

Editorial

Litigation, Regulation and Risks



Carol Baker
Editor &
Director of Marketing

Following a year of doing business in a more litigious and cost-conscious environment, Corporate counsel in the UK and the United States are foreseeing the continuation of an upward trend in litigation that began with the economic downturn.

According to the *Fulbright's 7th Annual Litigation Trends Survey Report*, 93% of US and 97% of UK respondents expect legal disputes to increase or remain the same during 2011. This expectation follows a year when 87% of US respondents and 50% of UK respondents faced at least one lawsuit, arbitration or regulatory proceeding, compared with the prior year's 83% and 45% respectively.

"Over the history of our survey, respondents have accurately predicted the rise and fall of litigation with the economy," said Stephen Dillard, head of Fulbright's global disputes practice. "Since the global economy began languishing in 2007, litigation has climbed steadily for three years. It is telling that, even as in-house legal departments continue to carefully manage costs, more than one-quarter of this year's respondents say they have increased their litigation budget and one-third say they have increased how much they spend on litigation."

Nearly one-third of all survey respondents say cost control is the most important way in which the economic downturn is affecting litigation management. Yet budgets are still on the rise: 28% of all respondents increased their budget, compared with only 16% reporting a decrease. The spending story was similar: 31% report an increase, while only 21% report a decrease. Sector-wise, budget and spending increases were seen in high proportions in energy, financial services, health care and pharmaceuticals, insurance and retail. On average, one-third of all real estate respondents reported either budget or spending decreases.

Given the importance of cost control, Fulbright asked where respondents plan to tighten their belts. Cost-control appears to mean "reallocation" more often than it means "budget decreases." This is underscored by respondents who said

they plan to decrease their budgeted spend in the same area where the most respondents also indicated they plan to increase it, with one-fourth of all respondents planning budget increases for e-discovery and contracts; while one-fifth plan to increase budgets for labour/employment and regulatory work.

While respondents cited that contracts and labour/employment actions will continue to consume litigation resources, it is regulatory and risk concerns which are front-and-centre in the minds of in-house legal counsel. And if any company is inclined to believe that risk assessment and risk management are only a matter of understanding and managing financial risks, the example of BP has demonstrated very vividly that is not the case.

The survey's regulatory and risk findings were echoed by the response received when the Financial Reporting Council (FRC) met nearly 100 company chairmen as part of its review of the UK Corporate Governance Code. It started each meeting by asking them what their boards were doing differently as a result of what they observed happening in the banking sector. Almost without exception, the first answer was "spending more time thinking about risk".

In a speech to Audit Committee Chairs, Stephen Haddrill, Chief Executive of the FRC, said that the FRC wished to explore how companies were responding to the new principle in the UK Corporate Governance Code that boards are responsible for determining the nature and extent of the significant risks they are willing to take in achieving their strategic objectives. He noted that there is a lot of deep reflection currently underway in boardrooms and committees, and that it was premature for the FRC to amend current guidance before new good practice had the chance to develop.

As a result, the FRC plans to hold a series of meetings in 2011 of Board chairs, audit and risk committee chairs, executives, investors and advisers to share their views and experiences, before considering whether the Turnbull Guidance on risk and internal control needs to be amended.

Carol Baker