

KENNETH JOHNSTON KANE RUSSELL COLEMAN & LOGAN PC

How vulnerable is a company to bet-the-company litigation? Are there certain things companies do that make them more vulnerable?

Vulnerability varies from industry to industry. I spend most of my time representing highly regulated companies. On any given day, a garden-variety dispute can turn into a large exposure. Many regulatory schemes provide statutory damage claims, which are susceptible to class treatment. While many cases do not go that route, the vulnerability is always present. The measure of vulnerability often depends on the plaintiff's agenda. All too frequently, I see companies underestimate their adversaries and overestimate themselves.

What are the most common mistakes you see companies and their inside or outside lawyers making?

Failure to focus on synergy is probably the most common. Companies and inside lawyers often simply outsource litigation without collaborating more closely with their outside lawyers. Synergy will pay dividends through higher success rates and reduced costs.

What keeps you up at night?

Everything. I have had insomnia since I was in grade school. As it relates to my practice, I would say that deadlines concern me the most. A missed deadline means trouble for a client and a lawyer. You can never be too careful.

What's your law firm's biggest challenge right now?

One of our biggest challenges is identifying high quality lawyers (and) to hire candidates with the right mix of brains, brawn and finesse.

How is your competition changing, and how has that forced you to respond?

With the subprime fiasco and the credit crisis in full swing, I see the competition retooling their transactional practices to support financial services litigation. I don't have that luxury. It may be a good use of resources for those firms, but it puts more players in the marketplace. We are humming along on cases at a fast pace. Really, it is just about doing solid work and maintaining top-of-mind awareness.

What is your business motto?

The first time I answered this question it got me into trouble. I was in law school, competing for a summer job. My honest answer resulted in a prompt rejection letter from a pres-

tigious law firm: "Work hard, play hard!"

What is one of your "hot buttons?"

Lack of candor to the tribunal really gets me worked up. I appreciate competitive advocacy; that's why I do this. But there is a very clear line. Try to gain advantage over my client by misrepresenting case law or facts, and I will take the gloves off. Make an intellectually honest argument to a judge about why the law does not apply, and I will buy you lunch.

What are you most proud of?

My family. During the early part of the decade we suffered through a couple of tragedies. But we are very blessed and living life to its fullest — including having a new baby boy. On a professional level, I helped a family with an insurance dispute when I was a young buck lawyer. Due to a tragic illness, the family incurred medical bills that could have bought a very nice home. After two years, we obtained a full award and attorney's fees. After the trial, the presiding federal judge sternly admonished the insurance company, its general counsel and trial counsel: "If you were sitting over in state court you would be looking at some heavy punies!" To hear the judge say that made me feel very proud that I had the opportunity to guide that family through a dark time.

What impact, if any, will this year's presidential election have on trends in corporate litigation?

I think we will see more financial services regulation from consumer transactions to complex derivative products. The general public blames Wall Street for most of the widespread problems in the credit markets. Politicians have and will continue to respond with regulatory "fixes." The current problems in the credit markets have resulted in a wave of litigation — volume far greater than what we saw after the S&L crisis. Before the election is over, each political party will have a new regulatory agenda, which will materialize after the election. In due course, that will result in more litigation.

Intellectual property law seems to be hot right now. How is case law evolving in that area, and of what should companies be made aware?

Tort reform is at work. Over the last two years, the courts have put a tighter bridle on patent infringement claims.

What's your opinion about arbitration as it exists in 2008, and what advice would you give to a company that may view



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that as a good alternative to entering the fray in front of a jury?

Private versus public dispute resolution is not the easiest decision to make. Each system has pros and cons. I do think that arbitration plays a solid role in the international arena because it often eliminates complex sovereignty and choice-of-law problems. As for advice, it really depends on the client. Arbitration is good for some but not for others.

Do you see any trends in business litigation that have you concerned, or, conversely, that

you believe will be a positive change for companies as far as lawsuits are concerned?

The cost of discovery is always a concern. Over the past two years the federal courts, and to a lesser degree, the state courts, have been immersed in the discovery of electronically stored information. The trends in this area have created an expensive satellite industry for collecting ESI. Every case cannot afford what the discovery rules require. I have serious concerns that I am seeing less than comprehensive discovery from both clients and adversaries.



'THE COURTROOM BRINGS TO MIND TWO STORIES:

Witness gone wild. In this story, a witness attacked me during a whistle-blower action. The case involved a seedy scheme by a union president who allegedly bribed a material witness in exchange for favorable testimony in a pension embezzlement case. My questions prompted a litany of 5th Amendment refusals to testify. For nearly an hour, I examined the witnesses' basis for asserting the privilege. The judge made me stop. During the next break, the witness ambushed me in the hall and tackled me. The U.S. Marshal broke it up before we shed any blood.

Judge gone wild. In this story a judge took judicial notice that all former officers of failed financial institutions were "liars, chiselers and thieves." It just so happened that my client representative, as well as her husband, fell into that category. The ensuing chaos was a zoo: judge banging gavel; client representative crawling over counsel table in a skirt and yelling at the judge; me packing my bags and dragging the representative from the courtroom; and people in the gallery howling like hyenas.' — Kenneth Johnston