often as private companies. The rate of corruption investigations in the manufacturing industry is particularly high, with 25 percent of manufacturing companies having faced an investigation in the past year.

Is the FCPA Working? Bribery cases may be having an impact on how companies do business. Fulbright's 2008 survey found 31 percent of respondents had made a decision not to do business in a given country based on the perceived degree of local corruption. In this year's survey, that same statistic is reduced to 16 percent. However: 39 percent of manufacturing companies avoided doing business in certain countries last year due to the perceived level of corruption.

Closer Look at Labor & Employment Litigation

Employment Litigation Rises With Jobless Rate: As the economy dips and unemployment spikes, the jobless sue their former employers in greater numbers. For the second straight year, survey respondents report sizeable increases in multi-plaintiff cases in the area of wage and hour disputes (FLSA) (up 15 percent), age discrimination cases (up 11 percent) and disability discrimination (up 8 percent). Corporate counsel also report increases, during the past 12 months, in race discrimination cases (up 10 percent), sex discrimination cases (up 11 percent), religious discrimination cases (up 4 percent) and ERISA cases (up 4 percent).

What Types of Labor Suits? Wage and hour disputes remain the primary concern when it comes to multi-plaintiff cases. On the class action front, labor/employment account for 40 percent of cases (while consumer litigation comes in second, and securities litigation third.) Which area of labor/employment litigation has seen the biggest jump? Nearly 40 percent of respondents point

to wage and hour, with misclassification, overtime and meal and rest break claims accounting collectively for the vast majority of wage and hour cases, and with minimum wage cases accounting for the remaining 6 percent. The wage and hour case trend started several years ago when plaintiffs lawyers discovered that state and federal law in this area provided the basis for recovery of small amounts per employee for events or practices covering hundreds of workers, but in addition attorneys' fees, and in some cases double damages. In the past year, discrimination cases have seen the greatest jump as employees lose job security or the jobs themselves.

Sex and Race: Sex discrimination cases came in second and race cases came in third. And when asked which labor and employment area has seen the greatest increase — when looking at both multi-plaintiff *and* single-plaintiff cases — 54 percent said discrimination, while only 25 percent said wage and hour, again attributable to the depressed job climate and related reductions in force.

California Bound: For wage and hour claims, U.S. respondents say that nearly half of all suits are filed in California because of that state's more protective laws. While some other states have state laws that are more restrictive than the federal Fair Labor Standards Act, none seem to be as generous as the Golden State.

How to Resolve? Litigation Versus Arbitration

Commercial International Arbitrations Expected to Rise: Nearly a quarter of counsel from large-cap companies and 17 percent of all respondents expect an increase in the number of commercial international arbitrations they will be involved in over the coming year. Increases are expected, particularly, in the financial services, insurance, manufacturing and retail sectors.

Rate of International Arbitration Higher in U.K. and Among Retail/Wholesale: Twenty-two percent of U.K. respondents say their company has been party to at least one international arbitration in the last 12 months, versus 14 percent of U.S. respondents. That number goes up to 29 percent, however, when looking only at large-cap companies. Moreover, 72 percent of retail and wholesale companies that participated in the survey commenced at least one international arbitration in the past 12 months.

Arbitration in Labor Suits — A Special Case: Fifteen percent of respondents said their company requires arbitration of disputes in non-union settings — that's down from last year's 22 percent. Why choose arbitration for these suits? The process is beneficial from an employee-relations standpoint, according to 83 percent of those respondents. Cost also is an issue: The median cost (\$50,000) to arbitrate

a single-plaintiff employment case is about half the median cost (\$99,038) of litigating a single-plaintiff employment case to conclusion. Though arbitration is not the better route for everyone: Large-cap companies, on the whole, spend more on arbitrating single-plaintiff cases, with 61 percent of large-caps paying upwards of \$50,000 per case. The median cost of arbitration for public companies is also substantially higher than for private companies.

For Domestic Disputes, Leaning Toward Litigation:

Fifty-five percent of U.S. respondents said that in disputes that are not international in nature, and when given a choice, they opt for litigation over arbitration — from both the defensive and offensive side. (In the U.K., however, arbitration for domestic disputes remains popular with 51 percent of U.K. respondents saying they opt for arbitration in domestic disputes.) The primary considerations for choosing one over another are cost, efficiency, higher comfort level and predictability of outcome.

Why Are Some In-House Counsel Choosing Litigation for Domestic Disputes?

In the U.S., some in-house lawyers believe litigation is more likely to produce decisions on the legal merits rather than an arbitrator's unchecked sense of fair play. What's more: arbitration can be no less expensive or time-consuming. Litigation, some respondents say, offers greater discovery opportunities, greater availability of dispositive motions and more established rules.

Class Actions

Still Lower in U.S.: Fulbright's 2008 survey discovered that the number of class actions brought against companies had gone way down from 2007 levels. In 2007, 51 percent of survey respondents reported one or more class actions having been brought against their company in the prior year. In 2008, that number dipped to 23 percent, and this year it also is at 23 percent, though that number escalates to 36 percent when confining the inquiry to large-cap companies and to 41 percent when looking only at the retail and wholesale industries. The class action mechanism is being used most commonly in labor/employment actions, consumer cases and securities litigation.

Still Non-Existent in U.K.: There is no direct U.K. equivalent of a U.S. class action. There are other mechanisms for pursuing group complaints, but they are largely unused. This year only 2 percent of companies say class actions (or the U.K. equivalent) were brought against their company in the past 12 months in the U.K.

What's New in Patents

Patent Offense: Has patent litigation gone by the wayside as in-house counsel preoccupy themselves with bankruptcy litigation, labor and employment suits and regulatory matters? Or, in the face of reduced budgets, are in-house counsel simply pushing patent disputes down on their priority lists? In the 2008 survey, 21 percent of respondents reported having been involved with at least one patent infringement proceeding as a plaintiff in the past 12 months. This year that number is down to 17 percent. In patent-heavy industries like technology and manufacturing, however, the numbers are as much as twice that.

Patent Defense: With patent claims going down, there was a corresponding drop in companies that have defended against patent infringement claims in the past 12 months.

What's Ahead: Corporate counsel do not seem to expect much of a jump in the coming year: 92 percent of respondents said they expect the number of patent infringement suits their companies will be involved with as a claimant to remain the same in the coming year. In-house counsel at technology companies do not expect to see a rise in the patent suits they file, though 15 percent of them expect an increase in the number of patent suits they will be involved with as a defendant.

Reforming the Discovery Process

To Limit or Expand? More than 60 percent of all in-house counsel (77 percent in the U.S.; 21 percent in the U.K.) would like to see the use of "full" pre-trial disclosure reconsidered in the U.S. to make the process more affordable. But in England and Wales, only 26 percent of all survey respondents say "full" pre-trial disclosure should be reconsidered, possibly because pretrial disclosure there is less fulsome already.

More Costly But Less Litigious: In any case, e-discovery, while growing ever more costly, has also become a less litigious subject. Last year 67 percent of companies said they never had an e-discovery issue in the prior 12 months become a subject of a motion, hearing or ruling from a tribunal — up from 44 percent in 2007.

Where are Companies Cutting Costs in e-Discovery?

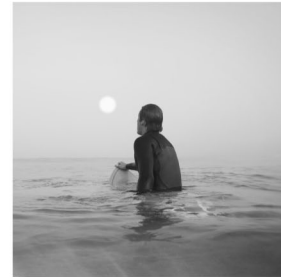
- **Specialized e-discovery practices:** About a quarter of all companies and 39 percent of energy companies are using law firms with specialized e-discovery practices. Such firms are providing companies with a mix of e-discovery services, from preservation to collection, processing and review.

- **Insourcing:** Nearly half of all survey respondents, 58 percent of large-cap companies, and 69 percent of retail/wholesale companies are keeping at least some e-discovery activities in-house, from preservation, collection, processing and review.
- **Outsourcing:** 22 percent of U.S. companies and 28 percent of U.K. companies are outsourcing main e-discovery functions through preferred provider relationships or master service agreements.

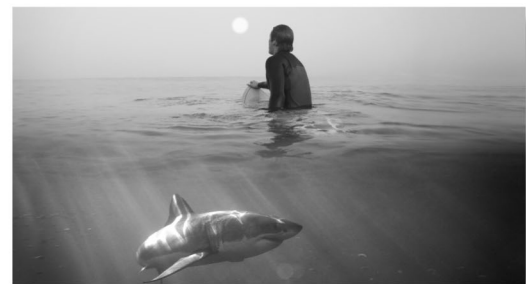
Does FRE 502 Save Money? Federal Rule of Evidence 502, enacted last year, permits claw-back of privileged evidence and "quick peek" review. The rule was intended to strengthen litigants' ability to protect their privilege by giving waiver protection to a party that inadvertently produces a privileged document. The rule was enacted, in part, to address the cost of pre-production privilege review. But 89 percent of respondents say the rule has resulted in no savings to their company. Another 9 percent say it has resulted in moderate or insignificant savings.

Dealing With Social Technology in Discovery: Given the popularity of social technology Web sites, such as Facebook, MySpace and Twitter, this year Fulbright asked how companies are restricting use of these sites among their employees.

- **Rate of restriction:** Fulbright's survey indicates that 46 percent of U.S. respondents restrict some mix of Facebook, MySpace, Bebo, LinkedIn, Plaxo, Twitter and YouTube, while 52 percent of U.K. respondents reported restrictions. In the U.S. and the U.K., Facebook, MySpace, Bebo and YouTube are the most commonly blocked sites.
- **Fewest Restrictions at Tech Companies:** Notably, tech companies are the least likely to block social networking sites, with 56 percent of tech companies who participated in the survey saying they have no restrictions on such sites.
- **Why Restrict?** In the past 12 months, 8 percent of companies that participated in the Fulbright survey report having been required, as part of discovery in the U.S. or disclosure in the U.K., to produce electronically stored information (ESI) from one of the above sites. But ESI production from social media sites appears to be more common in the U.K.: 18 percent of U.K. respondents reported having had to produce ESI from a social media site in the past 12 months versus only 4 percent of U.S. companies.



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