



# Fiduciary Liability Claim Trends

Prepared by the Lockton Financial Services Claims Practice

February 2017 • Lockton Companies

## **CLASS ACTIONS ALLEGING EXCESSIVE FEES PAID TO SERVICE PROVIDERS REMAIN THE MARQUEE FIDUCIARY LIABILITY RISK**

Retirement plans are increasingly in the crosshairs for plaintiffs' lawyers. Allegations of breach of fiduciary duty based on payment of higher-than-reasonable fees to ERISA plan service providers are becoming more common.

### **In the past 18 months, at least 38 ERISA class actions have been filed.**

Commentators have noted that the number of suits filed over the past year and a half represents a surge over previous norms. This spike is partly driven by recent mega-settlements that have increasingly motivated successful firms and encouraged copycats to bring similar suits.

### **Smaller ERISA plans are now being targeted.**

In the past, excessive-fee ERISA litigation targeted large plans with at least \$2 billion in assets. More recently, plans in the \$500 million to \$1.5 billion range, and some even smaller, have been sued. Once again, if the plaintiffs continue to be successful, even more suits can be expected.

### **Plaintiffs are focusing on more than just corporate plans.**

Corporations are not alone in facing excessive-fee cases. A dozen prestigious universities have been sued by a single law firm under the applicable ERISA section for including investment options that charge excessive fees. While those cases are in their very early stages, the size of the 403(b) plans involved suggests that these suits could also result in large settlements, which could encourage still more litigation in this area.

### **Excessive fee class actions are expensive to defend.**

One insurer indicated that getting a case through the motion-to-dismiss stage costs between \$500,000 and \$750,000. Moreover, due to the number of documents involved and fact-intensive nature of these cases, completing discovery can cost between \$2.5 million and \$5 million.





### The news isn't all bad.

In *White v. Chevron* (N.D. Cal. 2016), Chevron won its motion to dismiss in a high-profile excessive-fee case against the leading plaintiff's firm in this area. The opinion was very defense-friendly and determined that the challenged selection of certain investment options by the plan fiduciaries was prudent. The opinion is expected to support defendants across the universe of these claims.

### The fiduciary liability insurance marketplace has not changed much.

The insurance marketplace has not yet reacted negatively to growth of excessive-fee litigation. Insurers continue to offer attractive pricing and retentions for most buyers.

### UNCERTAINTY CONCERNING NEW RULE EXPANDING DEFINITION OF "FIDUCIARY" UNDER ERISA

The Trump administration has issued an order directing the US Department of Labor (DOL) to review its new rule expanding the definition of who qualifies as a fiduciary under ERISA. The new rule broadens the class of investment advisors who are ERISA fiduciaries and requires them to act in the client's best interests, reveal all conflicts of interests, and to more clearly disclose all fees and commissions. The rule has raised fears that the new, more investor-friendly standard of care will lead to additional claims against investment advisors. Fortunately, such claims would be covered by fiduciary liability, investment advisor, and other errors and omissions policies. Although the rule is scheduled to become effective on April 10, 2017, it is now likely that the rule will be delayed, and it may ultimately be revised or rescinded.

## **GROWTH OF ERISA STOCK-DROP LITIGATION REMAINS FLAT, BUT COULD DECLINE IN THE FUTURE**

The number of ERISA stock-drop suits filed per year has not grown in recent years. Those suits are filed by retirement plan participants against fiduciaries who elect to include shares of the company sponsoring the plan as an investment option. Plaintiffs typically allege that the fiduciaries knew that the company's stock was a poor investment but that they included it anyway.

Approximately 70 percent of ERISA stock-drop cases are filed following a related securities class action. Although settlements of those ERISA cases are typically less than the related securities class actions, the amounts are often large. According to Cornerstone Research, for suits filed between 1997 and 2014, the median settlement for ERISA stock-drop matters is \$6.5 million, with the average settlement about \$31.4 million.

The number of ERISA stock-drop suits may decline because of a very recent decision of the US Supreme Court. On January 25, 2017, in *Amgen v. Harris*, the Court decided that a stock-drop suit is vulnerable to dismissal if the plan fiduciaries might have done more harm than good by eliminating the stock as an investment option. An example of such harm would be the effect on the stock price if the stock is removed from the plan and participants and other investors begin to sell it, thinking that it is no longer a good investment. Some speculate that it may prove difficult for plaintiffs in many cases to overcome this hurdle and it may lead to fewer suits being filed as a result.

## **RECOVERIES BY THE EMPLOYMENT BENEFIT SECURITY ADMINISTRATION**

The Employment Benefit Security Administration (EBSA) is responsible for securing the integrity of private employee benefit plan systems. During 2015, the EBSA recovered nearly \$700 million on behalf of plans and participants. The EBSA achieved monetary recoveries and other corrective actions in 67 percent of its civil investigations. And the EBSA closed 275 criminal investigations, 67 of them with guilty pleas or convictions, and indicted 61 individuals.



## LEGAL DEVELOPMENTS

### When does a breach of fiduciary duty claim under ERISA accrue?

In 2015, the US Supreme Court decided in *Tibble v. Edison International* that ERISA plan fiduciaries have a “continuing duty to monitor trust investments and remove imprudent ones” and that a plan participant can bring a claim within six years of any failure to monitor. The case was remanded to the trial court to determine if a review of investment options added more than six years before the suit was filed was required. Commentators feared a ruling that plaintiffs could use to defeat motions to dismiss as well as bring new ERISA cases that were previously believed to be time-barred. But the Ninth Circuit dismissed the matter again without addressing the issue, leaving the question of review unanswered. For the near term, the trigger for when an ERISA claim accrues will remain unchanged.

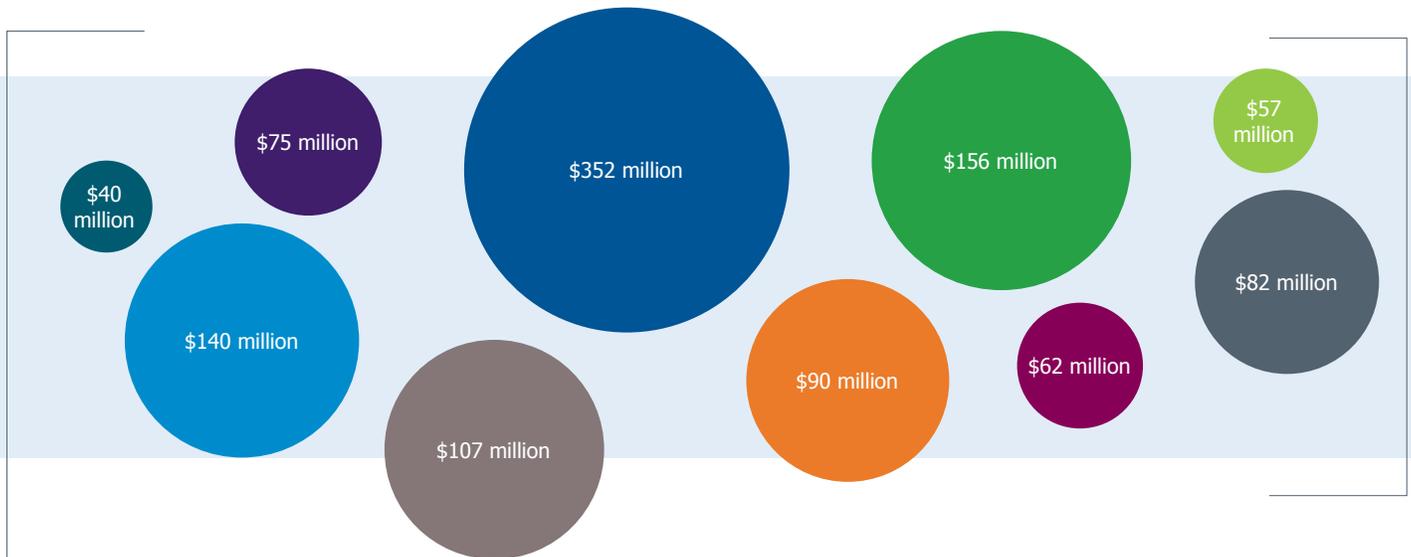
### Who qualifies for the “church plan” exemption to ERISA?

The US Supreme Court agreed to hear three consolidated cases from different Circuits concerning the church plan exemption to ERISA. The IRS has taken the position that church-affiliated plan sponsors—often healthcare systems—are captured by this exclusion and not subject to ERISA’s requirements. The Third, Seventh, and Ninth Circuits disagreed, saying that the plan must be maintained by a church or association of churches to qualify for the exemption. If the Circuit rulings are affirmed, a host of plans will be subject to ERISA and associated claims. Experts fear that if these rulings are upheld, there will be an influx of new claims that could result in billions of dollars of liability.

### Can an ERISA plan recover settlement monies in a securities class action?

Retirement plans that hold their sponsoring company’s stock are often some of the company’s largest shareholders. If a shareholder brings a securities class action, the retirement plan may be able to benefit from any settlement reached. Class action settlements typically exclude affiliates of the company being sued. Consequently, a plan’s ability to participate in the settlement depends on whether it is considered to be an affiliate of the sponsoring company. In *American International Group, Inc. Securities Litigation*, 2016 WL 5075939 (2nd Cir. Sept. 20, 2016), the Second Circuit decided that AIG retirement plans were not affiliates of AIG and that they could, therefore, receive their share of a shareholder class action settlement. The decision conflicts with a Seventh Circuit case, which could ultimately result in the question being decided by the US Supreme Court. In the interim, it will be interesting to see whether recoveries by a plan impact the incentive that plan participants have to bring claims alleging that plan fiduciaries acted imprudently by including company stock as an investment option.

## NOTABLE SETTLEMENTS



- **\$352 million settlement** in Washington by Providence Health Services for alleged ERISA violations related to the church plan exemption. (2016)
- **\$156 million settlement** in Mississippi by Singing River Health Services for alleged ERISA violations related to annual required contributions to the plan. (2016)
- **\$140 million settlement** by Nationwide Life Insurance arising from allegedly receiving undisclosed revenue-sharing payments from nonproprietary mutual funds. (2015)
- **\$107 million settlement** in Connecticut by Saint Francis Hospital for alleged plan mismanagement. (2016)
- **\$90 million settlement** by Boeing arising from alleged deprivation of benefits after sale of Spirit Aero Systems business unit. (2015)
- **\$82 million settlement** by Meriter Health Services for alleged improper lump-sum pension payments. (2015)
- **\$75 million settlement** in Maryland by Trinity Health for alleged ERISA violations related to the church plan exemption. (2016)
- **\$62 million settlement** by Lockheed Martin arising from alleged excessive fees for plan menu options. (2015)
- **\$57 million settlement** by Boeing arising from alleged excessive fees for recordkeeping and managing mutual funds. (2015)
- **\$40 million settlement** by American International Group for alleged breach of fiduciary duty related to allowing employees to invest in company stock as it headed into the financial crisis. (2015)

### Other Settlements

- **\$36 million settlement** by Northern Trust Investments arising from alleged imprudent management of collateral pools in its securities lending program. (2015)
- **\$33 million settlement** by Freight Car America arising from termination of union workers' retiree health and life insurance benefits. (2015)
- **\$30 million settlement** by International Paper arising from alleged excessive fees and improper revenue sharing. (2013)
- **\$27.5 million settlement** by Ameriprise Financial arising from alleged self-dealing and other breaches of fiduciary duties. (2015)
- **\$19.8 million settlement** in Utah by Larsen, Inc., for alleged overpayment by the ESOP for stock. (2016)
- **\$11 million settlement** in Alabama by Baptist Health System for alleged ERISA violations related to the church plan exemption. (2016)
- **\$10.3 million settlement** by Invesco with the DOL due to alleged improper valuation of plan assets under ERISA. (2016)
- **\$9.7 million settlement** by Eastman Kodak arising from alleged breach of fiduciary duty for continuing to invest in company stock when it was not prudent. (2016)
- **\$7.1 million consent** judgment in Indiana by PBI Bank for alleged overpayment by the ESOP for company stock. (2016)
- **\$6.25 million settlement** by AVON arising from alleged breach of fiduciary duty for continuing to invest in company stock when it was not prudent. (2016)

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