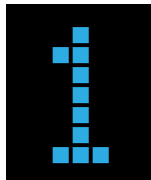


THE YEAR IN REVIEW

20 Stories the In-House Bar Couldn't Ignore

by Christopher Danzig, Cathleen Flahardy, Melissa Maleske,
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Illustrations by Jim Lange



The Great Recession

After months of looming financial instability with roots in the subprime mortgage meltdown, the year kicked off with overseas stock price plummets and continued with Bear Stearns' buyout in March. By April some business economists predicted the whole mess would turn around by fall. Ah, hindsight.

As we all now know—and most of us would prefer to forget—the other shoe dropped over one bloody week in September. The government seized Fannie and Freddie, Lehman Bros. collapsed, Bank of America scooped up Merrill Lynch, and AIG teetered on the edge of insolvency. In response, global financial markets went into a tail-spin, launching a period of historic ups and downs. It's been said the U.S. now faces its worst financial crisis since the Great Depression.

Meanwhile, the effects of financial tumult have spread. In September, the Department of Labor reported the country's unemployment rate had reached its highest level in five years. Through September, the year saw 14,811 mass lay-off events (at least 50 employees from a single employer). On a global level, the United Nations' International Labour Organization projected job losses will reach 20 million by the end of 2009—taking global unemployment past 200 million for the first time.

The Commerce Department said consumer spending was down the first year-to-year drop since 1991. Both the University of Michigan/Reuters and Conference Board Consumer Confidence indices showed consumer confidence had fallen to all-time lows.

Corporate profits went down \$60.2 billion (3.8 percent) in the second quarter, following a first-quarter drop of \$17.6 billion (1.1 percent), the Commerce Department said in September. The



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Institute for Supply Management said Nov. 3 the nation's manufacturing firms had reported September output at its lowest levels in 26 years. And corporate America's struggles have hit the legal department.

"The key thing is that [legal departments] are feeling increasing pressure to reduce their legal spending, particularly with outside counsel," says Rob Thomas, vice president of strategic development for Serengeti Law, a consultancy. "Another thing we see is that in-house law departments are expected to do more work with the same or fewer resources. It's putting quite a bit of pressure on the legal department."

Flagging corporate work took away the bread and butter of some law firms, leading to layoffs and shutdowns (see "You're Fired," p. 48). However, in the aftermath of the crisis, law firms have formed task forces to address the associated legal work—Mayer Brown was

ahead of the curve, announcing its subprime lending response team in October 2007; a year later a flood of law firms established global financial crisis teams.

Much of the legal work stemming from this crisis will focus on the Emergency Economic Stabilization Act of 2008, the 451-page, \$700 billion bill that Congress approved and President Bush signed Oct. 3 after a few frenzied days of negotiations on the Hill.

A fundamental function of the act was establishment of the Troubled Assets Relief Program (TARP), a \$250 billion plan under which the government will buy up troubled assets and purchase equity in financial institutions. At press time, Bank of America and Citigroup were among the institutions announcing participation in the program.

Financial institutions participating in TARP will be subject to executive compensation restrictions—including a conditional ban on golden parachutes and "incentives for executive officers to take unnecessary and excessive risks." The provision seems to address heavy public and political criticism of lucrative bonuses and compensation packages that executives at companies like AIG and Lehman Bros. received. Rep. Henry Waxman, chairman of the House Committee on Oversight and Government Reform, and New York Attorney General Andrew Cuomo have demanded detailed information on expected executive pay from banks accepting bailout money.

In a letter to nine banks, Cuomo wrote, "In this new era of corporate responsibility we are entering, boards of directors must step up to the plate and prevent wasteful expenditures of corporate funds on outsized executive bonuses and other unjustified compensation."

Electing Change



“Change has come to America.”

Addressing a quarter million jubilant supporters on an unseasonably balmy November night in Chicago, Barack Obama summed up his historic election with that simple phrase.

But there is nothing simple about the task facing the president-elect. And the change he promised throughout his campaign portends both

negative and positive outcomes for corporate America.

Pundits predict an Obama administration, backed by a Democrat-controlled Congress, will beef up regulation, pass labor-friendly legislation and take an activist approach to government. For example, with exit polls showing the sagging economy as the No. 1 issue among voters, Obama can claim a mandate for tough new financial regulation.

“Those in the financial services industry should understand that Sen. Obama has sent a very clear signal that he will pursue an activist agenda as president,” says William Donovan, partner at Venable. “Overhaul of the financial services regulatory structure, tougher liquidity and capital requirements, and credit card reform are all on the table.”

But government intervention in the economy isn't necessarily bad for all businesses, as the U.S. Chamber of Commerce demonstrated the day after the election by imploring Congress to back another economic stimulus package.

The “good news, bad news” extends to other expected Obama administration business policies. For example, Obama favors “cap and trade” legislation, requiring businesses to pay for the right to emit carbon dioxide. A crackdown on greenhouse gases could hurt carbon fuel-based energy companies but assist wind power and nuclear power providers.

Obama will have to contend with a Senate where his party apparently failed to win a filibuster-proof 60 seats. Though the final count was up in the air at press time, Senate Republicans probably will be able to block some bills that have gained strong business opposition, such as the pro-labor Employee Free Choice Act (See “Legislation in Limbo,” p. 54).

“The Republicans are in a good position to play defense and decide what Senate legislation will and will not pass,” says Jeffrey Munk, partner at Hogan & Hartson. “But they can't stop everything—they will have to prioritize.”

As a result, Munk recommends that general counsel start lobbying now. “I'd start to work now to defend my issues and thus get them on [the Republican senators'] list of must-stop legislation,” Munk says. “It's a lot harder to get an amendment passed to change the draft bill than to get [your priorities] in the draft initially.”

DOJ Decency

These days, it seems the news is often filled with stories of executives facing criminal charges, such as options backdating, tax fraud and bribery. But justice can't be served when prosecutors use unconstitutional tactics to win convictions.

In-house counsel complained for several years that the Justice Department was running roughshod over attorney-client privilege and the right to counsel as it conducted its investigations of corporate crime. Over the summer, however, the DOJ modified its policies—giving corporate employees a fairer chance to defend themselves.

Deputy Attorney General Mark Filip announced Aug. 28 that the DOJ would no longer pressure companies to waive attorney-client privilege or encourage them not to pay the legal fees of employees facing investigation.

Filip said at a press conference that the changes reflect the DOJ's commitment to two goals: “Safeguarding the attorney-client privilege, which is so central to our criminal justice system,” and “preserving the department's ability to investigate corporate wrongdoing effectively, which benefits corporations and members of the public alike.”

Under the new rules, the government may no longer consider whether a company has “sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation,” according to a DOJ press release.

The previous, stricter guidelines were institutionalized in the 2003 Thompson Memo following the Enron scandal. The most famous example of the now-defunct rules revolves around KPMG. While the DOJ prosecuted 19 of its former executives in 2006, the company side-stepped an indictment only because it bowed to the department's pressure and stopped paying the employees' legal fees.

On the same day Filip announced the changes, the 2nd Circuit upheld a decision from the U.S. District Court for the Southern District of New York throwing out the charges against 13 of the KPMG defendants—associate general counsel Steven Gremminger among them—because the old rules were unconstitutional. The three-judge panel ruled that the government, by forcing KPMG to impose conditions on, cap and eventually end legal payments to the defendants, violated their right to counsel.

“The government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense,” wrote Chief Judge Dennis Jacobs in the ruling.

Lawyers and judges hailed the new policy because it no longer forces corporations to turn against their employees.

“This is the right thing for the DOJ to do,” Todd Harrison, a partner at Patton Boggs, told *InsideCounsel* in October. “The prior guidelines violated due process and the right to counsel.”



You're Fired!

The list seems endless, but some of the country's most reputable law firms—including Blank Rome, Reed Smith, and Clifford Chance—have suffered cutbacks of both lawyers and staff—most as a result of the 2008 economic downturn.

In addition to the layoffs, two firms have completely dissolved. San Francisco-based Heller Ehrman sent shockwaves through the legal community when it announced in September it would close its doors for good. The 118-year-old firm boasted more than 500 employees and specialized in big litigation cases. But it suffered a tough year in 2007 when it lost much of its litigation work, and—with only a handful of overseas offices—it

struggled to compete in an increasingly globalized legal industry.

Additionally, the management team at Thelen, also based in San Francisco, announced it would dissolve effective Dec. 1 due to industrywide slowdown.

While neither firm denies being victims of economic troubles, others say their decisions to cut fat are unrelated. After Katten Muchin laid off more than 20 lawyers in October, a firm spokeswoman said the measure was taken to improve efficiency, adding that the firm's financial performance remains strong despite the current economic downturn.

Most, however, have been quite candid. Sonnenschein laid off 37 lawyers in May and another 25 in October. Firm Chairman Elliott Portnoy told colleagues via e-mail, "Tumult in the financial

markets is affecting our clients and dramatically reshaping the contours of the transactional, finance, restructuring and litigation work in the financial services sector."

The light at the end of the U.S. law firm layoff tunnel remains to be seen.

In a fall 2008 special client advisory from legal consultancy Hildebrandt, the firm predicts that profits per law firm partner will be flat or drop by as much as 15 percent this year.

"These results will put a severe strain on many firms," the advisory says. "The implications of the current economic crisis for the legal profession are significant. ... The widespread restructuring and realignment of financial institutions will disrupt many long-standing firm-client relationships."



Discrimination Ammunition

It's not easy to pin a label on the Roberts Court.

That became clear this year when the justices—by substantial margins—issued a series of pro-worker decisions in employment cases. Just a year after making tire plant supervisor Lilly Ledbetter a folk hero to workers' rights advocates by denying her equal pay claim, the court came back in the 2007-2008 term with five decisions making it easier for employees to file and win retaliation and age discrimination cases.

In May, the court opened a new avenue for filing retaliation claims that grow out of race discrimination complaints. In *CBOCS West Inc. v. Humphries*, the court ruled 7-2 that plaintiffs may bring retaliation claims under Section 1981 of the Civil Rights

Act of 1866. That statute offers plaintiffs attorneys several advantages over filing the claim under Title VII of the Civil Rights Act of 1964: It has a much longer statute of limitations; no EEOC review is required; claims can be filed against small, Title VII-exempt employers; and there is no cap on compensatory or punitive damages.

On the same day, the court ruled 6-3 in *Gomez-Perez v. Potter* that the Age Discrimination in Employment Act (ADEA) protects federal employees, as well as private sector employees, from retaliation for filing an age discrimination complaint.

The court also ruled for employees in three other age discrimination cases:

- In *Meacham v. Knolls Atomic Power Laboratory*, the court ruled 7-1 that

if an employer uses the "reasonable factor other than age" defense to explain a layoff's disproportionate impact on older workers, the employer, not the employee, must prove that such a factor is valid.

- In *Federal Express Corp. v. Holowecki*, the court found 7-2 that completing an EEOC intake questionnaire meets the ADEA's requirement that a "charge" be filed with the EEOC prior to filing an age discrimination lawsuit.

- In *Sprint v. Mendelsohn*, the court unanimously ruled that trial judges have discretion to admit "me too" evidence of discrimination from employees who worked under a different supervisor than the one who worked for the plaintiff.



Tangled Web



The number of closely watched online copyright and trademark cases in 2008 is indicative of how the law has not kept up with technology.

Viacom's ongoing \$1 billion lawsuit against Google is a prime example. Viacom alleges that Google, which owns YouTube, willfully infringes on Via-

com's copyright material by allowing users to upload clips of Viacom's TV programs onto YouTube.

The outcome will test the limits of the Digital Millennium Copyright Act's "safe harbor" provisions, which protect a company from liability as long as it removes infringing content when alerted by the copyright holder. A decision will also help define the future of digital media for the millions of users of online video sites.

A federal judge in San Jose, Calif., gave a potential preview in August, dismissing a 2006 case adult video company Io Group filed against video-sharing site Veoh. The judge ruled Veoh was not liable for copyright infringement for material its users uploaded to its site. Veoh successfully argued that it came under the safe harbor provisions because it was removing copyrighted videos when alerted by copyright holders.

The decision may prove influential for Google, which faces similar charges. It remains to be seen whether Google will use the safe harbor defense to argue that YouTube is not liable for copyright infringement.

Also, in what could become a landmark trademark case for auction Web sites, Federal District Judge Richard Sullivan of the Southern District of New York ruled July 14 in *Tiffany & Co. v. eBay Inc.* that eBay does not bear a legal responsibility to prevent its users from selling counterfeit items on its site. Sullivan's decision was the opposite of a June 30 ruling in France. The French court ruled that eBay didn't do enough to prevent the sale of counterfeit goods on its site and ordered it to pay Moët Hennessy Louis Vuitton €40 million (about \$63 million). eBay will appeal that decision.

In the *Tiffany* case, the U.S. court ruled eBay complied with law by taking down listings when Tiffany notified the company that its auction site contained counterfeit items, but eBay does not have to preemptively take down suspicious listings for Tiffany jewelry. Tiffany is appealing the decision.



Pre-emptive Strike

Thanks to a host of Supreme Court cases that addressed enforcement of state law in the face of conflicting federal rules, pre-emption had something of a coming out party in 2008.

The High Court ruled last term in *Preston v. Ferrer* (finding the Federal Arbitration Act pre-empts a California talent agency law) and *Chamber of Commerce v. Brown* (federal labor law pre-empts California union regulations). In the tobacco arena, it took on *Rowe v. New Hampshire Motor Transport Association* (federal aviation law pre-empts New Hampshire's regulation of tobacco deliveries), and this term in *Altria v. Good* it will address whether federal cigarette marketing rules pre-empt state claims of deceptive advertising in connection to so-called light cigarettes.

While the legal doctrine is a potential boon to all manufacturers, in one industry it's the unqualified belle of the ball.

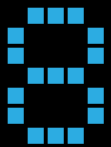
"In the course of the past year, pre-emption has taken absolute center stage in a way it never has before in the drug and device field," says Mark Herrmann, a Jones Day partner who co-authors the Drug and Device Law Blog.

The banner year kicked off in February as the court handed down *Riegel v. Medtronic*, in which it ruled 8-1 that FDA pre-market approval of medical devices pre-empts state claims. (*Warner-Lambert v. Kent*, a pharmaceuticals case, hit a 4-4 stalemate after Chief Justice John Roberts recused himself.)

Then there is this term's *Wyeth v. Levine*, addressing pre-emption of claims related to FDA-approved drug labeling, which is "the 600-pound gorilla, the one that everybody is watching," Herrmann says. "Think to yourself the words Vioxx, Fen phen, Baycol, Propulsid. There have been so many mass torts related to pharmaceuticals that there is just a ton of litigation that could be affected one way or another by the decision in *Levine*."

The court heard oral arguments in the case the day before the presidential election, and the eventual outcome of both the case and the vote will have great bearing on the future direction of pre-emption. The Bush administration has been a driving force behind the pre-emption cause, working over the past eight years to inject pre-emption language into 50 federal rules relating to product liability, including at least 10 this year. It is doubtful a Democratic White House and Congress will continue the crusade.

With *Levine* in the pipeline, however, there's no doubt 2009 will be a seminal one for judicial guidance on pre-emption. "I think the courts are trying to find some sort of balance between protecting manufacturers who operate under the umbrella of federal regulation and at the same time making sure that things don't get so one-sided that consumers would not be protected against the harmful impact of such products," Mayer Brown partner Jeffrey Sarles told *InsideCounsel* in September.



Discovery Gone Wrong

Chipmakers Qualcomm Inc. and Broadcom Corp. are no strangers to facing off in complex IP litigation. As rivalries go, they are on par with the Yankees and Red Sox.

So it was all a matter of routine when Qualcomm lost a 2007 patent infringement verdict to Broadcom. As related in a judge's order, former Qualcomm General Counsel Lou Lupin told a newspaper, "It probably won't have any impact on us one way or the other. It's just the latest round in a series of battles."

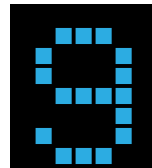
Lupin would later eat his words. In post-trial proceedings, U.S. District Judge Rudi Brewster found that Qualcomm had failed to turn over for discovery 46,000 e-mails that established the company's participation in a standards-setting organization—participation that waived the company's infringement claims and had been the centerpiece of Broadcom's defense. Brewster accused Qualcomm and its outside counsel of carrying out a "deliberate plan to conceal evidence" and ordered Qualcomm to foot Broadcom's \$8.6 million legal costs.

2008 brought the fallout. Sent before U.S. Magistrate Judge Barbara Major to face sanctions, Qualcomm's venerated outside legal team found little sympathy. In a January order, Major imposed sanctions on six of them, concluding that even if they had been unaware of the withheld evidence's existence, their choices had enabled the "monumental discovery violation."

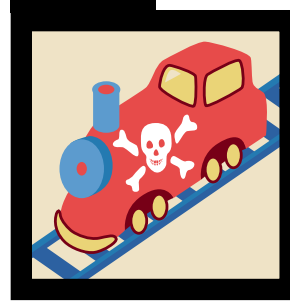
Bad became worse for Qualcomm after some of its employees filed declarations critical of the company's outside lawyers. Brewster vacated the sanctions order and invoked a self-defense exception to lift privilege for Qualcomm's outside lawyers, a chilling prospect.

Since Brewster's March order, Qualcomm seems to be trying to limit its exposure, moving to protect privileged information.

We may never know the full story, but the case provides a clear lesson in discovery. As Major wrote in her January order, "For the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together."



Getting the Lead Out



Congress wasn't playing around when it took on Polly Pocket play sets, Batman action figures and Thomas & Friends railway toys. Expressing outrage over 100 recalls of these and other unsafe toys in 2007, legislators from both parties

joined forces to pass sweeping changes to the law governing regulation of product safety. The Consumer Product Safety Improvement Act, which President Bush signed in August, will increase to \$15 million the maximum civil penalties that the Consumer Product Safety Commission (CPSC) can impose on companies that fail to report potential product defects—up from \$1.25 million under the old law.

The CPSC, virtually dormant in recent years, will get a big budget boost along with increased authority to order mandatory recalls. And it is required to develop a host of new safety standards as well as a public, searchable Internet database on which consumer complaints about unsafe products will be posted.

"This long-overdue law gives the CPSC the shot in the arm that it desperately needs," Ami Gadhia, policy counsel with Consumers Union, said in a statement.

While the legislation will tighten regulation over all consumer products, it puts the strongest focus on toys. It bans lead and phthalates, a potentially dangerous type of chemical, from toys and requires that toys and infant products be tested before they are sold. The ban on phthalates took effect in November, while the lead standards phase in over three years. But even in advance of tougher standards, the CPSC logged more than 50 toy recalls in the first three quarters of this year.

Beyond accelerated regulatory action, corporate defense attorneys are concerned that information made public under the stricter reporting requirements and in the new database will spur an upswing in product safety litigation.

"Private plaintiffs piggyback whenever a company discloses that it has a dangerous product," Joseph Beck, partner at Kilpatrick Stockton, told *InsideCounsel* in November. "The statute forces you to lay the groundwork for that lawsuit by self-reporting. And the amendments make it even easier for plaintiffs lawyers to get that information."

One such lawsuit growing out of 2007's rash of Chinese-made toys with unsafe lead levels was settled early this year. RC2, the maker of Thomas & Friends toys, agreed to an estimated \$30 million settlement of a class action suit filed by thousands of families who purchased lead-tainted Thomas train cars. RC2 also dropped its Chinese supplier and promised to implement new quality controls.



Stoneridge Standard

The Supreme Court's Jan. 15 decision in *Stoneridge Investment Partners v. Scientific-Atlanta* finally answered the question of whether third parties could be held liable for the fraudulent actions of their clients under the Securities Exchange Act of 1934. And the answer—"no"—came just in time to restrict an expected tidal wave of litigation growing out of the credit crisis.

The rejection of scheme liability in *Stoneridge* represents a significant victory for banks, accountants, lawyers and other professionals by protecting them from potential multibillion-dollar class action securities-fraud liabilities based on their dealings with public companies that were engaged in fraud.

Stoneridge also brought an end to the massive \$40 billion lawsuit against

financial institutions growing out of the Enron scandal. Using *Stoneridge* as a guide, in *California Regents v. Merrill Lynch* the Supreme Court denied the plaintiffs' bid to proceed against the bankers from firms including Merrill Lynch and Credit Suisse Group.

Stoneridge centered on investors who brought a securities fraud class action against cable company Charter Communications Inc. for alleged misstatements in its financial statements designed to inflate its stock price.

Plaintiffs also sued some of Charter's third-party vendors, including Scientific-Atlanta Inc., claiming the defendants knowingly participated in business arrangements that were intended to assist the public company in issuing misleading financial statements that

affected its stock price. However, the third parties never made public statements themselves.

Justice Anthony M. Kennedy wrote that the decision should not be regarded as a free pass for secondary actors who engage in deceptive conduct. He noted that even though such actors might be beyond the litigation reach of private plaintiffs, they were still subject to criminal penalties and civil enforcement by the SEC.

"*Stoneridge* is part of a general trend by the Supreme Court to come up with law to apply to complex securities cases to allow them to be resolved earlier in the case, during a motion to dismiss or summary judgment, instead of at trial," says Lisa Wood, a partner at Foley Hoag.



Damage Control



The Supreme Court raised the hopes of corporate America for limits on out-of-control punitive damage awards when it slashed a \$2.5 billion

judgment against Exxon for losses Alaskan fishermen and landowners suffered following the 1989 Exxon Valdez oil spill. But the June decision in *Exxon Shipping Co. v. Baker* addressed only cases under federal maritime law, leaving open the question of punitive limits in other types of cases.

Justice David Souter wrote that under maritime law, the ratio of punitive to compensatory damages should be no greater than 1-to-1 in order to preclude "unpredictable and unnecessary

awards." That meant the punitives in *Exxon* could not exceed the \$507 million awarded in compensatory damages. In a footnote, Souter suggested that a similar standard should be applied outside the maritime context, writing that "the constitutional outer limit may well be 1:1"—which raised questions about exactly what the court was trying to say.

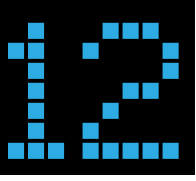
Even Justice Ruth Bader Ginsburg seemed confused. In her dissenting opinion, she wrote: "In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed 'the constitutional outer limit'? On the next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the states, and for all federal claims?"

It may be awhile before Ginsburg's questions are answered, and corpo-

rate defense counsel are standing by. The court bypassed an opportunity to address the issue in June, when it agreed to rehear *Philip Morris USA v. Williams*, but only on narrow grounds. The court had sent the case back to the Oregon Supreme Court in 2007 on the grounds that jurors had assessed punitive damages based on alleged harm to parties other than the plaintiff.

But the Oregon court in January cited a violation of state legal procedure by Philip Morris and reaffirmed the punitive award of \$79.5 million to a smoker's widow, who also was awarded \$521,000 in compensatory damages.

When the case came back to the U.S. high court, the justices agreed only to hear the narrow question of whether a state court can reject direction from the Supreme Court based on a state procedure violation.



Legislation in Limbo

Considering that more than 30 labor and employment bills were floating around Capitol Hill this year, legislators passed remarkably few actual changes in federal employment law.

Of course, Congress approved—and President Bush signed in September—significant amendments to the Americans with Disabilities Act (ADA), enabling millions more people to qualify for protection and accommodation based on physical and mental impairments. Because of employer-friendly court interpretations, defense lawyers used to easily dispose of most ADA cases on summary judgment. The new law makes it much more likely the cases will be able to proceed to trial (see “Disability Redefined,” p. 24).

Congress also stepped in to preclude employment discrimination based on genetic information, anticipating that testing to discover genetic predispositions for cancer, heart disease and other serious illnesses will become standard medical procedure. The Genetic Information Non-Discrimination Act, which President Bush signed into law in May, prevents employers from using genetic information to make employment decisions and bars them from requiring genetic tests. It also prohibits health insurance companies from denying coverage or raising premiums based on genetic information.

But perhaps more important than the labor and employment bills Congress passed this year are the ones it left hanging.

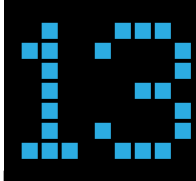
In the latter category, business community ire focused on the Employee Free Choice Act (EFCA). First introduced in 2003, this union-backed legislation emerged from obscurity in 2007 when it passed the House. While the Senate took no action in 2008, proponents set the stage for a vote next year.

EFCA would make several changes in labor law favoring unions, but is best known for its “card check” provision, requiring certification of a union where 50 percent of workers sign cards, eliminating the current secret ballot election process. Employers argue card-signing campaigns are conducted quickly and quietly, effectively precluding the employer’s right to make a case for remaining union free. Others say such a scheme denies workers their rights.

“Depriving employees of their right to vote is an infringement on their freedom and basic right to due process,” says Martin Payson, a partner at Jackson Lewis.

Other bills that passed the House in 2007 but lost traction this year in the Senate include:

- The Employment Non-Discrimination Act (ENDA), banning discrimination against gays and lesbians.
- The Lilly Ledbetter Fair Pay Act, which would overturn a Supreme Court ruling that pay discrimination cases must be filed within 180 days after the discrimination first occurred. Under the bill, the 180-day clock would start anew with each unequal paycheck.



Diversity Drive



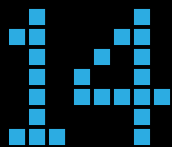
Many in-house legal leaders have been working for a long time to increase diversity in their departments and among outside counsel. This year a few major companies took

their initiatives to a new level with public pushes for more diversity in their outside firms.

Wal-Mart, a leading corporate advocate of diversity in the legal profession, announced in June that it had developed software to monitor the diversity of its outside counsel. The retailer plans to drop law firms that don’t meet diversity benchmarks. The company has not publicly released specifics. Wal-Mart says it has already dropped four law firms for lacking commitment to diversity.

In July Microsoft announced its “pay for performance” approach to increase diversity efforts by the 17 law firms that handle \$150 million of legal work for the company annually. Microsoft made the final 2 percent of each firm’s legal fees payable as a bonus contingent on whether those firms made defined, quantitative progress. Brad Smith, senior vice president, general counsel and corporate secretary of Microsoft, wrote in *Inside Counsel’s* Inside Perspective column “Taking New Steps” in September that the reason for the change was that Microsoft believed diversity in its legal teams is a business necessity. “We cannot be effective if we cannot understand and appreciate the interests of the incredibly diverse individuals who make up our stakeholder groups,” he wrote.

Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel, says it makes sense that corporate legal departments committed to diversity in their own ranks are going to demand the same discipline and shared values from their largest suppliers. “It’s not PR—it’s smart business, and the way the corporate world works,” she says. “Client companies have diverse staffs, juries are diverse, future employees of the firm are diverse. Can anyone really be having a conversation about the business case for diversity any more? The only question is whether folks are going to toe the line like Wal-Mart does and put their money where their mouth is.”



Taking the Lead

In recent years, first denial and then inaction have been hallmarks of the federal government's approach to climate change. This year it looked like that might change. The Supreme Court gave the EPA authority in 2007 to regulate greenhouse gases under the 1970 Clean Air Act, and the agency was prepared to announce in July that the act provided a workable and effective way to address climate change. But after consulting with the White House, the EPA did an

abrupt about-face, saying the law is "ill-suited" for greenhouse gas emissions. Meanwhile, Congressional investigations found White House officials had refused to open EPA e-mails and attempted to suppress research that made clear the need for climate change controls.

But a greener regime is on the horizon, as Barack Obama supports development of renewable energy and an economywide cap-and-trade plan for carbon reductions.

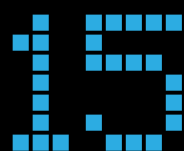
"My sense is that beginning next year, the federal government as a whole will have renewed energy to look at and hopefully pass federal climate change legislation," says Adam Kahn, coordinator of the environmental practice group at Foley Hoag. "Companies that are interested in influencing the shape of federal climate regulation should get ready to participate in that process in 2009."

In the meantime, state and regional initiatives have led the way. In August, the Northeastern and Mid-Atlantic states' Regional Greenhouse Gas

Initiative—the country's first mandatory, market-based greenhouse gas reduction program—held the first U.S. auction for power plant carbon allowances. A similar program for Western states is planned for 2012. According to Kahn, such programs are underway in virtually every corner of the United States and will likely continue to proliferate in the face of federal inaction.

Increasingly, U.S. companies aren't willing to wait for a new regime of climate change regulations, Kahn says. Instead, many industrial companies are setting their own voluntary carbon targets to help shape future regulations, comply with overseas rules or enhance their image. Others have started simply because they find waiting unacceptable with a global crisis looming.

"You see a lot of different reasons, but at this point the number of large multinational companies with significant industrial operations and without some sort of position on climate change is increasingly small," Kahn adds.



Method Madness

It's a decision some experts believe may change U.S. patent law. The Federal Circuit issued a full court opinion Oct. 30 in *In re Bilski* that restricts the patent protection of business methods. The case had garnered significant attention because of the potential impact the decision would have on an increase in business method patents.

In its 9-3 ruling, the court held that in order for a process to receive patent protection, it has to either "transform ... an article to a different state or thing" or be "tied to a particular machine."

In 1997, Bernard Bilski and Rand Warsaw submitted a patent application seeking exclusive rights to a method of using hedge contracts to reduce the risk that a commodity's wholesale price

might change.

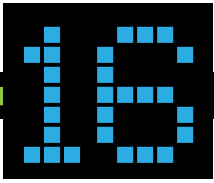
The U.S. Patent and Trademark Office rejected their application, and in 2006 the Board of Patent Appeals and Interferences affirmed that decision. Bilski and Warsaw appealed this ruling to the Federal Circuit in early 2007.

"*In re Bilski* raises the compelling and arguably unanswered question of whether business methods and other inventions completely divorced from technology can be patented," Dale Lazar, a patent attorney at DLA Piper, told *InsideCounsel* in October 2007.

In its ruling restricting patent protection on business methods, the Federal Circuit overturned the eligibility requirements for patenting methods or processes set out in its 1998 decision in

State Street Bank v. Signature Financial Group. In that case, the court held that ideas about how to conduct business aren't always unpatentably abstract. Any business method that produces a "useful, concrete and tangible result" can be patented as a "process" under Section 101 of the Patent Act, the court said. But in *Bilski*, the court said the test is inadequate to determine patent eligibility. Instead, the machine-or-transformation test should be used.

Three of the Federal Circuit judges dissented in *Bilski*, arguing the majority opinion didn't go far enough in rejecting business method patents. Some experts believe additional cases will determine the true ramifications of the *Bilski* decision.



Lying Lawyers

Many lawyers—both in-house and outside—closely watched this year as the drama involving plaintiffs firm Milberg (formerly Milberg Weiss) continued to unfold, not only in the legal media but also in the mainstream press.

In 2006 a U.S. attorney for the Central District of California indicted several Milberg Weiss partners on racketeering, mail fraud and bribery charges after discovering the firm had agreed to pay class-action plaintiffs a portion of the attorneys' fees if the firm won a case. This year, those partners received tough sentences for their actions—ranging from six months to 30 months in prison for their roles in the kickback scheme.

But corruption isn't limited to the plaintiffs bar.

In late March, Latham & Watkins partner Samuel Fishman pleaded guilty to fraud for overbilling his clients and charging false personal expenses to his firm—to the tune of more than \$300,000. The firm fired Fishman and reimbursed

all of its affected clients. Fishman appeared remorseful in his March 28 hearing, but offered up a possible explanation for his actions: He claimed he suffers from bipolar disorder.

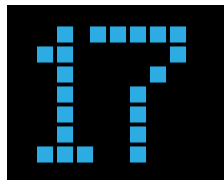
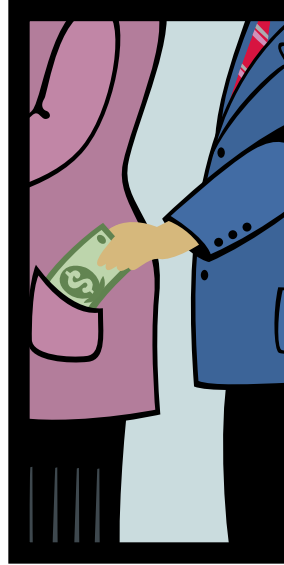
Corruption isn't limited to the plaintiffs bar.

Fishman certainly isn't alone in his greed. In September, a partner with Sullivan & Cromwell resigned from the New York bar after admitting he defrauded his firm and five of his clients out of more than \$500,000 in false expenses. According to Carlos J. Spinelli-Nosedà's affidavit of resignation, during his 10-year tenure with the large corporate defense firm he billed clients for such things as meals he never purchased and trips he had never taken. Spinelli-Nosedà admitted that if charges were

brought against him he would be unable to defend his actions.

Most recently, FBI agents arrested an Adams and Reese partner for breaking into the firm's computer network to download documents. James Perdigao had already been charged in 2004 with bilking the firm out of almost \$30 million and was out on bond at the time of his October arrest. The former New Orleans-based lawyer claimed prosecutors were conspiring against him because he possessed politically sensitive information. A New Orleans magistrate judge ordered that Perdigao remain in jail for violating the terms of his bond.

In early November, Perdigao pleaded guilty to 30 of the 63 felony counts he was facing.



Corrupt Counsel

There was no shortage of 2008 headlines spotlighting the misdeeds of in-house counsel.

The most recent involved David Aufhauser, former general counsel for investment bank UBS. On Oct. 7, Aufhauser agreed to pay \$6.5 million to settle an allegation that he dumped his investments in auction-rate securities after obtaining information that the market was in trouble.

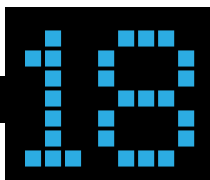
As part of the deal, Aufhauser will give up a \$6 million bonus he had been scheduled to receive from UBS. He also will pay a \$500,000 civil penalty. Aufhauser will not face criminal charges, and he is not required to admit any wrongdoing.

Much harsher punishment appears to be in store for Robert Graham, former assistant general counsel at General Re Corp. In February, a jury

convicted him of 16 counts including conspiracy, securities fraud, mail fraud

Aufhauser will give up a \$6 million bonus from UBS.

and making false statements to the SEC. His sentence—under consideration by the judge at press time—could



Judge Dread



In a perfect world, all judges would be wise, impartial and ethical. For better or worse, though, judges are humans too, and even they sometimes find themselves embroiled in controversy.

Within the past year, judges from across the country have faced reprimand for their conduct—ranging from the ridiculous to the downright corrupt.

“A lot of this year’s judges who got in trouble were federal,” says David

Lat, founding editor of *Abovethelaw.com*. “In past years, most of the judges who got in trouble were state judges.”

In October, the chief federal district judge in Colorado, Edward Nottingham, resigned amid accusations that he asked a prostitute to lie about their relationship. Nottingham, who oversaw Qwest

CEO Joe Nacchio’s insider trading case in 2007, has run into trouble before. Last year he said he was “too drunk” to remember how he spent \$3,000 at a strip club.

A Texas federal judge faces more sinister charges. A female court employee accused Judge Samuel Kent of abusive sexual contact and attempted aggravated sexual abuse. In August, he became the

first federal judge ever to be indicted for sex crimes. Kent has continued hearing cases as the investigation moves forward.

U.S. District Judge Thomas Porteous’ actions have led to the first attempt to impeach a federal judge in two decades. Investigators have accused Porteous, a Louisiana jurist, of perjury—he allegedly signed false financial disclosures and bankruptcy forms—and ethical mis-

conduct. He presided over a trial while allegedly taking money from attorneys on both sides. Impeachment proceedings began in September, but as of yet, he has not been criminally charged.

Questionable financial behavior also has plagued the West Virginia Supreme Court. After the court ruled in favor of coal giant Massey Energy, photos surfaced in January of Chief Justice

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Elliot Maynard partying in France with Massey CEO Don Blankenship. When the court reheard the case, Maynard stepped aside. However, Justice Brent Benjamin did not, even though the same CEO had donated more than \$3 million to his election campaign. A third justice recused himself after calling Blankenship a “clown.” Maynard has since lost an election and no longer serves on the court.

be up to 230 years in prison and millions of dollars in fines.

On Jan. 25, Thaddeus Bereday, general counsel of WellCare Health Plans, resigned under pressure along with chairman and CEO Todd Farha and CFO Paul Behrens.

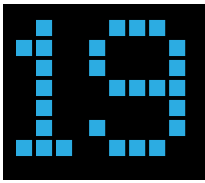
At the time, the health care company was under investigation for fraud in connection with refund payments to Florida’s Medicaid pro-

gram. In October the Department of Justice announced a guilty plea by a former employee who admitted he conspired to defraud the Florida Medicaid program out of more than \$20 million.

On Jan. 28, Kevin Heron, the former chief lawyer of Amkor Technology Inc., was sentenced to 15 months in prison for making stock trades based on confidential company information,

including expected adverse earnings reports and plans for a joint venture with IBM.

And on Aug. 14 Nancy Heinen, former general counsel of Apple Inc., settled illegal options backdating charges with the SEC for \$2.2 million. While she did not admit or deny the commission’s allegations, she agreed not to serve as a public company officer or director for the next five years.



Taking Care of Keywords

E-discovery feels overwhelming to in-house counsel, outside counsel and everyone else involved in ongoing litigation. Short of throwing your computer equipment out the window, no one can stop e-discovery's increasing burdens.

In May, a federal district court decision in Maryland clarified the rules again, this time for keyword search terms used in privilege review. The defendant in *Victor Stanley Inc. v. Creative Pipe Inc.* accidentally turned over 165 privileged documents during e-discovery, and the plaintiff, Victor Stanley, wanted to make the documents admissible.

Judge Paul Grimm agreed, in what experts have called the most important case yet regarding privilege in e-discovery. The judge said the defendant's sloppy keyword searching meant that privilege was waived.

"All keyword searches are not created equal," Grimm wrote.

Creative Pipe knew the difficulty in reviewing the tens of thousands of documents. After the court ordered both parties to produce electronically stored information, the defendant said it did not have enough time and asked for a clawback, an agreement that if the company inadvertently turned over privileged documents, the parties would agree not to use them. When the judge extended the deadline by four months, Creative Pipe withdrew its clawback request.

Originally, the defendant planned to use a human-led privilege review, but it dropped this strategy and used an automated search tool instead. During a second stage of review, several attorneys checked files by looking only at document titles.

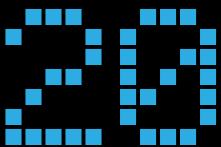
After discovery ended and the priv-

ileged documents had been given up, Creative Pipe could not explain its rationale for choosing search terms or defend the qualifications of the people who did the searching. Moreover, the defendant did not sample any results before turning them over.

"The only prudent way to test the reliability of the keyword search," Grimm wrote, "is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be."

Although Grimm's ruling is limited to a small jurisdiction, experts say the case will have a wide ripple effect.

"When ... less tech-savvy judges read something as clear as this ruling, they can make more confident choices," Patrick Burke, associate general counsel at Guidance Software Inc., told *InsideCounsel* in October.



Go-Getters

This year saw many high-profile in-house counsel land top-notch positions at some of the country's leading companies. While *InsideCounsel* would like to list every in-house attorney who has made an interesting move, we only have room for a handful of stand-outs:

In February, Roderick "Rick" Palmore, Sara Lee Corp.'s influential general counsel known for his "Call to Action" diversity initiative, became executive vice president, general

counsel and chief compliance and risk management officer at General Mills Inc. Palmore succeeded Siri Marshall, who retired Jan. 1.

Palmore launched his Call to Action campaign in 2004, aided by general counsel colleagues, with the goal of improving minority representation and mobility inside legal departments and law firms. Legal departments that join the Call to Action agree to limit ties with firms that don't meet certain criteria on hiring and promoting minority attorneys.

Three months after Palmore's appointment, Sara Lee named Margaret (Peggy) Foran executive vice president, general counsel and corporate secretary. She was previously senior vice president, associate general counsel and corporate secretary at pharmaceutical giant Pfizer, known for her expertise in corporate governance.

Brenda C. Barnes, chairman and

CEO of Sara Lee, said in a statement, "During her three-decade long career, Peggy has earned the respect of corporate leaders, stakeholders, directors, investors and peers."

Soon after, Pfizer named Amy Schulman as its new general counsel. She previously was a partner in the New York office of DLA Piper. Schulman had been leading the drug maker's defense in litigation involving its painkillers Celebrex and Bextra.

Then mid-year, Thomas Sager, who also is well-known for his efforts on law department diversity, was promoted to senior vice president and general counsel at E.I. du Pont de Nemours and Co. He replaced Stacey J. Mobley, who retired.

In 1997 Sager, along with several other in-house counsel, formed the Minority Corporate Counsel Association, which has become the leading diversity organization of its kind.