

## ERISA CAPABILITIES

*Among the ERISA Litigation Cases Discussed Inside...*

---

**DiFelice v. US Airways, Inc.**

**In re Syncor ERISA Litigation**

**Hecker v. Deere & Company**

**In re WorldCom, Inc.  
ERISA Litigation**

For more than two decades, attorneys have retained Cornerstone Research staff and our affiliated experts to provide consulting support and expert testimony in commercial litigation involving securities and financial institutions matters. This experience has equipped our staff with the knowledge and tools to address a wide variety of Employee Retirement Income Security Act (ERISA) litigation issues effectively.

We have provided attorneys with analytical support in all phases of ERISA cases in which plaintiffs allege that the plan's investment in the corporation's stock was imprudent (ERISA company stock cases). We have worked with leading business and academic experts on both damages and liability issues in these cases. Although many of these cases are ongoing, others have been resolved favorably for our clients through trial, summary judgment, mediation, or settlement. We describe some of these cases in the following pages.

A new type of ERISA litigation emerged in 2006: suits that are filed on behalf of participants in company-sponsored retirement plans and allege that plan fees are excessive. In these cases, our work has included the analysis of damage theories and a review of the specific features of the plans at issue, placing both in the context of the 401(k) plan industry as a whole. Recently we have also addressed ERISA claims involving allegedly improper option grants.

Cornerstone Research works with affiliated faculty and industry experts in a distinctive "partnership" that combines the strengths of our extensive litigation experience with specialized, relevant knowledge from the business and academic worlds. Members of our senior staff also have served as testifying experts in ERISA matters. Our network of internal and external experts enables us to provide specific expertise across a broad array of relevant areas, including the prudence of the company stock as an investment option, the reasonableness of fees incurred by the plans, and damages flowing from these claims.

## SELECTED CASE EXPERIENCE

### **Vincent D. DiFelice, et al. v. US Airways, Inc., et al.**

Retained by Morgan, Lewis & Bockius

Defense counsel achieved a complete victory for US Airways, Inc. in the first post-Enron ERISA company stock case to go to judgment following trial. The plaintiff alleged that US Airways and the fiduciaries of the US Airways, Inc. 401(k) Savings Plan should have intervened to eliminate US Airways stock as an investment option and liquidate existing company stock holdings. Assisting the defense counsel, Cornerstone Research supported analysis and expert testimony by John Peavy, Ph.D., CFA, and Adel Turki, Ph.D.

Dr. Peavy analyzed US Airways' viability prior to its bankruptcy and explained the importance of considering the implications of modern portfolio theory in assessing the prudence of including employer stock as one among a set of diversified investment options. Dr. Peavy testified that at no point during the relevant period did the available information indicate that the stock was an imprudent investment option for the plan. Dr. Turki provided testimony demonstrating that an analysis of the plan's transaction and holdings data, using reasonable assumptions, implied a damages amount far lower than the amount calculated by plaintiffs' experts.

Following a six-day bench trial in the U.S. District Court for the Eastern District of Virginia, Judge T.S. Ellis III concluded that "there is no question the Company Stock Fund was a viable investment option throughout the class period" and "the continued offering of the Company Stock Fund as an investment option in the Plan was not a breach of US Airways' ERISA fiduciary duty. . . ." Moreover, in this precedent-setting decision, the court both accepted and cited modern portfolio theory. On August 1, 2007, the Fourth Circuit Court of Appeals affirmed the trial judgment in favor of the defendants.

### **In re Syncor ERISA Litigation**

Retained by Gibson, Dunn & Crutcher

As in many employer stock price drop ERISA lawsuits, plaintiffs in this matter alleged that the company and two of its board of directors' members were in possession of material information but failed to act to prevent losses by the employee retirement plan. Specifically, plaintiffs alleged that the company and the two board members breached their fiduciary duties by investing retirement plan assets in Syncor International stock while the company was engaged in an international bribery scheme.

Working with Dr. Allan Kleidon of Cornerstone Research, the attorneys representing Syncor established that the company's financial condition was not significantly affected by the international bribery scheme, and in fact Syncor's stock price outperformed both the NASDAQ index and the S&P 500 index during the class period. The court found that plaintiffs failed to establish that the plan's investment in the stock was imprudent, even given a stock price drop after public disclosure of the bribery scheme. Citing this evidence, among other things, the court granted summary judgment in favor of Syncor and the two company directors.

### **Dennis Hecker, et al., v. Deere & Company, et al.**

Retained by Morgan, Lewis & Bockius

Plaintiffs alleged that Deere and the fiduciaries of the John Deere Savings & Investment Plan and the John Deere Tax Deferred Savings Plan breached their duties to plan members and caused the Deere plans to pay excessive fees and expenses. On June 21, 2007, U.S. District Judge John C. Shabaz of the Western District of Wisconsin dismissed the complaint. Judge Shabaz ruled that Deere's fee disclosures were fully compliant with ERISA requirements and

that any claim based on the amount of the total fees is foreclosed by ERISA's safe harbor provision.

Working with Professor Laura Starks of the University of Texas and a member of the Texas Regents Investment Board, Cornerstone Research assisted counsel for Deere by analyzing plaintiffs' liability and damages claims. Our work included providing an overview of the relevant features of the 401(k) plan industry and analyzing the structure and fees of the Deere plans. We also analyzed the damages methodology used by plaintiffs' experts and assisted counsel to understand the ways in which the methodology was not appropriate.

### **In re WorldCom, Inc. ERISA Litigation**

Retained by Gibson, Dunn & Crutcher

In a precedent-setting decision regarding the role of a directed trustee, our client, Merrill Lynch Trust Company, FSB, achieved a complete victory via summary judgment. Cornerstone Research supported John Peavy, Ph.D., CFA, who testified regarding the viability of WorldCom prior to its bankruptcy filing in July 2002. Judge Denise Cote of the Southern District of New York ruled in favor of Merrill Lynch, concluding that "[t]he publicly available information regarding WorldCom did not create at any time before June 25, 2002, a reliable picture of serious concerns regarding the short-term viability of WorldCom." The court's opinion was the first to adopt the guidance provided by a Department of Labor December 2004 Field Assistance Bulletin that a directed trustee has a fiduciary duty of inquiry "when it knows or should know of reliable public information that calls into serious questions the company's short-term viability as a going concern." This decision has been cited favorably in several subsequent cases.

## CORNERSTONE RESEARCH ERISA DATABASES

### Company Stock Cases

Cornerstone Research has developed an extensive database of ERISA company stock cases, allowing us to provide relevant historical data on cases and settlements to our clients. Our database contains 146 cases filed since 1997. Most (131) of the cases were filed after the Enron ERISA case filing in November 2001. Figure 1 reports the number of ERISA company stock filings by quarter from 1997 through the first half of 2007.

Using a broad range of data sources, we have collected detailed information for each of the cases, including docket information, size and composition of the retirement plans, company performance, and case status.

Almost half of the cases in the database were filed in one of three federal court circuits: the Second Circuit (New York, Connecticut, and Vermont), the Third Circuit (Pennsylvania, New Jersey, and Delaware), and the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee). The two district courts with the largest number of filings are the Southern District of New York and the District of New Jersey. Almost 80 percent of the cases accompany a securities class action with similar allegations.

The sizes of the firms and retirement plans involved in these cases vary substantially. The proportion of company stock in the retirement plan at the beginning of the class period is, on average, 39 percent. Statistics on the companies, the retirement plans, and company stock performance are reported in Figure 2.

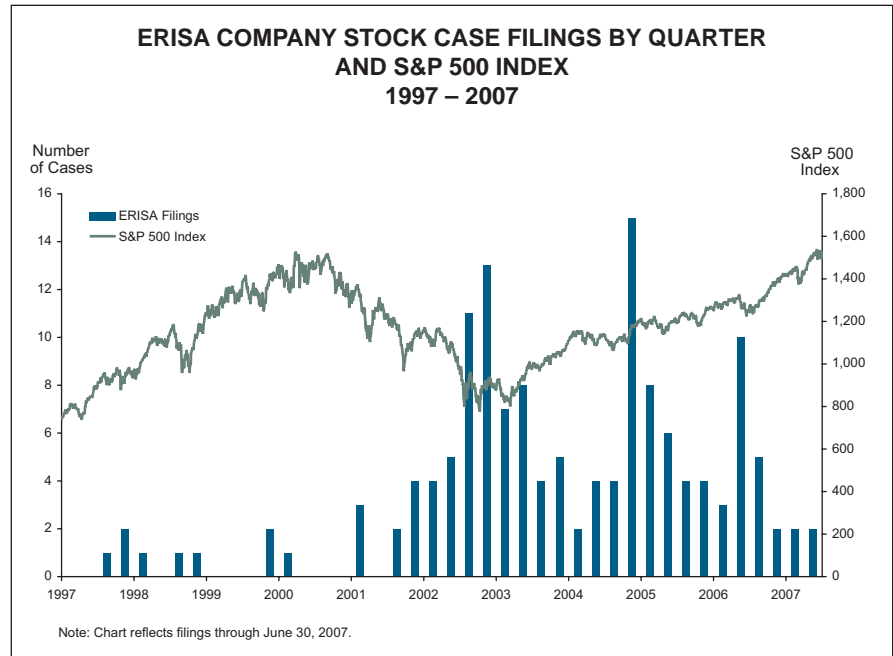


Figure 1

<b>ERISA COMPANY STOCK CASES SUMMARY STATISTICS</b>			
Dollars in Millions			
	Mean	Median	Maximum
Market Capitalization of Plan Sponsor	\$28,036	\$8,820	\$396,253
Value of Company Stock in Retirement Plan	\$804	\$179	\$23,095
Percentage of Plan in Company Stock	39%	39%	100%
Stock Price Decline in Class Period	57%	58%	100%
Maximum One Day Stock Price Decline	29%	24%	97%

Note: Market capitalization as well as the value and percentage of company stock holdings are measured as of the beginning of the class period. Cases for which certain data were unavailable are excluded from the above summary statistics.

Figure 2

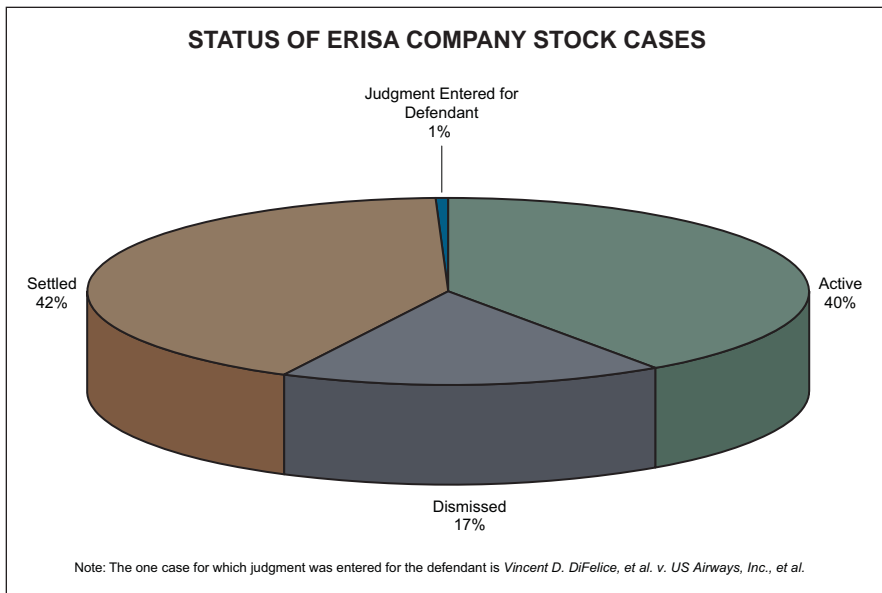


Figure 3

### Company Stock Cases, continued

Of the 146 cases in our database, 59 are still active, 25 have been dismissed, 61 have settled, and one (*DiFelice v. US Airways, Inc.*) has had judgment entered for the defendant upon the conclusion of trial. See Figure 3.

For the 61 settled cases, the mean (i.e., average) settlement amount is \$23.1 million, and the median (i.e., midpoint) settlement amount is \$8.6 million. The average time elapsed between the filing date and the settlement announcement date is 2.7 years. For the 54 settled cases that have an accompanying securities fraud case, the ERISA settlements are approximately 16 percent of the amount of the securities case settlement on average. Figure 4 provides information on the distribution of ERISA settlement amounts.

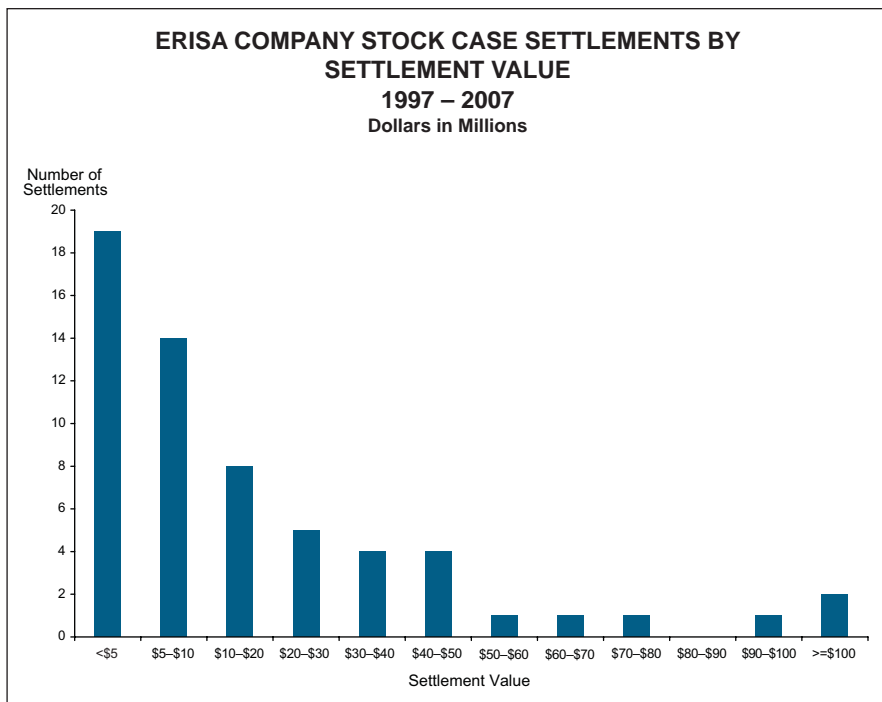


Figure 4

## CORNERSTONE RESEARCH ERISA DATABASES

### **ERISA Company Stock Settlement Prediction Model**

As part of our ongoing research on ERISA company stock case settlements, Cornerstone Research has begun to develop a statistical model of the determinants of settlement outcomes. Regression analysis based on the 61 settled cases reveals that the important determinants of settlement amounts include the following:

- Value of company stock held in the plan at the start of the class period
- Value of total assets in the employee savings plan at the start of the class period
- Excess return of the company stock over the S&P 500 return during the class period
- Market capitalization of the plan sponsor at the start of the class period
- Largest drop in company stock price during the class period

As expected, the analysis indicates that settlement amounts are higher the greater the value of the company stock in the plan, the greater the value of the plan, and the greater the market capitalization of the sponsoring firm. In addition, the analysis shows that the poorer the performance of the company stock relative to the S&P 500 and the greater the largest drop in the company stock price, the higher the settlement amount. As more cases settle, we will be updating this analysis.

### **ERISA Excessive Fee Case Database**

Cornerstone Research also has begun to develop a database capturing the recent ERISA excessive fee cases. Currently the database contains 18 case filings, the majority of which were filed during the third quarter of calendar year 2006. We have collected information for each of the cases, including the parties to the litigation, the number of participants, and the value of the retirement plan.

The average number of participants per plan is just over 67,000, and the median number is slightly less than 44,000. The average size of the retirement plans is \$7.5 billion with a median size of \$4.0 billion. At least ten of the plans offer company stock as an investment option in the plan. In 17 of the 18 cases, the plaintiffs allege that fees paid to investment managers were excessive; in over half the cases, plaintiffs allege that excessive fees were paid to both the plan's investment managers and its recordkeeper. Fourteen of the 18 excessive fee cases were filed by Schlichter Bogard & Denton.

### *Selected Experts*

---

**Christopher M. James**  
*William H. Dial/SunTrust Eminent Scholar of Finance, Warrington College of Business University of Florida*

**Allan W. Kleidon**  
*Senior Vice President Cornerstone Research; Lecturer in Finance, Graduate School of Business Stanford University*

**Kenneth M. Lehn**  
*Samuel A. McCullough Professor of Finance, Katz Graduate School of Business University of Pittsburgh*

**John W. Peavy III**  
*Chief Investment Officer RPF Equity Advisors, Inc.*

**Laura T. Starks**  
*Charles E. and Sarah M. Seay Regents Chair in Finance, McCombs School of Business University of Texas, Austin*

**René M. Stulz**  
*Everett D. Reese Chair of Banking and Monetary Economics, Professor of Finance, Fisher College of Business The Ohio State University*

**Lassaad Adel Turki**  
*Vice President Cornerstone Research*

*Selected Client Law Firms*

Akin Gump Strauss Hauer & Feld	Drinker Biddle & Reath	Kirkpatrick & Lockhart Preston Gates Ellis	Reed Smith
Alston & Bird	Farella Braun + Martel	Latham & Watkins	Richards, Layton & Finger
Arnold & Porter	Fenwick & West	LeBoeuf, Lamb, Greene & MacRae	Robins, Kaplan, Miller & Ciresi
Axinn, Veltrop & Harkrider	Finnegan, Henderson, Farabow, Garrett & Dunner	Manatt, Phelps & Phillips	Schulte Roth & Zabel
Baker Botts	Folger Levin & Kahn	Mayer, Brown, Rowe & Maw	Shartsis Friese
Baker & Hostetler	Fried, Frank, Harris, Shriver & Jacobson	McDermott Will & Emery	Shearman & Sterling
Baker & McKenzie	Fulbright & Jaworski	McKenna Long & Aldridge	Sheppard, Mullin, Richter & Hampton
Bartlit Beck Herman Palenchar & Scott	Gibson, Dunn & Crutcher	Milbank, Tweed, Hadley & McCloy	Sidley Austin
Bingham McCutchen	Goodwin Procter	Mintz Levin Cohn Ferris Glovsky and Popeo	Simpson Thacher & Bartlett
Boies, Schiller & Flexner	Harkins Cunningham	Mitchell Silberberg & Knupp	Skadden, Arps, Slate, Meagher & Flom
Cadwalader, Wickersham & Taft	Haynes and Boone	Montgomery, McCracken, Walker & Rhoads	Snell & Wilmer
Cahill Gordon & Reindel	Heller Ehrman	Morgan, Lewis & Bockius	Sonnenschein Nath & Rosenthal
Chadbourne & Parke	Hogan & Hartson	Morris, Nichols, Arsh & Tunnell	Stroock & Stroock & Lavan
Choate, Hall & Stewart	Holland & Hart	Morrison & Foerster	Sullivan & Cromwell
Cleary Gottlieb Steen & Hamilton	Howrey	Munger, Tolles & Olson	Thompson & Knight
Clifford Chance	Hunton & Williams	O'Melveny & Myers	Vinson & Elkins
Cooley Godward Kronish	Husch & Eppenberger	Orrick, Herrington & Sutcliffe	Vorys, Sater, Seymour and Pease
Covington & Burling	Irell & Manella	Palton Boggs	Wachtell, Lipton, Rosen & Katz
Cravath, Swaine & Moore	Jenner & Block	Paul, Hastings, Janofsky & Walker	Weil, Gotshal & Manges
Davis Polk & Wardwell	Jones Day	Paul, Weiss, Rifkind, Wharton & Garrison	Weston Benschhof Rochefort Rubalcava MacCuish
Debevoise & Plimpton	Katten Muchin Rosenman	Pepper Hamilton	Wiley Rein
Dechert	Kaye Scholer	Perkins Coie	Williams & Connolly
Dewey Ballantine	Kelley Drye & Warren	Pillsbury Winthrop Shaw Pittman	Willkie Farr & Gallagher
Dickstein Shapiro	Kilpatrick Stockton	Powell Goldstein	Wilmer Cutler Pickering Hale and Dorr
DLA Piper	King & Spalding	Proskauer Rose	Wilson Sonsini Goodrich & Rosati
Dorsey & Whitney	Kirkland & Ellis	Quinn Emanuel Urquhart Oliver & Hedges	Winston & Strawn

*Cornerstone Research*

www.cornerstone.com

<b>Boston</b>	<b>Los Angeles</b>	<b>Menlo Park</b>	<b>New York</b>	<b>San Francisco</b>	<b>Washington</b>
699 Boylston Street 5th Floor Boston, MA 02116 617.927.3000	633 West Fifth Street 31st Floor Los Angeles, CA 90071 213.553.2500	1000 El Camino Real Suite 250 Menlo Park, CA 94025 650.853.1660	599 Lexington Avenue 43rd Floor New York, NY 10022 212.605.5000	353 Sacramento Street 19th Floor San Francisco, CA 94111 415.229.8100	1875 K Street, N.W. Suite 600 Washington, DC 20006 202.912.8900
Christine S. Nelson	George G. Strong, Jr.	Cynthia L. Zollinger	James K. Malernee, Jr.	Vandy M. Howell	Michael E. Burton
John Gould	Richard W. Dalbeck	Catherine J. Galley	Lori Benson	Matthew R. Lynde	Michelle M. Burtis
Rahul Guha	Elaine Harwood	Michael C. Keeley	James C. Meehan	Andrea Shepard	Sharon B. Johnson
David F. Marcus	Carlyn Irwin	Allan W. Kleidon	Darwin V. Neher	Ilene S. Friedland	Lassaad Adel Turki
Barbara J. Alexander		Daniel M. Garrett	Jonathan M. Rozoff	Samid Hussain	Mary A. Woodford
Anu Bharadwaj		Michael D. Topper	Geeta Singh	Allan L. Kretz	Greg Eastman
Yesim C. Richardson		Alexander Aganin		Thomas R. Varner	Greg Leonard
		Kristin M. Feitzinger			Laura E. Simmons
		Bradley F. Johnson			
		Joseph T. Schertler			
		Adam A. Wantz			

