

LITIGATION OUTLOOK FOR 2009
by Stephen D. Susman

- I. Two things have happened in the last three months that should be greatly encouraging to any commercial trial lawyer.
 - A. In this period, more causes of action were created than in last 40 years—I use that time period only because it coincides with the time I have been trying cases
 - B. The country has elected as its president an African American who was president of the Harvard Law Review.
 1. Seriously, the meltdown of our economy has caused both sides of the political spectrum to recognize, for the first time in 30 years, that we need more govt. intervention and regulation in certain areas of our economy.

- a) For 30 years, Reaganomics and the Chicago School of free-market economics have brought us Tort Reform, Securities Law Reform, Class Action Reform and Antitrust Reform: all calculated to close the courthouse doors to injured parties, to protect business defs and to avoid lawsuits and jury trials.
 - b) Arbitration, mediation, summary judgments, heightened pleading requirements have all played their role in decreasing the number of cases filed and, even more dramatically, tried.
2. But, as the song goes, “the times they are a changing” and we are witnessing the pendulum

being pushed back towards the litigation boom of the 60s and 70s.

II. This is not to say that I have encouraged my partners to go out and buy bigger homes and new cars.

A. There will be some lean years ahead for trial lawyers because we are not immune from the economic conditions we work in.

B. First, while there are a lot of causes of action, it is harder to recognize them. A general economic turndown makes it difficult to distinguish between “shit happens” and malfeasance. A loss no longer is circumstantial evidence of scienter.

C. Second, clients can't afford to pay lawyers big hourly fees.

1. That's why major firms are freezing hourly rates.

And why others, that do corporate work and real

estate work as well as trial work, are laying off lawyers or just going out of business.

2. I quickly add that those that pay trial lawyers by the hour need to watch that what is given with one hand, is not taken away with the other by assigning too many lawyers to a case in order to counter the same hourly rates and to subsidize dormant practice areas.

- D. Finally, the absence of liquidity has already had an impact of the ability to settle lawsuits, forcing the trial of cases that should have been settled because the def had rather borrow from the plaintiff than use funds needed to settle that are needed to pay workers and trade creditors.

III. So where do I predict a major increase in litigation in 2009?

- A. Financial fraud is an obvious area: securities litigation, breach of fiduciary duty claims, accounting malpractice claims and probably legal malpractice.
- B. Breach of contract cases are becoming commonplace as firms invokes MACs because they just cannot afford to live up to their commitments or look for other ways to avoid long-term contracts entered into before the crash.
- C. Antitrust will make a comeback
 - 1. Already the number of price-fixing cases is increasing based on enforcement activity that started with the EEC. I predict the new DOJ and FTC will be much more active in these investigations.
 - 2. With Bush (a man who never saw a merger he didn't like) himself saying that the reason we are

where we are is we let the banks become too big to fail, I also predict increased Clayton Act enforcement.

3. With a Democratic Congress, I think it is highly likely that the Supreme Court's legalization of minimum resale price maintenance will be legislatively overruled.

D. Product liability litigation will revive as pressure builds in Congress to overturn the Court's preemption decisions, a goal that is high on the agenda of the pls' bar.

E. In the restructuring and bankruptcy area, post-confirmation litigation will flourish.

F. Environmental litigation of all types will increase as soon as a new EPA starts enforcing the laws on the books and Congress passes others to make sure the

American taxpayers are getting value as an Obama administration resorts to green public works projects as a way to both create jobs and combat global warming.