

THE AM LAW LITIGATION DAILY

A Litigation Look Ahead: What to Expect From 2024

By Ross Todd

January 3, 2024

Back before the holidays, I told you the litigation trends I am keeping an eye out for this year.

But last month I put the same question to a bunch of you. Here are some of the things I heard back:

Let's start with my go-to person for a global perspective on litigation trends. For the past three years I've written these look-ahead columns, I've queried **Michele Johnson**, the global chair of the litigation and trial department at **Latham & Watkins**, who has leadership responsibilities for 1,000 litigators worldwide. This year, she said technology is clearly in the driver's seat.

"Heading into 2024, technology-based litigation trends swirl around every industry, market, and practice," she said. "The opportunities and uncertainties of AI, the rapidly evolving privacy and cyber regulations across the globe affecting every company with data (so, every company), and the impacts of the cryptocurrency markets are top of mind, even as global events and market uncertainty collide to create greater complexities."

Johnson said that as artificial intelligence gains greater footholds, she expects an uptick in "hefty regulation and private actions" aimed at curtailing the perceived anticompetitive impacts of the technology. "These actions won't be limited to the leaders in tech," she said. "All companies dealing with their own and their consumers' data will be vulnerable to regulation and litigation." As



an example, she pointed out that in 2023 alone, algorithmic pricing service providers were hit with at least five large class actions in the U.S.

Bob Bodian, the managing partner of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo who is himself a practicing litigator, said that litigation held pretty steady at his firm in 2023, except in intellectual property, where there was a 30% uptick in activity last year. He attributed some of that IP surge to an increase in activity at the U.S. International Trade Commission after cases had essentially ground to a halt there during pandemic shutdowns. But he also said he expects the IP surge to continue due to the firm's investments in the life sciences industry. "Life sciences

is not going anywhere,” Bodian said. “These companies have more and more money and are just doing more things.”

“There’s a lot more, more companies doing a lot more deals,” Bodian said. “So obviously, litigation is just going to follow that. So it would be kind of natural that there’d be more tech litigation because there’s just more tech.”

Maria Ginzburg, the managing partner of New York’s Selendy Gay Elsberg, said that she and her colleagues have been seeing a rise in “uptiering” disputes that they expect to continue into 2024. What exactly does she mean? “Also known as ‘lender-on-lender violence’ or ‘liability management’ transactions, these are aggressive out-of-court restructurings where one group of lenders extends funds to the distressed borrower and subordinates other lenders in the same transaction, trying to amend and strip any contractual rights that prohibit this in the process,” she said. “Given the current volume of troubled borrowers, we can expect further litigation tied to restructurings.”

Rachel Fritzier, a securities litigator with Kirkland & Ellis in New York, said that she has noted an uptick in lawsuits attacking companies’ ESG policies and that she expects to see more. “We’re seeing a lot of shareholder litigation claims for breach of fiduciary duty, but usually the theory essentially amounts to blaming a company’s ESG policies for some aspect of its financial performance” she said. “I think this is something that has already begun, but I think we’re going to see more of it, particularly in 2024. It’s an election year. We’re increasingly polarized as a country around a lot of these issues. And I think this is going to be one of those new frontiers that public companies are going to have to face.”

Jonathan Youngwood, one of the two global co-chairs of the litigation department at Simpson Thacher & Bartlett, said that after seeing securities cases stemming from IPOs dry up last year, he expects to see an uptick in 2024 just because

of the nature of what went on in the financial markets. “There are certainly more IPOs that have priced and marketed in the last year than in the year preceding. And so I think you’re going to see more IPO cases in 2024 than you saw in 2023,” he said.

Youngwood also said he expects to see large institutional investors opt out of certain securities class actions. “There’s a whole group of plaintiffs lawyers who pursue that work,” he said. Youngwood said while many cases will still move forward without meaningful opt-outs, there will be others where the class settlement may be the largest part of the case—“but it’s not the end of the case.”

Steve Ciriemi, the head of class actions and corporate actions at fintech company Broadridge, said that U.S.-style securities class actions continue to expand in countries including New Zealand, Brazil, China and Singapore. He said that while there has been “sort of an anti-American legal system mindset” in Europe and Asia for many years, as collective actions have expanded abroad, investors have taken note as the opportunities for significant recoveries have emerged. “We’re getting a lot of inquiries from European and Asian investors and institutional investors,” he said.

Latham & Watkins’ Johnson said that following the implementation of the EU Directive on Representative Actions, the firm is expecting an increase in “mass, class, collective, representative, and group actions across the EU, particularly in cross-border cases.”

“The plaintiff-friendly directive is focused on consumer law, including data protection, energy, financial services, travel and tourism, and telecommunications, but could affect all businesses doing business anywhere in the EU,” she said. “Expertise and experience in defending mass actions across Europe will be at a premium.”