

# FIDUCIARY LIABILITY

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The past year produced new as well as continuing challenges for ERISA fiduciaries and the companies that sponsor benefits plans for their employees. Internal and external financial pressures led many firms to curtail and/or eliminate benefits. But overall, exposures are not shrinking and new potential exposures are appearing in securities lending programs and target-date funds (also known as lifestyle plans) – both previously thought to be relatively risk free. If there is a lesson to be learned from the past year, it is that *nothing is risk free*.

- Willis saw an increase of 130% in the number of Fiduciary Liability claims filed over the previous year (following a 70% increase in 2008).
- However, market forces at play in the overall insurance field are countering what otherwise seemed to be ingredients for market hardening.
- We expect pricing to be stable this year, with decreases still possible for best-in-class risks.

## LOSS LEADERS

A major concern for fiduciaries is the increase in the size of the largest ERISA class action settlements. That figure hit \$17.7 billion in 2008, almost a ten-fold increase from \$1.8 billion in 2007, with the bulk of that coming from four large settlements.<sup>1</sup> With more ERISA tagalong claims against financial institutions working through the courts, these figures may grow further.<sup>2</sup>

Corporate downsizings have swelled the ranks of those who typically bring ERISA fiduciary suits – ex-employees. At the same time, courts appear to be liberalizing the rule that ERISA civil claims can only be brought by current or potential ERISA plan beneficiaries (or other fiduciaries themselves). In a series of recent cases, a more modern view is emerging that allows *past participants* who have cashed out of a plan to bring a claim. They may allege that a breach of ERISA's fiduciary duty improperly resulted in the reduction in value of their interest in the benefits plan.<sup>3</sup>

Litigation over fees related to some 401(k) pension plans (costs that are ultimately paid by the participants themselves) continues through the courts as well. Perhaps the most notable decision came from the U.S. Court of Appeals for the Seventh Circuit, which denied a petition to rehear *en banc* the John Deere 401(k) fees litigation case.<sup>4</sup> The plaintiffs filed this petition in the wake of the landmark decision dismissing their claims, in the first of the many 401(k) fee cases to be considered by the federal appellate courts. Stay tuned for more while defense expenses continue to mount.



Many purchasers of Fiduciary Liability insurance buy the coverage, in part, due to their awareness of ERISA's limitations on personal indemnification of fiduciaries (whether they be corporate officers, directors or employees). This issue came up recently when an appellate court denied corporate indemnification to the defendant fiduciaries. The court held that ERISA's fiduciary and self-dealing rules should apply to any fiduciary who also serves as a corporate director or officer at the time they make a fiduciary business decision from which they could directly profit.<sup>5</sup> While the ERISA plan in question here was an Employee Stock Ownership Plan (ESOP), this reasoning may apply to non-ESOP companies as well.

## PLAYERS AND PRICING

The major Fiduciary Liability insurers continue to be the major Directors & Officers insurers, though the roster is changing. For a period in 2009, this marketplace shifting resulted in some unexpected reductions in premium pricing. Now, a number of the new markets are beginning to look less favorably on this line and unpredicted price increases are cropping up. Almost gone are the precipitous drops that buyers previously enjoyed.

While we expect capacity to be stable in 2010, some of the markets that acted aggressively in the recent past are reconsidering and potentially re-pricing some Fiduciary accounts. So while stated capacity will likely remain the same, the willingness of some of these markets to continue to price aggressively is in doubt.

Best-in-class accounts for Fiduciary Liability insurance will continue to be those where:

1. The plan sponsor is not facing significant financial challenges
2. The pension plans do not (and did not) hold sizable amounts of company stock (10%+ of total plan assets, or \$1 billion or more in value)
3. Plan funding levels (if relevant) are 90% or more
4. M&A activity is at a minimum
5. Strong governance controls are in place

## TERMS & CONDITIONS

Terms and conditions to watch for include certain provisions migrating from D&O contracts, such as exhaustion of limits wording, carrier financial insolvency drop-downs, financial condition wording, broad severability and tailored claim notice requirements. Buyers should also consider ERISA-specific provisions specifying that damages in ERISA tagalong claims are not "benefits" that are excluded under Fiduciary Liability policies. Another potential issue is higher sublimits for a host of new and/or "improved" fiduciary penalties.

## CHANGING BUYING HABITS

Traditionally, buyers prefer to have the same carrier lead their Fiduciary and D&O programs. Over the last renewal period, this changed for a number of buyers and many split the ticket for the first time ever, utilizing different carriers to lead the two programs. Events in 2010 will tell us whether this new trend is likely to continue or whether there will be a return to a joint purchase with a single carrier.

## CONTACT

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<sup>1</sup>“Class Action Workplace Litigation Hot Item in '08,” *The National Law Journal*, January 21, 2009, citing a report issued by the law firm of Seyfarth Shaw.

<sup>2</sup> ERISA tagalong claims are ERISA suits arising out of a stock drop in the employer's securities when held in a company pension plan, such as a 401(k) plan.

<sup>3</sup> One of the more recent such decisions was *Harris v. Amgen, Inc.*, Case No. 08-55389 (U.S. 9th Cir, July 14, 2009).

<sup>4</sup> *Hecker v. Deere & Co.*, Nos. 07-3605, 08-1224, 2009 WL 1797441 (7th Cir. June 24, 2009).

<sup>5</sup> *Johnson v. Couturier*, 2009 US App LEXIS 16559, 9th US Circuit Court of Appeals.