

At A Glance

## Economic Analysis in ERISA Litigation

### Overview

In the last quarter century, employee benefit plans, especially 401(k) defined-contribution retirement plans, have become increasingly important as a means for saving for retirement and other purposes. Historically, litigation has arisen when stock or bond market fluctuations have imposed losses on these plans. The current financial crisis is no exception, and ERISA litigation over losses in these plans is once again on the rise. These losses typically relate to retirement plans containing employer stock in companies hit hard by the crisis. Shareholders may also pursue litigation over other poorly performing investments in 401(k) plans. In addition, crisis-related retirement plan disputes have arisen over such issues as the investment of cash collateral held in securities-lending programs.

Experts in NERA's Securities and Finance Practice have deep expertise in addressing the financial questions at issue in ERISA litigation, including prudence and reasonableness of decisions by fiduciaries, disclosure of information to plan participants, and estimation of losses to a plan or to its participants from alleged wrongdoing. In some cases, allegations are closely related to allegations in parallel shareholder class actions. In other cases, the allegations center on the retention of employer stock as an investment despite events (such as imminent bankruptcy) that heightened the risk of that stock. NERA's experts have also analyzed issues of allegedly excessive fees in 401(k) plans.

### Key Areas of Expertise

NERA economists apply their expertise to both liability and damages issues in ERISA litigation:

#### Liability Issues

ERISA cases typically center on the alleged imprudence of the inclusion of a particular investment option in the plan, most often the employer's stock. When plan participants suffer losses from their investments, NERA experts have been called upon to assess the causes of those losses. NERA experts have deep experience in analyzing such questions in the context of securities litigation, and bring

that same expertise to bear in ERISA litigation. An analysis of the causes of losses also bears on the related question of whether losses should have been foreseen.

#### Damages

NERA experts understand the important economic differences between ERISA and the securities laws, and have prepared estimates of alleged damages in many ERISA lawsuits. We are frequently asked to analyze and interpret plan financial data, preparing alleged damage estimates at the plan level. We have also worked with individual participant data, preparing alleged damage estimates for each participant in a plan. Damage estimates in ERISA cases



typically entail a comparison of actual returns with those on alternative “but-for” investments, and we have extensive expertise in evaluating information on investment options.

Similar analysis may be relevant in class certification proceedings. Members of the proposed class may be shown to benefit from different assumptions in damage calculations, such as different assumptions for starting and ending dates for the calculations. Some members may also be shown to have gained, rather than lost, from alleged breaches by defendants.

NERA maintains a database on ERISA class-action lawsuits related to employer stock. This database can be used to assist in settlement negotiations by providing information on settlements in comparable cases.

## Client Experience

NERA experts have consulted with counsel on dozens of ERISA matters. We have analyzed liability issues, and have also prepared estimates of damages assuming liability. Many of these cases have pertained to employer stock in defined-contribution plans, but we have also analyzed financial issues in a variety of other kinds of cases.

Examples of recent ERISA cases in which NERA has participated include:

- In *Summers, et al. v. UAL Corporation ESOP Committee, et al.*, a NERA expert submitted a report and gave deposition testimony related to the prudence of retaining UAL stock within the UAL ESOP after the terrorist attacks in 2001. The NERA expert also presented calculations of alleged damages assuming liability, under the assumption that UAL stock should have been removed from the ESOP. In 2005, the district court granted summary judgment for the directed trustee, relying on NERA’s and other expert reports. This decision was upheld by the Seventh Circuit.
- NERA has assessed the prudence of the removal of two single-stock investment options from a 401(k) plan, concluding that the large returns in those options after their removal could not reasonably have been anticipated

by plan fiduciaries. The NERA expert evaluated evidence on the efficiency of the markets for the two stocks, and considered the impact of the removal of the two stocks on the risk of the participant investment portfolio. NERA’s expert also calculated alleged damages assuming liability for each plan participant using a detailed set of plan data provided by the client.

- In another case, a NERA expert submitted a report on the reasonableness of fees in a 401(k) plan. The opinion was based on a comparison of returns after fees in the plan to comparable investment funds, and on a comparison of reported fees in the plan to those of similar 401(k) plans.

## About NERA

NERA Economic Consulting ([www.nera.com](http://www.nera.com)) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

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