EXECUTIVE RISKS
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CHECK PLEASE: WHAT'S THE ERISA DAMAGE?

While there is ample data to assist in estimating potential damages in D&O securities class actions, the same cannot be said for tagalong claims brought under the Employee Retirement Income Security Act of 1974 (ERISA). This has proved frustrating to defendants who want a rough idea of their potential damages. It has also stumped buyers of Fiduciary Liability insurance trying to estimate their likely exposure.

One way to end this information drought is to assemble publicly available data on ERISA tagalong cases and study the relationship of ERISA tagalong settlements to the underlying stock-drop loss.[1] The Willis Executive Risks Practice recently examined this data, and found some initial correlations that may be useful in estimating coverage needs.[2]

"ERISA tagalong" is the term used to refer to claims that we would typically think of as D&O securities claims, as they arise after a drop in the value of the company's stock, except that these claims are brought separately on behalf of the company's pension plan (typically a 401(k) plan) that holds the employer's securities.

A GUIDELINE

Our numbers show:

- ERISA settlements averaged slightly more than a quarter (26.6%) of the amount of the stock-drop in question.
- Of the total amount awarded in stock-drop cases, in both D&O securities plus ERISA tagalong, 83.3 cents of every dollar represented the securities claims awards and settlements and 16.7 cents those of the tagalong claims. The larger the securities settlement, the larger the tagalong settlement.[3]

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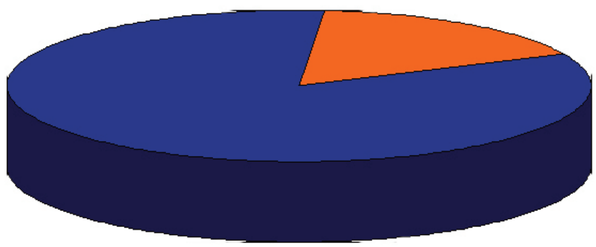
[1] Not every so-called tagalong claim follows an underlying or accompanying D&O suit; sometimes they are brought without any accompanying securities claim.

[2] Much of the data was gathered and compiled by Matt Shapiro, a Willis graduate intern.

[3] The correlation of ERISA settlements to D&O securities settlements in our study was very strong: .88.

COMPARING D&O SECURITIES SETTLEMENT VALUES TO ERISA TAGALONG SETTLEMENTS



What does it all mean? It means that ERISA tagalong claims need to be taken seriously. In concrete numbers, the ERISA settlements we studied ranged from $954,000 to $257 million. The securities settlements ranged from $9 million to $7.2 billion. A rough guideline based on these figures suggests that if securities claims are insured up to limits of $100 million, buyers should consider purchasing limits in excess of $25 million for ERISA tagalong claims, plaintiff legal fees and their own defense costs.

The usefulness of such a general rule, however, only goes so far. The actual numbers in each case varied widely. The range of outcomes varied from less than 1% to 70% of our stock-drop damage estimation. (The deviation was 16.7%.) Furthermore, a number of settlements were announced after we completed our initial study, and several dozen cases are still open; both may influence later findings when this study is performed again. The uncertainty around how to estimate their potential exposure will continue to challenge fiduciaries.

IT AIN'T OVER TIL IT'S OVER

The biggest hurdle in analyzing the ERISA tagalong claim data was determining the actual stock-drop damages. The complaints themselves were rarely helpful. Sometimes they simply stated that the plaintiffs were seeking "billions of dollars" in damages. And unlike D&O securities claims (where the time period in which to measure maximum stock-drop damages is well defined in statute), ERISA claims can be much more open ended. Under ERISA, the damage calculation is *ongoing* from the date of the alleged violation until the violation ends, often when the case is decided. In ERISA damage calculations, it's truly not over until it's over.

To derive the stock-drop damage estimates, we looked first to the court award or settlement document, then to the company's damage estimation in its public securities filings. If we had no luck with either of these sources, we calculated the amount based on the change in stock price from the date of the alleged violation to the date of the settlement agreement itself.

For more on the topic, please review our earlier discussion in our February 2008 *Alert*, "Spotlighting ERISA Tagalong Claims."

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