

LAW

TOP ISSUES FOR BUSINESSES

The decline in business rows

A survey indicates companies filed fewer suits — for a while

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Portland-area law firms report that 2007 was a kinder, gentler year for most businesses, with a marked decline in new lawsuits and regulatory actions filed against commercial clients.

These findings reflect a national trend indicated by the fourth annual Litigation Trends Survey conducted for international law firm Fulbright & Jaworski LLP. The survey was conducted in May and June, and asked companies about new suits filed against them or by them in the previous 12 months. Results, published in October, show that U.S. businesses reported a distinct drop in the number of new lawsuits compared with year-earlier data.

With 250 major U.S. corporations responding to the survey, 17 percent reported that they had no new lawsuits against them, up from 11 percent the previous year. Additionally, only 65 percent of the respondents initiated at least one lawsuit last year, compared with 70 percent of respondents in the 2006 survey, and 88 percent in the 2004 survey.

However, larger companies continue to be hit with larger lawsuits. Forty percent of all respondents said they were sued for more than \$20 million in the preceding 12 months, while 62 percent of billion-dollar respondents were served with at least one \$20 million lawsuit. Large companies also faced a significant number of cases pending in foreign countries.

Locally, “we have experienced a drop in what we would traditionally consider civil litigation,” said Stephen English, director of the litigation department at Bullivant Houser Bailey PC.

He cites three main reasons for the decline: a trend toward arbitration, the increasing cost of litigation and the booming economy of the last year.

“Historically in a bull market economy, people don’t file as many lawsuits. In an economy where everything is blasting on full cylinders, the cost of litigation outweighs the benefits a business might get from it,” English says, adding, “there’s no question that litigation has become more expensive because of a variety of rulings that have been put into place.”

Litigation work also slowed in the past 12 to 16 months for Portland law firm Stoll Stoll Berne Lokting & Shlachter PC, says Managing Partner Keith Ketterling, but it’s back on the upswing.

“In the last quarter of the year litigation did pick up substantially. In fact, we just hired someone to start [in litigation] in February,” he says.

Besides the reasons cited by English, Ketterling notes that in recent years Congress and the Supreme Court have been very business-friendly, and less sympathetic to consumers, making filing a lawsuit against a company a less attractive option.

Ketterling also credits the Sarbanes-Oxley Act of 2002, which was enacted following corporate



CATHY CHENEY/PORTLAND BUSINESS JOURNAL

Portland lawyer Keith Ketterling says the Supreme Court has been quite business-friendly in recent years.

accounting scandals, for a significant drop in the number of securities class actions in recent years. Sarbanes-Oxley requires much stricter recording and accounting for publicly held companies. It’s very expensive for companies to comply with, but Ketterling believes that it ensures much greater transparency.

“There’s a lot less fudging in their books,” he says.

Ketterling says the economy also plays a part in the decreased number of securities cases.

“When the markets have done well, people aren’t losing money in their 401(k)s. When you see a market correction, you’ll see the amount of securities cases go up.”

The stock market, of course, is now undergoing a correction, with the Dow Jones Industrial Average recently down about 10 percent from its record close on Oct. 9.

A non-lawyer also noticed a likely sign of litigation decline in 2007. Work for the Portland office of Tsongas Litigation Consulting Inc. slowed noticeably in the summer — in contrast to the five quite busy previous summers, said President Chris Dominic. However, the slowdown didn’t hit the company’s Seattle office.

Business certainly has picked up in Portland since then, Dominic said: “We’re cranking now.”

One factor in the increasing costs of litigation is new rules for electronic discovery that went into effect in December 2006. Paying someone to read through thousands of e-mails and text messages is expensive, but these searches can reveal invaluable information. The same is true of the cost of retrieving deleted files.

“Electronic discovery has increased the cost for litigation substantially, but at the same time I don’t think there’s an alternative. You have to look at it,” says Ketterling. “It’s expensive, but it has turned out a wealth of evidence in some cases.”

Bullivant’s English acknowledges the costs, but is less sure of the benefits of the new rules

regarding electronic discovery.

“Has e-mail changed the nature of litigation? It certainly has opened a window into how effusive people are in e-mails.”

English says that in the past, product liability was a hot button for companies, who lived in fear of being sued over faulty design, faulty manufacturing or failure to warn the consumer of dangers associated with a product.

In reality, he says, few product liability cases are ever filed, and those numbers continue to drop, due in part to more and better product warnings. The enhanced role of the judge as gatekeeper in sifting through the scientific basis for product liability may also have lowered the number of these cases being filed.

For English, what is significant about the litigation trends survey is not just the number of lawsuits being filed, but the number that are actually going to trial. He cites an analysis of cases tried in Oregon in 2006, which shows that in Washington County only 13 civil cases made it to trial. In Multnomah County, the number was 110 and in Clackamas it was 52.

“As fewer and fewer cases go to trial, the parameters by which you test whether a settlement is a good settlement are less reliable. I’m a very strong believer that we need more jury trials so that we have an idea of what the public thinks makes sense for a settlement,” says English.

With a slowing economy, as well as more companies involved in foreign trade, litigators in Oregon are likely to see their business increase once again.

“I do think that as the stock market and probably the real estate market continue to experience some troubles and pressures, litigation in those areas will pick up substantially,” says Ketterling.

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Keith Ketterling
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