TOP 10 COURT AWARDS AND SETTLEMENTS FOR 2013

As each year ends, we review the legal decisions, including court awards and settlements, from the previous year we believe will have the greatest impact on liability in the coming year and beyond for Directors and Officers, Employment Practices, Professional Liability/Cyber and Pension Fiduciary Liability exposures. Always a daunting task, this year we found several encouraging trends and at least a few indications that the status quo may be changing.

Please read the list below and let us know what you think.

1. Royal Dutch Petroleum: The potential extraterritorial reach of U.S. laws worries many global organizations; this is particularly true under the Alien Tort Statute (ATS). The Statute grants U.S. courts jurisdiction over any civil action by a non-U.S. citizen for a tort committed in violation of the law of nations or a treaty of the United States. In this employment/human rights action, a unanimous Supreme Court held that the standing presumption against the extraterritorial application of U.S. law applies to claims under the ATS. [Impact: EPL, D&O, Fiduciary, E&O]

2. Halliburton: Shareholder security class actions brought after a stock drop that follows revelations of alleged fraud are predicated on a rebuttable legal presumption referred to as the “fraud on the market theory.” The Supreme Court's decision to consider this case and to focus on this court-made legal predicate could drastically change the legal landscape for stock-drop litigation, long the bane of corporate America, potentially making it much more difficult for these suits to proceed. [Impact: D&O]

3. University of Texas Southwestern Medical Center: Retaliation claims are a serious concern for U.S. employers. In this case, the Supreme Court considered whether employees only had to show a “mixed-motive” for their Title VII retaliation claims – proof that an employer had a mix of motives for taking an employment action (including an illegal motive) – as opposed to the stricter “but-for” standard, requiring proof that the adverse employment action occurred because of an illegal motive. In a strong win for employers, the Court held that employees must show that an employer would not have taken the allegedly adverse employment action against them but for the employer’s unlawful retaliation, the higher of the two standards. [Impact: EPL]

4. Fifth Third Bancorp: When the company stock is in a company-sponsored retirement plan (including 401(k) plans), and the price of the stock drops significantly after the release of negative information, the potential is strong for “ERISA tagalong” claims. Very similar to D&O stock-drop claims, this type of suit is brought by a unique shareholder: one’s own retirement plan on behalf of the employees who own shares through the plan. In this decision, the U.S. Supreme Court agreed (“granted certiorari”) to consider whether fiduciaries may have breached their duties under ERISA by continuing to offer company stock in the retirement plan even after the value of the stock plunged. If the Court sides with the defendants, the risk of this type of suit may be largely eliminated. [Impact: Fiduciary]
5. **ComScore**: One of the largest firms tracking internet traffic was accused of secretly collecting and selling Social Security numbers, credit card numbers and passwords. The suit alleges violations of the Stored Communications Act, the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act. A federal court, on appeal, granted class action status to what could be the largest privacy case to go to trial (in terms of both class size and potential damages).⁴ [Impact: Cyber]

6. **Chevron and FedEx**: To combat duplicative multi-jurisdictional litigation, a number of companies amended their bylaws to include a forum selection clause, identifying their state of incorporation as the sole venue or location for state-based suits. Of course, this action itself drew litigation. In a powerful landmark ruling, the Delaware Chancery Court decided that directors of U.S. companies have the power to adopt “forum selection” bylaws requiring all shareholder suits brought in the name of the company to be filed in the state the directors select – without needing previous shareholder consent.⁹ [Impact: D&O]

7. **D.R. Horton**: The National Labor Relations Board had previously ruled that employees’ rights to engage in “concerted activities” under the National Labor Relations Act supersede the Federal Arbitration Act (FAA) – thereby requiring that employees be allowed to bring class actions and disallowing class-action waivers. The FAA, to the contrary, provides for the enforcement of parties’ agreements to resolve their disputes through arbitration rather than class or collective proceedings. In this case, the Fifth Circuit expressly overruled the Board’s decision, finding arbitration agreements containing class waivers to be enforceable, and bringing the courts in line with last year’s Supreme Court decision in *AT&T Mobility LLC v. Concepcion*.¹⁰ [Impact: EPL]

8. **US Airways, Inc.**: The Company’s health plan unambiguously provided for reimbursement to the plan of amounts recovered by the plan participant from a third party in connection with injuries caused by that third party (in this instance, an auto accident). The court ruled that plans can enforce their clearly stated reimbursement provisions. In doing so in this case, they resolved a split in the circuit court and rejected the “double-recovery rule,” under which a plan or an insurer can recover only what it paid after the injured person recovers all losses (such as pain and suffering), which would have limited the plan’s entitlement to reimbursement.¹¹ [Impact: Fiduciary]

9. **Siemens AG**: Dodd-Frank’s whistleblower bounty program has provoked worldwide interest and tips.¹² This means that attention is already focused on the global reach of its anti-retaliation provisions. While it may remain for the higher courts to ultimately decide, a court recently found that Dodd-Frank did not protect an employee in China who was allegedly terminated in retaliation for raising compliance concerns under the U.S. Foreign Corrupt Practices Act (FCPA).¹³ [Impact: EPL, D&O]

10. **Amgen**: Shareholders had accused the firm of misleading them about the safety of some of its products. The question before the court was whether the shareholders should first have to show that the alleged misinformation had materially and fraudulently inflated the stock’s price before being permitted to proceed as a class. In a 6-3 vote, the U.S. Supreme Court sided with the shareholders, making it easier for them to bring class-action lawsuits by allowing the class to proceed without first having to show the materiality of the alleged misinformation in falsely inflating the firm’s stock price in the early stages of litigation.¹⁴ [Impact: D&O]
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1 Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (Apr 17, 2013).
2 Fraud-on-the-market arose from the Supreme Court’s 1988 decision Basic v. Levinson (485 U.S. 224) and is based on the efficient markets hypothesis that a stock’s price reflects all the public information that can be known about it. This has meant that the plaintiffs did not need to prove that they were aware of the fraudulent matters when they bought the company’s stock and that they relied on the veracity of this information in their decision making.
4 Title VII of the Civil Rights Act of 1964 makes it illegal for employers to discriminate against employees on the basis of race, color, religion, sex, or national origin. It also specifically prohibits retaliation against employees for reporting or otherwise complaining about violations under the Act.
5 Univ. of Tex. Sw. Medical Center v. Nassar, 133 S. Ct. 2517, 186 L. Ed. 2d 503, 118 FEP Cases 1504 (2013) (June 24, 2013).
6 “ERISA” refers to the Employee Retirement Income Security Act of 1974, as amended, as is the federal law which sets the rules, responsibilities and potential personal liability of fiduciaries of corporate sponsored pension and welfare benefit plans.
12 http://www.sec.gov/whistleblower