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## Litigation & Corporate Law

# Businesses expect no litigation ebb in 2011, cite economy as key factor

Premium content from Business First - by Robert Celaschi , For Business First

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Most companies don't expect the level of litigation they'll face in 2011 to ease up, though the rough economy and the regulatory climate are likely to alter the mix.

A little more than two-thirds of companies surveyed say they expect to have as many cases to deal with as this year, and 26 percent say they expect more.

That's according to the seventh annual litigation trends survey released in November by global law firm [Fulbright & Jaworski LLP](#). Answers came from 403 general corporate counsel or heads of litigation in businesses in the U.S. and United Kingdom.

The poor economy was cited by 40 percent of the firms expecting an increase in litigation. But that plays out differently in real life depending on the industry and the client.

"For employment claims, we saw an increase that could be attributable to the economy," said **Russ Dempsey**, chief legal officer at [National Investment Managers Inc.](#) in Dublin and vice president of the Central Ohio chapter of the [Association of Corporate Counsel](#).

A down economy means more layoffs, and ex-employees who don't find new jobs right away have more time to contemplate a lawsuit against a company, he said.

And, indeed, labor and employment law was one of the three most numerous types of litigation cited in the Fulbright & Jaworski survey, coming in behind contract disputes and ahead of personal injury cases.

"I think we will see a slight decrease," Dempsey predicted for 2011. "The economy is unthawing, but it is slow to do so. I think that trend will continue, but decrease."

### Regulation rising

In other areas of business, however, a down economy can mean less litigation. When there's less construction, for instance, there are fewer opportunities for contractor disputes, said litigation attorney **Thomas Hill**, a director at Kegler Brown Hill and Ritter in Columbus.

Smaller cases are more likely to be settled quickly in a down economy, he added, because the litigants – the reasonable ones, at least – see the legal costs outweighing the benefit of a protracted lawsuit.

Tougher government regulation has companies girding for more legal battles in 2011. It was cited by one in five U.S. companies, and by one in four companies with more than \$1 billion in revenue.

"We're a financial services company, and also in the retirement plan industry. We've noticed both the Department of Labor and IRS increasing regulatory activity and audit activity," Dempsey said.

In the Fulbright & Jaworski survey, 34 percent of the largest companies expressed concern about tighter regulation, up from 29 percent in last year's survey.

Of the 6 percent of surveyed companies that expect less litigation in 2011, one oft-cited reason is that the companies are being more careful to avoid lawsuits.

"I think the more sophisticated companies work hard to manage the situation, particularly in the employment context, to minimize litigation," said **Marion Little**, a partner with litigation boutique law firm [Zeiger Tigges & Little LLP](#) in Columbus.

Companies are getting better at handling layoffs in a way that makes ex-employees less likely to go away angry, Little said.

For companies large enough to have in-house counsel, they typically work with the human resources department to make sure each layoff is justified and properly documented, Hill said. The same kind of process typically applies regulatory compliance.

"Large companies are becoming more and more heavily regulated, particularly in the health-care industry. Prudent companies – and most of the large ones are pretty prudent – will put in place processes to try to minimize the chance that the company has done something in violation of some regulatory rule or law," Hill said.

An improving economy may also help cut down on some types of litigation, cooling some tempers in inter-company disputes.

"When the economy is good, money is flowing and everyone is happy," Little said. But just as many divorces have their roots in financial woes, so do many corporate lawsuits.

In-house counsel may work hard at preventing litigation, but when a case hits they often turn to outside law firms for help.

"Litigation is a sporadic thing. You never know when you are going to get sued as a company," Hill said. "If you want to have an in-house counsel staff that actually litigates the cases, you are going to have to keep people on staff who won't have anything to do for a lot of the time."

Also, companies might be pulled into the courtroom in any state where they do business. That usually requires outside attorneys who understand the applicable state laws and local rules of court.

The recession hasn't caused most companies to keep more litigation work in house that had gone to outside firms.

"In good economic times or bad economic times, companies don't make decisions that are lavish, if they are prudent," he said.

Where in-house legal departments have been contemplating change is in the traditional hourly fee charged by litigation firms, Dempsey said. His own company is a big advocate of alternative fee arrangements for outside help with lawsuits.

"We try to structure as many as possible on a fixed-fee or risk-sharing model," he said.

There's one wild-card factor in the general amount of litigation that may unfold in 2011. Attorneys often say one of their jobs is to keep cases from getting to court. A dispute that's settled early saves both sides time and money.

That means carefully screening the items at issue to see what's really worth a courtroom battle.

But the legal profession has had its own cutbacks in recent years. That means a lot of underutilized attorneys in the marketplace.

"Does that all of a sudden create a number of plaintiff's attorneys out there who don't have the discipline to screen cases?" Little asked. "I don't know, but that's what I always wonder."

*Robert Celaschi is a freelance writer.*