

TOP 10 COURT AWARDS AND SETTLEMENTS

Every year we consider the court awards and settlements from the previous 12 months that we believe may be of significance to companies and their executives in the coming year and beyond. We limit our list to cases impacting Executive Risks exposures: Directors & Officers Liability, Errors & Omissions, Employment Practices, ERISA Fiduciary and Fidelity/Crime.

1. MADOFF

Many share the blame in what will hopefully be the worst case of fraud this century: a master criminal, now behind bars; his accountants, soon to be in adjoining cells; various financial intermediaries around the world, and even the U.S. Securities and Exchange Commission (SEC), failing to detect the multidecade Ponzi scheme. With many years of litigation still to come, the task of preventing similar schemes will be a key challenge in 2010 and beyond. The temptation to create an even more onerous reporting and regulatory framework will be hard to resist. *Several cases.* **[Impact: Crime, E&O, Fiduciary]**

2. BANK OF AMERICA

A federal judge sent shock waves through corporate boardrooms and set the SEC back on its heels when he refused to accept a consensual settlement arising from Bank of America's purchase of Merrill Lynch. Instead, he found the settlement unfair and unreasonable because, essentially, there were no individual executives or their attorneys named in the suit or party to the settlement. The suit may be refiled, this time naming individuals as additional defendants. We fear that the lesson learned is to go after individuals rather than corporate defendants. *SEC v. Bank of America Corporation.* **[Impact: D&O, E&O]**

3. NOLL MANUFACTURING COMPANY

Employees argued that company accounts were being drained by oversized compensation packages approved for management by management by the company's officers and directors who were also fiduciaries of the private company's Employee Stock Ownership Plan (ESOP). A Court of Appeals held that the higher fiduciary standards of conduct set forth in the Employee Retirement Income Security Act (ERISA) should apply where an ESOP fiduciary also serves as a corporate executive making business decisions from which he or she could directly profit.



This holding may have implications for non-ESOP companies as well (especially when a large amount of employer stock is in company-sponsored plans). *Johnson v. Couturier* **[Impact: Fiduciary]**

4. YUMA REGIONAL MEDICAL CENTER

Before *Yuma*, the federal courts were already divided over the rights of independent contractors to sue for discrimination. The split widened this year as the Ninth Circuit's Court of Appeals reversed a lower court and ruled that a doctor whose contract was terminated can sue his or her hospital employer under the Rehabilitation Act. The Rehabilitation Act overtly covers only employer-employee relationships and *not* claims by independent contractors. This case can be seen as a significant win for independent contractors. As their number is rapidly expanding, this decision may have broad application. *Fleming v. Yuma Regional Medical Center* **[Impact: EPL]**

5. PEREGRINE SYSTEMS

This case produced the largest payment to date by outside directors in a securities settlement: \$61.5 million in personal funds. Securities class action lawsuits were filed against the company and certain directors and officers after it restated its financial statements by \$500 million; several officers, including the CEO and CFO, entered guilty pleas in the criminal investigations and the company ultimately filed for bankruptcy. Outside directors are getting more focus from the plaintiffs' bar; bankruptcy of the company leaves them alone in the center of the litigation bull's eye. *Alan Marshall, et al. v. Peregrine Systems, Inc., et al.* **[Impact: D&O]**

6. HEARTLAND PAYMENT SYSTEMS

After hackers stole information on 130 million credit and debit cards from this payroll and credit card processor, the firm successfully fended off a securities stock-drop suit by shareholders following news of the theft. While the court dismissed the complaint with prejudice, the "win" cost the company more than \$50 million in legal defense and forensic services. With more companies outsourcing their IT applications to vendors, this case is bound to be of interest to many. *In re Heartland Payment Systems Inc. Securities Litigation.* **[Impact: D&O, Cyber]**

7. XEROX CORPORATION

The U.S. Supreme Court will examine how much deference a court must give to a plan administrator's interpretation of plan rules under ERISA. A federal Court of Appeals had ruled that a court has "allowable discretion" to adopt any "reasonable" interpretation of the retirement plan's terms under certain circumstances, potentially overriding the administrator's position. As the only case involving ERISA that the Supreme Court has decided to hear this term, this case is going to be watched closely by plan executives and sponsoring companies. *Sally L. Conkright et al. v. Paul J. Frommert et al.* **[Impact: Fiduciary]**

8. FREDERIC BOURKE

Under the "conscious avoidance" theory, an individual who did not himself pay bribes but consciously ignored information clearly suggesting that they were paid can run afoul of the Foreign Corrupt Practices Acts (FCPA). This executive was sentenced to a year and a day in jail and fined a million dollars for conspiring to violate the FCPA and for lying to FBI agents. The court agreed with the prosecutors on the FCPA's knowledge standard: "When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is *aware of a high probability of the existence of such circumstance*, unless he actually believes the circumstance does not exist." Sometimes, what you don't know *can* hurt you – especially if it seems that you should have known it. *U.S. v. Bourke* **[Impact: D&O]**

9. CATERPILLAR

The company agreed to pay \$16.5 million to 80,000 401(k) participants to settle one of the 14 cases alleging excessive fees filed against large U.S. employers by a single law firm. The strategic decision to settle rather than spend years in litigation raises concerns that even though some companies have prevailed and gotten their suits dismissed, this line of cases may still be fairly expensive for all involved. With 401(k) pension plans now so critical to retirees and the additional suits focusing on the mutual funds themselves, any change in the liability landscape is bound to have loud repercussions. *Martin, et al. v. Caterpillar Inc., et al.* **[Impact: Fiduciary, E&O]**

10. MERRILL LYNCH

The company was accused of artificially inflating its share price by issuing false and misleading statements about collateralized debt obligations and other assets backed by subprime mortgages. The firm agreed to pay \$475 million to settle the consolidated securities class action and \$75 million to settle claims by the company's pension plan, which held the firm's stock. While many credit crisis and subprime suits have not fared well thus far in the courts, including a number that were initially dismissed, the outcomes can and will vary substantially. *In re Merrill Lynch & Co. Inc. Securities, Derivative and ERISA Litigation.* **[Impact: D&O, Fiduciary, E&O]**

CONTACTS

For additional information, please visit the **Willis Executive Risks website** or contact:

Atlanta, GA

Charles Maxell
404 224 5123
charles.maxell@willis.com

Boston, MA

David Goldstein
617 351 7498
david.goldstein@willis.com

Chicago, IL

Brian Gauen
312 621 4855
brian.gauen@willis.com

Denver, CO

Jim Iacino
303 218 4039
jim.iacino@willis.com

Los Angeles, CA

Chris Crawford
213 607 6294
chris.crawford@willis.com

New York, NY

Steve Pincus
212 915 7940
steve.pincus@willis.com

Radnor, PA

Matt Schott
610 254 5642
matt.schott@willis.com

San Francisco, CA

Michael Mahoney
415 291 1535
mike.mahoney@willis.com