

IN FOCUS

VERDICTS

B2B takes on a whole new meaning

Business disputes dominated the landscape in 2007, as traditional torts paled by comparison.

By Julie Kay
STAFF REPORTER

WHILE BIG BUSINESS AND many legislators have painted the courts in the popular imagination as handing out gigantic verdicts in class actions, medical malpractice and products liability cases, in reality the biggest verdicts last year were obtained by businesses suing other businesses.

Also interesting to note was that several large law firms—historically thought of as strictly white-shoe defense firms—represented plaintiffs in securing some of the largest verdicts of the year.

Those were two insights gleaned from Top 100 Verdicts of 2007, a survey compiled by VerdictSearch, an affiliate of *The National Law Journal*. Award amounts in the survey reflect the jury's award and do not include increases or decreases resulting from contributory negligence, settlements or other post-trial activity, and the survey may not reflect every large verdict reached last year.

Kathleen Flynn Peterson, president of the American Association for Justice, the world's largest trial bar, said the picture that emerges reinforces what her group has been preaching.

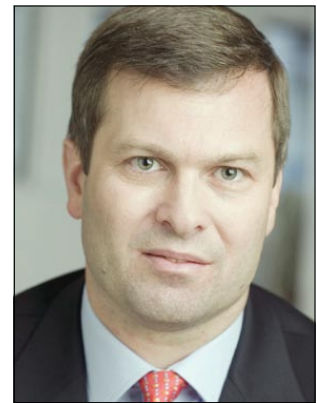
"The public thinks of trial lawyers

and their relationship to torts, but once again—and consistent to what we've seen—torts are a small percentage of the civil caseload," she said. "Big business argues that the courts are clogged with frivolous suits, and that really isn't borne out. Businesses suing businesses account for the vast majority of the verdicts—seven out of 10 [in the VerdictSearch survey]."

By VerdictSearch's count, the largest recovery in 2007—one that some observers think was the largest intellectual property (IP) verdict yet recorded—was the \$1.5 billion obtained by Kirkland & Ellis litigator John M. Desmarais for Lucent Technologies Inc., which accused Microsoft Corp. of infringing its patents underlying MP3 technology. The judge has thrown out that verdict, but Lucent is appealing that ruling. [See "This verdict made jaws drop," *The National Law Journal*, February 18, 2008.]

IP disputes combined were worth \$2.3 billion, roughly twice the value of the IP verdicts reported for 2006. That represented by far the largest proportion of nearly \$7.7 billion in recoveries in 2007. That total was practically unchanged from 2006, and so was IP's ranking.

Contract disputes, meanwhile, accounted for nearly \$1.6 billion in recoveries and fraud for \$587 million—the latter dramatically less than the \$1 billion in recoveries in 2006.



ASSAF: "You have to be willing to break the mindset" against plaintiff's work.

Torts worth less

Traditional torts generally recovered less than in 2006. Products liability recoveries were worth \$795 million, compared with \$834 million in 2006; medical malpractice verdicts were down slightly at \$552 million compared with \$530 million the year before; toxic torts recoveries were down, from \$554 million in 2006 to \$360 million in 2007; nursing home litigation declined from \$180 million in 2006 to \$54 million in 2007; and employment verdicts plummeted from \$238 million in 2006 to \$61 million in 2007.

Motor vehicle accident verdicts increased, by contrast, from \$316 million in 2006 to \$405 million.

In the securities litigation area, one trend has been toward plaintiffs taking cases all the way to trial, or at least very close. A prominent example—one that

didn't work out so well for lead plaintiffs' counsel at Labaton Sucharow of New York—was an investor lawsuit against JDS Uniphase Corp. and various top executives. Investors had sought \$20 billion in damages (from an Internet company valued at a mere \$3 billion) for alleged artificial inflation of the company's stock price. Plaintiffs also alleged that executives dumped large portions of their own stakes before the stock tanked.

In November, an Oakland, Calif., jury returned a defense verdict. In re *JDS Uniphase Corp. Sec. Litig.*, Master File No. C-02-1486 CW (EDL) (N.D. Calif. 2007).

Notwithstanding the outcome, the case illustrates trends that have been in the works for a while, according to legal observers. Not the least of these is the decline of the so-called "volume model" of securities litigation trailblazed by litigators like Melvyn I. Weiss and his former partner William S. Lerach. Under that model, defendants generally could be counted on to settle rather than risk trial. After 1995, however, the Private Securities Litigation Reform Act brought institutional plaintiffs to the forefront. They "are taking their fiduciary duties seriously and saying, 'I've got to maximize the recovery for the class,'" said Thomas A. Dubbs, who litigated the *JDS Uniphase* case for Labaton Sucharow.

Of course, "using trials can backfire," said Morrison & Foerster partner Jordan Eth, who with lead defense counsel James P. Bennett participated in the *JDS Uniphase* case.

They can succeed, too, as when Philadelphia's Barrack, Rodos & Bacine won a \$280 million jury verdict last month against Apollo Group Inc. for having fraudulently misrepresented recruitment practices at Apollo's University of Phoenix.

What most impressed litigation experts from around the country was the growing tendency of corporations to sue other corporations; to fight all the way to trial rather than settle; and to win big verdicts.

In other words, the days when corporations were loath to air dirty laundry involving business competitors in open court, and instead settled disputes behind closed boardroom doors with the help of mediators and arbitrators, may be ending.

Noting that IP and contract disputes represented about half of the recoveries last year, Gene Assaf, a litigator in the Washington office of Chicago's Kirkland & Ellis, remarked, "That's stunning.

"I can't believe that commercial disputes would account for half the dollars of the top 100 verdicts," said Assaf, who

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nonetheless achieved one of those verdicts in *BASF Corp. v. Lyondell Chemical Co.*, No. MRS-001069-05 (Morris Co., N.J., Super. Ct.), involving the breach of a chemical supply contract. [See "Practice makes perfect for these hot litigators," *The National Law Journal*, February 18, 2008.]

"I think this shows that corporations are becoming much more aggressive and much more sophisticated and comfortable with the jury system as a way of resolving disputes," Assaf said.

Assaf believes that corporations became more comfortable with the jury system in the 1990s, when many were hauled into court as defendants. Also, following the turn-of-the-century technology boom and resultant importance of IP assets, the amount of money at stake grew and technical issues became much more complicated, significant and worth fighting over, he said.

Moreover, clients have become somewhat dissatisfied with arbitration, with its limited discovery and lack of appeals process, he said.

Regarding tort reform, John Majoras, head of antitrust litigation at Jones Day,

said the public might be surprised to learn how few of the top 100 outcomes reported by VerdictSearch represented class actions.

"You think of class action as the big tickets," he said. "To me, that demonstrates that more settle. The class action bar has become a settlement bar."

Anti-corporate backlash

Trial lawyer Michael Papantonio of Levin Papantonio Thomas Mitchell Echnner & Proctor in Pensacola, Fla., believes that dissatisfaction arising from the lack of health care for many people, high gas prices, the Iraq war and the bungled recovery from Hurricane Katrina is feeding a backlash against Corporate America.

Papantonio secured the year's fifth-largest verdict, according to VerdictSearch. That was \$251.7 million in a case involving toxic waste from a West Virginia smelter plant. *Perrine v. E.I. du Pont de Nemours & Co.*, No. 04-C-296-2 (Harrison Co., W.Va., Cir. Ct. 2007).

"The American jury system is turning around," he said. "The public and juries are in a very punitive frame of mind."

Whether the plaintiffs' side of the courtroom will have long-term appeal for large, traditionally corporate law firms—and whether these firms are more willing to take cases on a contingency fee basis—is not easily answered.

Degrees of comfort

Clearly, many large firms are comfortable with one-off cases and with intellectual property actions, with corporations often countersuing in protracted, high-stakes disputes. Whether these firms will jump into lawsuits against accounting firms, banks and other big corporations remains an unanswered question.

If business-suing-business is a growing trend, as Assaf of Kirkland & Ellis believes, then his firm is in the forefront. Kirkland & Ellis represented three of the winning plaintiffs on the VerdictSearch top 10 list—two involving IP contests and the third in a contract dispute. But they are not alone.

Buchanan Ingersoll & Rooney of

Pittsburgh also represented a plaintiff in major litigation last year. That case was *Wheeling Pittsburgh Steel Corp. v. Central West Virginia Energy Co.*, No. 05-C-85-MJG (Boone Co., W.Va., Cir. Ct. 2007), involving allegations that the defendant's failure to deliver a special kind of coal on time resulted in damage to a smelter. The plaintiff recovered nearly \$220 million.

Also prominent in 2007 was Shook, Hardy & Bacon of Kansas City, Mo., a 117-year-old law firm. (It made the NLJ's Defense Hot List last year). That case was an IP dispute involving voice-over-packet technology. *Sprint Communications Co. v. Vonage Holdings Corp. Co.*, No. 2:05-cv-02433-JWL (D. Kan. 2007).

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The challenge for a big, "lumbering" corporate defense firm, he said, is to break out of simply defending a case on technicalities and fine points and to start thinking "thematically" and being willing to go to trial. "You have to break the mindset," he said.

Other firms clearly are resistant to taking on plaintiff's work. Steven W. Thomas of New York's Sullivan & Cromwell represented Banco Espirito Santo S. A. against its accounting firm in a contract dispute and won \$522 million. *Banco Espirito Santo Int'l Ltd. v. BDO Seidman LLP*, No. 2004-14009-CA-31 (Miami-Dade Co., Fla., Cir. Ct. 2007). Shortly after winning a verdict worth nearly \$522 million, he was effectively shown the door by his partners. Thomas recently set up his own litigation boutique in Venice, Calif.

"My firm was behind me—until it

actually happened," he said. "When it [the verdict] hit all the newspapers, they started getting calls from the mergers and acquisitions clients saying, 'What the heck are you doing suing accounting firms?' The message is: It's OK to represent plaintiffs as long as you aren't too successful."

Countered Assaf: "He would have been treated like a hero at our firm."

Sullivan & Cromwell declined to comment, as did other large firms including Baker & McKenzie, Greenberg Traurig and White & Case.

Jones Day's Majoras thinks IP will continue to be the exception to the defense-only rule for large firms.

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"Increasingly over the last 10 years or so, the interest in protecting IP rights and the value of those rights is so substantial that you want to hire the most capable firm," he said.

"From the plaintiff perspective, you need a lot of resources to handle these cases. There has to be so much expertise in science, etc., that you do see large firms taking on those cases. But I still think as a general matter, the larger law firms won't be on the side of plaintiffs."

TOP VERDICT CATEGORIES

Dollar value of verdicts by cause of action, in millions.

Rank	Category	Total
1.	Intellectual property	2,325
2.	Contract	1,589
3.	Products liability	795
4.	Fraud	587
5.	Medical malpractice	552
6.	Motor vehicle	405
7.	Toxic torts	360
8.	Premises liability	214
9.	Sexual assault	151
10.	Whistleblower	103

Source: VerdictSearch. Figures are rounded to the nearest \$1 million.

A larger truth may be that large law firms simply lack the litigation talent needed to become true litigation shops.

"The biggest, brightest law firms don't

have a large bench of litigators," said Papantonio. "If you take most defense organizations, historically they may have three lawyers that can try cases. They're trying to foster more trial lawyers and develop a stable of trial lawyers."

As far as Assaf is concerned, if large law firms don't start talking about representing plaintiffs—not in medical malpractice or class actions, but in corporate disputes—they will land in financial trouble. "Today's defendant is tomorrow's

plaintiff," he said. "In 2015, if law firms are not having an internal discussion about whether to represent plaintiffs, that's a bad sign." ■

Staff reporter Michael Moline contributed to this report.

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