

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. SKILLING¹

A number of high-profile prosecutions, including those of Enron's Jeffrey Skilling, Hollinger's Conrad Black and others, were put in doubt when the defendants challenged the scope of a federal law that was used to send them to jail: "honest services" or the crime of depriving others of one's service. In a hard blow for white-collar prosecutors, *the challengers won*.² The defendants, however, had also been charged and found guilty on other counts and so remain behind bars while the prosecutors re-work their strategies going forward.

[Impact: D&O]

2. WAL-MART³

With potentially billions of dollars at stake in this action, the U.S. Supreme Court agreed to consider whether or not federal class action status should be granted to the one million plus plaintiffs in this blockbuster gender discrimination suit. More broadly, the final decision by the High Court in this case may have significant implications for other/all potential federal class actions. **[Impact: EPL, D&O, E&O, Fiduciary]**

3. YOUTUBE⁴

The stakes: national precedent regarding the scope of potential liability for nearly every business on the internet that posts what could be infringing content (and potentially the future of the web). In this appeal, the plaintiff seeks to overturn a recent decision that under the safe harbor provisions of the Digital Millennium Copyright Act, YouTube bears no liability for thousands of videos posted by third parties on its site with alleged infringed copyrights. **[Impact: Media E&O]**



4. BDO SEIDMAN⁵

Plaintiffs sought to hold the accounting firm responsible for poor returns on securities purchased from a now-defunct financial firm.⁶ Deciding an issue that has split the federal circuits, the Third U.S. Circuit Court of Appeals firmly rejected the "fraud-created-the-market" theory in securities fraud cases. Supporters of the theory had argued that where no market exists for a security, investors should be able to rely on the factors that bring a security to market as proof of its genuineness, and so enjoy the same presumption of reliance that comes with the commonly accepted fraud-on-the-market theory. **[Impact: E&O and D&O]**

5. ROTHSTEIN⁷

In a fairly unique Ponzi scheme, attorney Rothstein raised \$1.2 billion by selling discounted stakes in fraudulent settlements of sexual harassment and

whistleblower lawsuits, which ranged from hundreds of thousands to millions of dollars. He told investors they would collect the full proceeds when the cases settled, while he actually took money from new investors to pay back old ones. Result: a 50-year prison sentence for using his law firm to run his Ponzi scheme. **[Impact: Crime]**

6. VERIZON'S BELL ATLANTIC CASH BALANCE PLAN⁸

While converting a traditional defined benefit plan to a cash balance pension plan, a scrivener's error, or drafting mistake, multiplied the participants' benefits, resulting in an increased value or cost of \$1.7 billion. The company sought to reform its plan. The court found clear and convincing evidence of a drafting error as well as extrinsic evidence as to the parties' understanding of the plan, and allowed for the correction of the error in spite of ERISA's written document rule.

[Impact: Fiduciary]

7. NATIONAL AUSTRALIA BANK⁹

Investors and foreign issuers are taking note of this Supreme Court decision that could significantly impact their ability to sue or be sued in the U.S. for securities fraud. This suit involved foreign plaintiffs who had purchased their shares of a foreign company on a foreign stock exchange (referred to as an "F-cubed case"). This precedent-setting decision set out the "transactional test" for determining the extraterritorial reach of U.S. securities fraud laws, holding that U.S. securities laws apply only to transactions made on U.S. exchanges unless the law expressly provides for a broader global reach.¹⁰ **[Impact: D&O and E&O]**

8. COMPUTER SCIENCES CORPORATION¹¹

"ERISA tagalong claims"¹² allege a breach of fiduciary duty relating to the value (or existence) of employer securities in an employer-sponsored pension plan. A determining factor in this matter is whether the court will apply the *Moench presumption*.¹³ In affirming summary judgment (win) for the defendants, the Ninth Circuit Court of Appeals joined the Third, Fifth and Sixth Circuits in adopting the *Moench* rebuttable presumption that fiduciaries acted consistently with ERISA in their decisions to invest plan assets in employer stock. With a split in the courts on this critical point, this issue may be ripe for review by the Supreme Court.

[Impact: Fiduciary]

9. JANUS FUNDS¹⁴

While we await the U.S. Supreme Court's ultimate decision, the focus in this case is on the critical distinction between a fraud's primary player and a helper. Interested parties, including lawyers, accountants and brokerage firms, all want the Court to clarify that they aren't primary actors and so are immune from private suits, even if they are actively involved in a fraud. In its brief, the S.E.C. says that if there was no violation of the law by Janus, it is not clear who committed the violation. **[Impact: E&O and D&O]**

10. KINDER-MORGAN¹⁵

In what may be the "largest common fund recovery in a merger acquisition case"¹⁶ a \$200 million settlement resolved the class action suit brought by company shareholders who objected to the share price when the company took itself private. The lawsuit accused the firm's managers of breaching their fiduciary duty by offering an "inadequate and unfair" price when they took the company private. As similar transactions occur, this matter can stand as a case study.

[Impact: D&O]

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¹ *Skilling v. United States*, 130 S. Ct. 2896, along with *Black v. U.S.*, 130 S. Ct. 2963, and *Weyhrauch v. U.S.*, 130 S. Ct. 2971.

² Justice Ginsburg, writing for the Court in *Skilling*, concluded that only kickbacks and bribery can be punished under the statute, concluding that Mr. Skilling “did not commit honest-services fraud.” She reached the same conclusion in a parallel case involving Lord Black. In the third case, the Court also ruled in favor of a former Alaska legislator, Bruce Weyhrauch, who was ensnared in a corruption probe.

³ *Wal-Mart v. Dukes*, 178 L. Ed. 2d 530.

⁴ *Viacom v. YouTube*, 718 F. Supp. 2d 514.

⁵ *Malack v. BDO Seidman*, 617 F.3d 743.

⁶ American Business Financial Services.

⁷ *U.S. v. Rothstein*, 2010 U.S. Dist. LEXIS 74814.

⁸ *Young v. Verizon’s Bell Atlantic Cash Balance Plan*, 615 F.3d 808.

⁹ *Morrison v. National Australia Bank*, 130 S. Ct. 2869.

¹⁰ For more on this decision, see our Executive Risks Alert “F-Cubed Suits After Recent U.S. Supreme Court Decision,” July 2010.

¹¹ *Quan v. Computer Sciences Corporation*, 623 F.3d 870.

¹² The name “ERISA tagalong” derives from the fact that this type of claim often accompanies a D&O securities class action and is based upon the same allegations of fraud as to value of these securities.

¹³ This presumption is based on the holding in *Moench v. Robertson*, 62 F.3d 553.

¹⁴ *Janus Capital Group, Inc. v. First Derivative Traders*, 566 F.3d 111 and 178 L. Ed. 2d 459.

¹⁵ *In re Kinder-Morgan Shareholder Litigation*, District Court of Shawnee County, Kansas, Case No. 06-C-801.

¹⁶ “Kinder-Morgan settlement OK’d,” THE CAPITAL-JOURNAL, Created November 19, 2010 at 5:56 PM, updated November 20, 2010 at 12:08 AM.