TOP 10 CASES FOR 2014

This year’s list of the top 10 legal decisions and settlements affecting the world of management liability (Directors & Officers, Fiduciary, Cyber, Errors & Omissions, and Employment Practices) points to yet another significant year in the Executive Risks arena. Last year was marked by several noteworthy decisions that not only had an immediate impact on the litigating parties and issues in dispute, but also teed up issues for further judicial and/or legislative consideration in 2015. So, while we have already turned the calendar on 2014, we anticipate that some of the key legal decisions and developments in 2015 will have their origins in legal decisions highlighted here.

1. Fifth Third Bancorp: Employers who offer company stock through employee retirement plans face the risk of so-called “ERISA tagalong” lawsuits in the event that the employer’s stock takes a turn for the worse. These lawsuits, which are similar in nature (though involve potentially different parties) to shareholder stock-drop claims, can be expensive and time-consuming. Unfortunately for retirement plan fiduciaries, the U.S. Supreme Court held that the fiduciaries are no longer entitled to a presumption of prudence when investing in company stock. However, the decision is not all bad news as the Supreme Court replaced the presumption with a heightened pleading requirement, imposing on plaintiffs the burden of demonstrating that the decision to invest in company stock was imprudent under the circumstances. Only time and continued litigation will tell whether this new burden more than offsets the likely rise in defense costs for plan fiduciaries.¹ [Impact: Fiduciary]

2. Halliburton: Class certification of plaintiff investors in securities fraud actions may still be based upon the presumption that each individual investor purchased the stock in an “efficient market,” meaning that any misinformation disseminated by defendants concerning the stock presumably impacted the stock price, but defendants may rebut the presumption by producing evidence that any misrepresentation did not actually affect the stock price. The Supreme Court refused to overrule precedent allowing for class certification based upon the efficient market hypothesis, but allowed defendants to present substantive arguments during class certification which may increase legal expense.² [Impact: D&O]

3. Target: Following a data breach, businesses who handle sensitive customer information, including credit and debit cards, may be forced to defend against a wave of class action lawsuits from the affected customers. But, what duty of care, if any, does the company owe to the financial institutions who issued those cards to the consumers? Despite lacking a direct relationship with the issuing banks, a federal court in Minnesota found that Target’s conduct created an increased risk of harm such that the banks, as foreseeable victims, were able to defeat Target’s motion to dismiss their claims stemming from the high-profile holiday-season data breach. Though it remains to be seen if the particular facts of the breach and requirements of the state law involved limit the case’s applicability in future data breaches, the case has certainly opened the door to increased costs and liability in the realm of cyber risk.³ [Impact: Cyber, D&O]
4. Integrity Staffing Solutions: The Supreme Court ruled that time spent by warehouse workers waiting for and undergoing security screenings after their shifts is not compensable under the Fair Labor Standards Act (FLSA). For pre-work or post-work time to be compensable, the activity must be related to the “productive” work for which the employee is employed. The decision represents a significant victory for employers, particularly those in the retail industry, as a number of similar suits are pending in courts around the country or have been settled by employers. That said, wage and hour claims continue to increase and remain a significant source of concern for employers.  

5. ATP TOUR: The use of a corporation’s bylaws to limit the number and impact of intra-corporate disputes continues to be a hot topic in the world of corporate governance. For example, bylaw provisions designating an exclusive jurisdiction for such disputes, or requiring an unsuccessful plaintiff to pay the company’s legal costs, can obviously provide a strong deterrent to expensive, frivolous shareholder litigation. That is why it was significant last year when the Delaware Supreme Court held that fee-splitting bylaw provisions, which allow a corporation to claw back some of its legal costs from an unsuccessful plaintiff in intra-corporate litigation who did not obtain a judgment on the merits that substantially achieves the full remedy sought, are per se valid. While the court’s decision served to reaffirm the validity of these important provisions, at least in the case of non-stock corporations, Delaware is considering passing legislation limiting the decision’s impact on stock corporations in early 2015. Stay tuned.

6. Tibble International: Over the past several years, the issue of fees paid by 401(k) plan participants has been the subject of several high-profile lawsuits. Last year, the Supreme Court entered the fray by agreeing to hear the case in the next term. The Court is faced with deciding whether or not ERISA plan fiduciaries breach their duty of care when they offer plan participants high-cost retail mutual funds instead of lower-cost institutional funds. While the Court’s decision is likely to focus on the tolling of ERISA’s six-year statute of limitations and not on the fees themselves, this case nevertheless holds important implications for plan sponsors by exposing them to potentially larger classes of plaintiffs. Oral argument is set for February 2015, with a decision expected later this year.

7. Omnicare: The Supreme Court granted certiorari to clarify the standard for pleading falsity under the federal securities laws, and in particular Section 11 of the Securities Act of 1933. Section 11 liability is based upon registration statements containing an “untrue statement of material fact” or omission. The Court will decide whether the alleged untrue statement must be both actually untrue and subjectively believed to be untrue by the speaker (as the Second, Third and Ninth Circuit Courts of Appeal have held) or whether the alleged statement need only be objectively false (as the Sixth Circuit Court of Appeals has ruled). A relaxed pleading standard under federal securities laws would increase potential liability of public corporations, auditors and underwriters. The Court heard oral argument in November 2014 and will issue a decision this year.

8. Activision Blizzard: The $275 million settlement of a shareholder derivative lawsuit brought by Activision shareholders ranks among the largest ever for a derivative suit, topping last year’s $139 million settlement involving News Corp. The suit was filed in connection with Activision’s and an entity controlled by Activision’s two senior officers’ repurchase of its shares from Vivendi SA., its controlling stockholder, which transaction plaintiffs alleged was conflicted. Of the settlement amount, $207.5 M of the settlement is to
be paid by Activision directors and officers and their D&O insurers, and the remaining $67.5 M is to be paid by Vivendi. The Settlement Fund, less plaintiffs’ attorney fee award, which may be as high as $72,500,000, is to be paid to Activision. This the latest mega settlement highlighting the increasing severity risk of derivative lawsuits.\footnote{Impact: D&O}

9. Siemens AG: Taiwanese citizen and resident employed overseas by Chinese subsidiary of Siemens could not sue Siemens successfully in New York federal court for wrongful termination and retaliation under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 USC Section 78u-6(h) (Dodd Frank or the Act), as its provisions apply only to conduct occurring within the U.S. and not extraterritorially. The court held that where the whistleblower, the employer, the conduct at issue, and the alleged retaliation were all located abroad, the plaintiff could not invoke the protection of the Act. This decision signals less protection for overseas whistleblowers under U.S. laws. The Second Circuit did not decide the issue of whether a whistleblower must report the alleged securities violations to the SEC (as the Fifth Circuit has held), or whether the Act only requires that the whistleblower report the conduct to supervisors with authority to investigate, as the majority of federal district courts have held. This is another issue to watch in the upcoming year.\footnote{Impact: EPL, D&O}

10. Adobe Privacy: Theft of customer information continues to be an important issue for companies of all size, particularly in the wake of several high-profile (and expensive) data breaches. Aside from the costs associated directly with the breach itself, these incidents often spawn a multitude of class action lawsuits. Affected companies are often able to defeat these lawsuits early on due to the plaintiffs’ inability to provide proof of “actual or imminent” harm necessary to maintain standing.\footnote{Impact: Cyber, D&O} That’s why a federal district court’s decision to allow the case to survive a motion to dismiss – even without actual proof of misused personal information – stands in stark contrast to nearly every other decision to date. Whether or not other courts opt to follow this court’s lead remains to be seen, but this may be a key issue for years to come.

CONTACTS
For additional information, please contact your Willis Client Advocate\textsuperscript{®} or FINEX\textsubscript{NA}@willis.com.

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1 \textit{Fifth Third Bancorp v. Dudenhoeffer}, 134 S. Ct. 2459 (2014)
5 On the topic of forum selection bylaws for intra-corporate disputes, we note that the \textit{City of Providence v. First Citizens BancShares}, C.A. No. 9795-CB (Del. Ch. Sept. 8, 2014) decision, in extending last year’s \textit{Chevron} decision to designated jurisdictions other than Delaware, reaffirms the potential of such provisions in containing the costs of abusive shareholder litigation by making multiple suits easier to consolidate and therefore potentially subject to one motion to dismiss early in the litigation.
Willis North America Inc.

Brookfield Place
200 Liberty Street, 7th Floor,
New York, New York 10281-1003
United States
Tel: +1 212 915 8888

www.willis.com

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6 ATP Tour v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014)
7 Tibble v. Edison Int’l., 729 F.3d 1110 (9th Cir. 2013), cert. granted, No. 13-550 (2014)
8 Indiana State District Council of Laborers v. Omnicare, 719 F.3d 498 (6th Cir. 2013),
cert granted, 134 S.Ct. 1490 (Mar. 4, 2014)
9 In re Activision Blizzard Stockholder Litigation, C.A. No. 8885-VCL (Del. Ch. 2014)
10 Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2nd Cir., 2014)
11 The US Supreme Court’s decision in Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013) was the decision most often relied upon in defending against post-breachment class actions on the basis of standing