

Litigators Weigh In With What to Watch for in 2023

By Ross Todd
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Alright. I told you in a column last month what I'll be looking out for in 2023 litigation-wise.

Now it's your turn.

Let's lead off with the same person I've turned to first for predictions the past two years, **Michele Johnson**, the global chair of the litigation and trial department at **Latham & Watkins**. I figure that makes sense since her leadership responsibilities cover nearly 1,000 litigators worldwide and the web of information she draws from is just as wide.

"Uncertainty tends to be a one-way ratchet," Johnson said. "As turmoil surrounding the pandemic and the U.S. elections fades a bit, a number of significant factors continue to influence the global business and legal environment."

Johnson said the concerns of a potential recession in the U.S. and financial challenges in the U.K. and elsewhere globally are bringing "the counter-cyclical, or perhaps a-cyclical, nature of disputes practices into sharp relief."

"Bankruptcy and restructuring litigation certainly, but also product liability, data privacy & cybersecurity, shareholder, patent, antitrust, and crypto litigation, as well as government investigations across the globe, will continue to rise in frequency and complexity," she said.

Dana Seshens, the co-head of civil litigation at Davis Polk & Wardwell, who is based in New York, said the core of the work her firm is seeing now reflects a lot of the fundamental types of litigation



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it tends to see irrespective of where we are in an economic cycle—there's just more of it. She and her partners have seen an uptick in securities cases, which is not all that surprising, given the volatility in the marketplace. More stock prices dropping equates to more stock-drop cases, after all. But she added she thinks that trend will continue into 2023 as the economic volatility continues.

"Given where we are in the economic cycle, we're now just starting to see the uptick in bankruptcy work and bankruptcy-related litigation," Seshens said. "We've seen it was very quiet for a while. It's now starting to ramp up, and I think about two months from now [there] will be much more significant activity levels in bankruptcy-related litigation."

While she said she and her litigation colleague were busy during the heart of the pandemic, it wasn't quite at the same levels as their colleagues in the corporate practices, who road out a some-

what unexpected boom in capital markets and M&A work. But now, Seshens said, litigation has “really skyrocketed.”

“And I think, at least as we look six months ahead, we don’t see any change on the horizon,” she said.

Bob Bodian, the managing partner of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo and a litigator, who is based in New York, said that the previous two years of intense deal work contribute to “fertile ground” for litigation. “Inflationary pressures, recessionary pressures—there’s more disruption in the market,” he said. “Deals that were going to happen that don’t happen sometimes create litigation, or deals that do happen, but don’t turn out to be anything like people thought they were going to look like, tend to create litigation.”

While Bodian said that he thinks every firm has to be careful about expense management during times like these, as the firm’s managing partner he tends to focus on top-line growth. “What’s required is a much more intense focus on business development and client service,” he said.

He said he’s cautious about cutting marketing budgets because, to some extent, “that’s the lifeblood of helping your partners generate business and do the things they need to do to increase the top line.” He said that even if there’s a 5% downturn, which would be significant, 95% of the business is still there for the taking. “So, if you can increase your share of it just by a little touch, you’ll be in good shape,” he said.

Bodian added that although no one knows exactly where the greater economy is headed, there’s a general sense that government regulators and prosecutors are going to be a bit more active, meaning more “investigation-type work.”

On that front, former federal prosecutor John Kocoras, who joined the Chicago office of Skadden, Arps, Slate, Meagher & Flom late last year, said

he’s watching out for the Department of Justice to take concrete steps to show that its recent pronouncements about corporate compliance efforts and individual accountability were “not merely aspirational.”

“I expect that there will be resolutions with companies over the coming year where the department will emphasize what companies did right or what companies did wrong relative to those guidelines,” Kocoras said. In particular, he said he’ll be looking out for companies getting credit for including provisions tied to compliance efforts in compensation agreements and using internal systems that effectively preserve relevant written communications (i.e. not ephemeral messaging). And he said to expect to see the government highlighting both the carrots and sticks featured in its new guidelines—especially given the skepticism in the defense bar about whether companies will be given credit for being proactive.

“I think the department will seek out examples to demonstrate that they mean what they say about rewarding effective compliance programs,” he said.

Kocoras also said he expects to see an uptick in activity surrounding companies’ pronouncements about their ESG efforts. “I expect that when a company’s practices turn out to be inconsistent with statements made about ESG initiatives and goals, there may be litigation,” he said. He likened the situation to cases involving consumer products, where consumers have brought lawsuits claiming that they were deceived by product labels or advertising. “I think we’ll see increased parallels in litigation brought by investors. But I think companies that are careful about the accuracy of their statements on ESG and have robust initiatives to support their statements are going to be well-positioned to defend themselves in those cases,” he said.