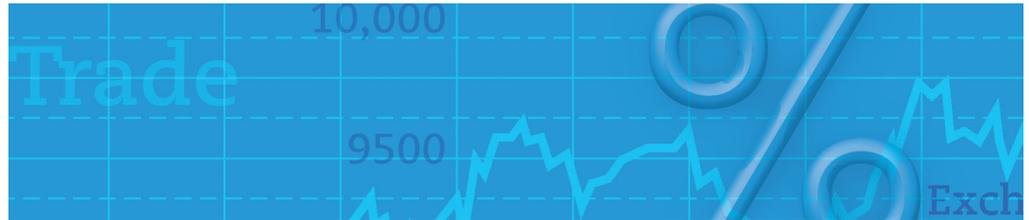


22 October 2008

Do Options Backdating Class Actions Settle For Less?

An Update to Part IV of A NERA Insights Series

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Previous topics in our options backdating series include:

- [The Statistics of Luck](#)
- [Accounting, Tax, and Economics](#)
- [Options Backdating: A Primer](#)

In the previous edition of this paper, published in June 2008, we noted that the eight shareholder class action lawsuits then in our database that involved backdating allegations had each settled for less than the amount forecast by NERA's settlement prediction model. Indeed, in all but one of these cases, the settlement was less than two-thirds of the predicted amount. We were unsure of the reasons for the low settlements observed up to that point, and put forward two hypotheses: either suits alleging backdating are generally viewed as weaker on the merits than other class actions (and would therefore be expected to continue to settle for less) or the weakest cases had simply settled most quickly, which would suggest that future settlements in backdating class actions might be as high as or higher than our predictions.

Three recent settlements—Brocade Communications, UnitedHealth Group, and Monster Worldwide—provide some support for the latter hypothesis: that the initial low settlements may have been because the weakest cases settled first. Both Brocade and UnitedHealth settled for amounts exceeding NERA's predicted settlement, while Monster settled for nearly 90% of the predicted settlement. In the UnitedHealth Group matter, the settlement announced was more than five times the predicted amount. Four other recent settlements—PainCare Holdings, Brooks Automation, Vitesse Semiconductor, and Openwave Systems—were more consistent with the pattern observed for the early settlements: the settlement in PainCare Holdings was for 25.6% of the predicted amount, the settlement in Brooks Automation was for 9.9% of the

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predicted amount, the settlement in Vitesse was for 27.3% of the predicted amount, and the settlement in Openwave Systems was for 28.1% of the predicted amount.

An updated version of Table 1 from our June 2008 paper shows that the actual settlements to date in backdating class actions have averaged about 74% of the settlements predicted by the model. The increase in this figure, from less than 38% in our June 2008 paper, is largely driven by the inclusion of the UnitedHealth Group settlement.¹

Using the updated sample of 15 settlements, we repeated our formal test to determine whether a backdating indicator variable, added to NERA's existing predicted settlement model, is statistically significant. With the additional settlements included in the data, the estimated backdating variable indicates that settlements in backdating cases to date are about 61% of settlements in comparable non-backdating cases. The result, however, is statistically significant only at the 8% level.² This means that, in light of the new data, we cannot reject at the standard 5% significance level the hypothesis that settlements in class actions involving backdating allegations are, on average, no different than settlements

in non-backdating cases with a similar level of investor losses and other characteristics captured by the model.³

It may be too early to reach any firm conclusion regarding which of the two hypotheses we put forward is correct. Of 40 backdating-related federal class actions filed to date, seven have been dismissed without leave to re-file and one has been voluntarily dismissed, so taking account of those cases and the 15 settled cases, 23 cases have been resolved and 17 are pending. We will continue to track these settlements and post updates as warranted.

Table 1 (Updated). Predicted and Actual Settlements for Backdating Class Actions as of 22 October 2008

Issuer Defendant (1)	Class Action Filing Date (2)	Settlement Status (3)	Settlement Date		NERA Predicted Settlement (6)	Actual Settlement	
			Tentative (4)	Final ⁴ (5)		Amount (7)	% of Predicted (8) =(7)/(6)
Newpark Resources, Inc.	04/21/2006	Approved	04/13/2007	10/09/2007	\$23,278,481	\$9,240,000	39.69%
Meade Instruments, Corp.	09/27/2006	Approved	05/24/2007	12/10/2007	3,037,964	2,950,000	97.10%
Rambus, Inc.	07/17/2006	Approved	09/07/2007	05/14/2008	217,713,093	18,000,000	8.27%
Mercury Interactive Corp.	08/19/2005	Approved	10/15/2007	09/25/2008	435,047,901	117,500,000	27.01%
American Tower Corp.	05/26/2006	Approved	12/13/2007	06/11/2008	24,386,368	14,000,000	57.41%
KLA-Tencor Corp.	06/29/2006	Approved	01/24/2008	09/26/2008	210,228,128	65,000,000	30.92%
HCC Insurance Holdings	03/08/2007	Approved	02/08/2008	07/17/2008	36,443,928	10,000,000	27.44%
Wireless Facilities, Inc.	03/15/2007	Tentative	03/14/2008	12/03/2008	33,847,340	4,500,000	13.29%
PainCare Holdings	03/21/2006	Approved	05/07/2008	09/15/2008	7,800,754	2,000,000	25.64%
Brocade Communications	05/19/2005	Tentative	06/02/2008		136,465,598	160,000,000	117.25%
Brooks Automation, Inc.	06/19/2006	Approved	06/24/2008	10/02/2008	78,243,309	7,750,000	9.91%
UnitedHealth Group	05/05/2006	Tentative	07/02/2008		182,889,372	925,500,000	506.04%
Monster Worldwide	03/15/2007	Tentative	07/31/2008	11/21/2008	53,278,071	47,500,000	89.15%
Vitesse Semiconductor Corp.	05/01/2006	Tentative	08/11/2008	11/17/2008	80,724,168	22,029,576	27.29%
Openwave Systems, Inc.	02/21/2007	Tentative	08/26/2008		71,083,962	20,000,000	28.14%
						Average	73.64%

Note: Cases are listed in chronological order of tentative settlement date.

¹ Excluding United Health, the average settlement is just under 43% of the predicted amount.

² This finding does not materially change if the parameters of the predicted settlement model are estimated using a sample of cases updated through June 2008.

³ Excluding the UnitedHealth settlement, however, the estimated backdating indicator variable is statistically significant at the 1% level and suggests that backdating cases settle for 50% of the settlement amounts in comparable non-backdating cases. In four of the cases shown in Table 1, the settlement encompassed allegations in addition to options backdating: Newpark Resources, Inc., Wireless Facilities, Inc., Paincare Holdings, Inc., and Vitesse Semiconductor Corp. If settlements of these cases are excluded, the results are qualitatively similar to the results presented above, which include these cases: the estimated backdating indicator variable is statistically insignificant if UnitedHealth is included, and significant at the five percent level if UnitedHealth is excluded.

⁴ For tentative settlements, the date shown in Column 5 is the date scheduled for a hearing to determine court approval.

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