

Top 10 US Court Awards & Settlements

As is our custom, our January *Alert* presents a brief summary of the most important US Executive Risks cases of the previous year. Since, by definition, only 10 can be chosen, the winnowing task is somewhat daunting. Criteria for selection varies, but ideally our Top 10 will feature cases that are significant not only in terms of the dollar size of the settlement or award, but also the impact they have had, or may have, on the Executive Risks lines of business and on future litigation.

We indicate which aspect of Executive Risks will be most affected at the end of each summary.

- 1. Enron:** The successful criminal prosecution of the company's two most senior executives – which was no certainty – demonstrated that the US legal process does work. **[D&O, E&O, Fidelity, Fiduciary]**
- 2. IBM:** The company's ultimate triumph in its decades-long battle with certain participants in its cash balance pension plan left both sides bruised (but saved the company the \$1B+ price tag for a loss) and demonstrated that complicated plan language and technical legal nuances can be lost in the passion felt by the plaintiffs for their cause. Although this decision brought closure for IBM, a number of high profile cash balance cases are still working their way through the courts, with no real certainty as to how they will be decided. **[Fiduciary]**
- 3. In re: IPO Securities Litigation:** Class action litigation is, for good or ill, a bedrock of the US legal system. So when a court overturns the largest consolidated securities class action ever, involving more than 100 firms for the better part of six years, it gets serious consideration for our Top 10. And when the case looks like it might be setting a new standard for certifying other class actions – possibly outside the realm of securities litigation – it is assured a spot on the list. **[D&O, E&O, EPL, Fiduciary]**
- 4. KPMG:** We have repeatedly said that corporate indemnification is not a certainty in today's world. The court's scathing wording in its holding regarding the firm's decision to not pay the legal fees for 16 former executives (indicted on criminal fraud charges related to the sale of allegedly improper tax shelters) indicates that this decision is not without cost. Since then, the Thompson memo has been superseded by the McNulty memo (from the President's Task Force Against Fraud) on judging corporate cooperation and encouraging companies to deny indemnification to those under suspicion. Undoubtedly, there is more to come on the subject in 2007. **[D&O, E&O, EPL, Fiduciary]**
- 5. US Airways:** ERISA tagalong cases (breach of pension fiduciary liability suits that partner with traditional D&O securities claims where there is company stock in a 401(k) or other type of pension plan) are making new law on a number of fronts. Therefore, a decision that carefully considers the competing legal issues and plan documents, and provides a possible road map for other plan sponsors is one that will likely impact other decisions and finds a place on our Top 10 List. **[Fiduciary]**
- 6. Burlington Northern & Santa Fe Railway:** Employment retaliation cases continue to bedevil both employers and the courts. The court considered whether or not impermissible retaliation could be found where there was no loss of wages or employment. This landmark

decision may well make it easier for employees who allege discrimination or claim whistleblower status to successfully pursue a retaliation claim. **[EPL]**

- 7. Hewlett-Packard:** The tension in today's boardroom may be at an all time high, but using questionable tactics to access private information on one's own executives can worsen rather than mitigate the problem. The company's settlement with the California Attorney General and several executive resignations do not even begin to measure the cost to the company of these activities. **[D&O, EPL]**
- 8. Comverse Technology:** Most who were caught up in the options dating scandal that hit in 2006 did not engage in criminal activities. Comverse's former CFO is one exception. In addition to pleading guilty to a criminal charge, the former executive represents one of the first settlements in investigations and litigation relative to stock option dating practices. As well as agreeing to cooperate with the Security & Exchange Commission's ongoing litigation, he will pay nearly \$2.4M in disgorgement, fines and interest, be barred from serving as an officer or director of a public company, as well as being suspended from appearing in front of the SEC as an accountant. **[D&O]**
- 9. Gemstar-TV Guide International:** The courts are just beginning to feel the impact of Sarbanes-Oxley (SOX). This case made our list because it demonstrates the use of SOX's claw-back provision to pull back excessive executive compensation during the period when a fraud occurred: in this case, to recompense shareholders hurt by a scheme that inflated revenues to meet financial targets. Shareholders will benefit from the disgorgement of salary and bonuses, exercised stock options and stock sales that resulted in millions for the company's former executives. **[D&O]**
- 10. PayPal:** In a world seemingly rife with security breaches, the company's settlement is potentially important. The suit was filed on behalf of a proposed class of customers alleging that the firm did not clearly communicate information about its consumer protection programs on specific types of transactions. On-line auction users will recognize the name. PayPal, an eBay company with over 100 million accounts, enables any individual or business with an email address to send and receive payments online, making it a significant cog in the wheel of virtual retail. **[E&O / Cyber]**

Executive Risks Regional Contacts

For further information, please contact any of the following:

Jonathan Ashall
145 King Street West
Suite 1200
Toronto, ON M5H 1J8
P- 416 646 8351
F- 416 869 1649
jonathan.ashall@willis.com

Murn Meyrick
145 King Street West
Suite 1200
Toronto, ON M5H 1J8
P- 416 216 0774
F- 416 869 1649
murn.meyrick@willis.com

Janet Bos
145 King Street West
Suite 1200
Toronto, ON M5H 1J8
P- 416 216 0794
F- 416 368 9189
janet.bos@willis.com

Catherine Richmond
1500-1095 West Pender Street
Vancouver, BC V6E 2M6
P- 604 605 5611
F- 604 683 5746
catherine.richmond@willis.com

Suzanne Brisebois
1130 Sherbrooke Street West
Suite 1400
Montreal, PQ H3A 2M8
P- 514 284 8106
F- 514 844 8022
suzanne.brisebois@willis.com