



# Fiduciary liability claim trends

November 2018



Traditionally, fiduciary liability claims were of low frequency and severity, and many insureds enjoyed corresponding low retentions and premiums.

While insurers have not reacted in a unified way, the claim environment has become much more active and severe during the past 24-36 months, highlighted by well-publicized excessive fee litigation under ERISA. This fiduciary liability claim trends report discusses, among other items, the many excessive fee cases brought against universities, why proprietary funds are more challenging risks, and recent results from a Boston College study examining the causes and consequences of 401(k) lawsuits.

## University 403(b) plan excessive fee claims see defense verdict in first trial but show mixed results overall.

Excessive fee claims against businesses managing 401(k) plans have spiked in frequency during the past several years. In late 2016, the primary culprit for those claims, the law firm of Schlichter Bogard & Denton (Schlichter), abruptly switched targets. They filed more than a dozen lawsuits against prominent universities in connection with their 403(b) plans. Excess fee lawsuits against universities have reached varying results:



- **New York University (NYU) won at trial, but now faces an appeal.**

In the first of Schlichter's university cases to go to trial, the court ruled in NYU's favor, finding that the plaintiffs failed to prove that the retirement committee acted imprudently or that the plans suffered a loss as a result.<sup>1</sup> This strong defense result is an encouraging sign that these cases can be defended and won. However, few expect Schlichter to give up on the university cases. The firm appealed this verdict and has a strong record appealing defeats in these cases (see following page).

- **Other university lawsuits have seen mixed results, including dismissals, class certification and settlement.**

Claims against the University of Pennsylvania and Northwestern University were dismissed at the pleading stage, but both cases have been appealed. In that vein, a motion to dismiss in the Johns Hopkins case was denied, but the 4th US Circuit Court of Appeals granted the defendant's interlocutory appeal. Conversely, courts allowed claims against Vanderbilt and another university to move forward, with the latter case now certified as a putative class. The University of Chicago settled the excess fee case against it for \$6.5 million. That appears to be a good deal in light of amounts paid to resolve other excessive fee suits.

The increased frequency of 403(b) suits has begun to migrate from the higher education space into other nonprofit institutions, with at least one healthcare system facing an excessive fee claim. In the current climate, plans of all types and sizes are potential targets, and insureds should seek advice from counsel to mitigate risk of a claim.

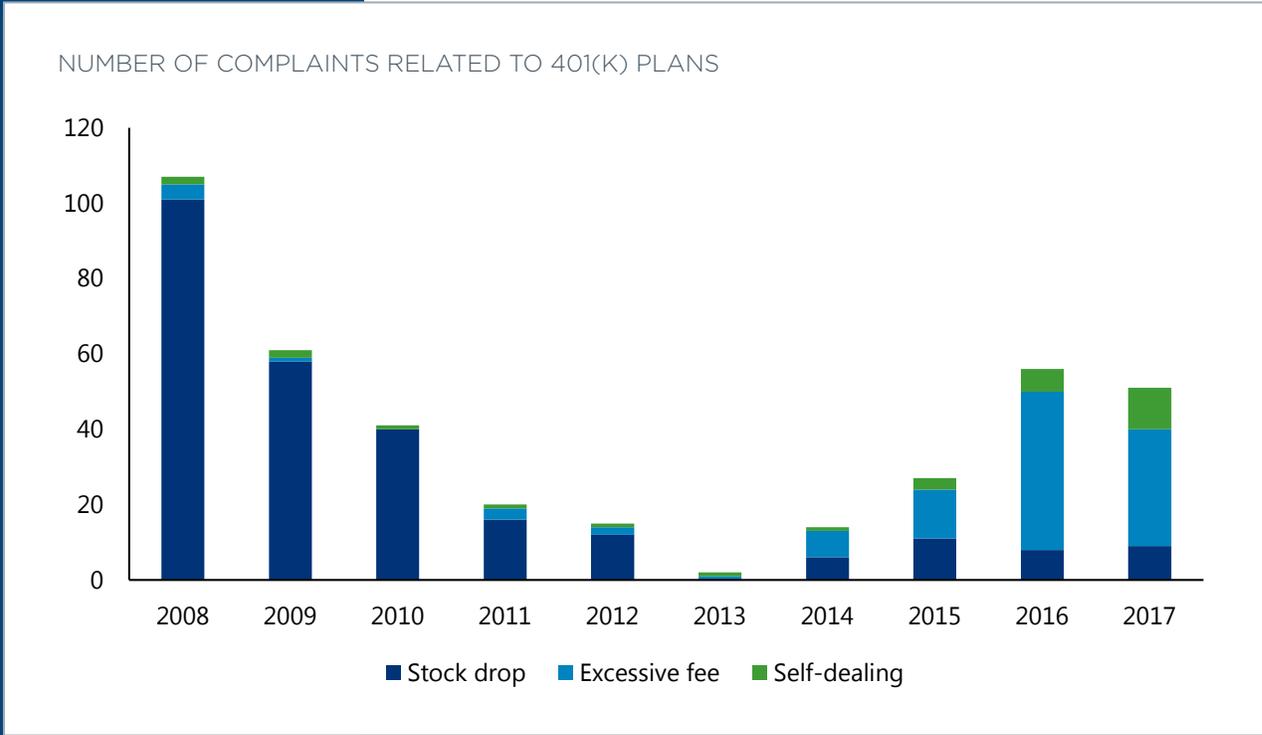
## Frequency of lawsuits against plans using proprietary funds remains high.

---

While excessive fee claims remain at elevated levels, plans employing proprietary funds have proven to be the most enticing target. These plans arguably have greater potential exposure. This is because of the perception that plan fiduciaries have a conflict of interest and select proprietary funds not based on merit, but to provide revenue to the plan sponsor. For example, General Electric (GE) had four lawsuits consolidated in the District of Massachusetts alleging it breached its fiduciary duty by investing more than half the plan assets in proprietary mutual funds that underperformed its benchmark. Likewise, BB&T faced similar allegations but settled on the eve of trial for currently undisclosed terms. The increased frequency of claims against plans with proprietary funds has resulted in certain insureds experiencing more aggressive underwriting.

# Recent study shows marked change in fiduciary liability claims during the past 10 years.

The Center for Retirement Research at Boston College recently published a study examining the causes and consequences of 401(k) lawsuits.<sup>2</sup> The study analyzed data from Bloomberg's Bureau of National Affairs ERISA Litigation Tracker, noting how claims for "inappropriate investment choices" (labeled as "stock drop" in the below chart) are no longer the dominant type of fiduciary claim, supplanted by excessive fee claims. While the past two years have not matched post-recession highs, they are still the most active claim years this decade.

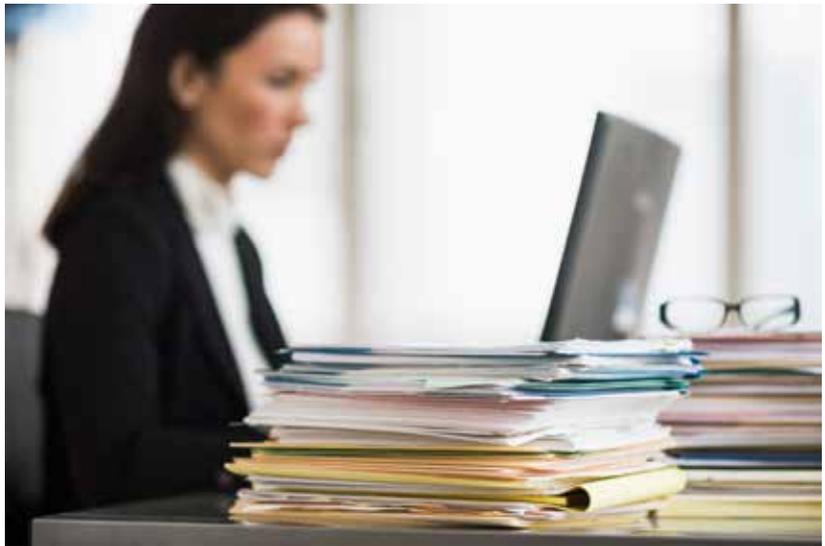


## Sixth Circuit continues defense-friendly trend in stock-drop actions.

The 6th Circuit followed other circuit court rulings by enforcing a high bar for liability in stock-drop actions based on public and nonpublic information. The court held that a failure to investigate the merits of investing in a publicly traded company is not the type of “special circumstances” that can support a breach of fiduciary duty claim based on public information. They also ruled it is acceptable to rely on the public market price. Likewise, the fiduciaries did not breach their duty by failing to base investment decisions on nonpublic information, as acting on such information could easily have harmed the plan’s stock more severely and could have run afoul of securities laws.<sup>3</sup> Defense-friendly decisions like this help explain why stock-drop claims are less frequent.

## Supreme Court rules in favor of hospitals on church plan ERISA exemption.

The US Supreme Court ruled unanimously that faith-based nonprofits, like hospitals, healthcare systems and schools, may be treated the same as churches under ERISA and are also exempt. The ruling reversed contrary holdings by the 3rd, 7th and 9th Circuits that would have upset the status quo and caused a multibillion-dollar compliance issue for religiously affiliated hospitals.<sup>4</sup>



## Circuit courts split on relevance of “bargaining power” to determine if a plan qualifies for “top hat” exemption under ERISA.

A top-hat plan is an unfunded plan limited to a select group of management or highly compensated employees. It is exempt from many of ERISA’s requirements, often leading to litigation over whether the exemption applies. The 3rd Circuit recently joined the 1st Circuit in holding that meaningful bargaining power by the top-hat plan participants was not relevant to the inquiry, thereby increasing the likelihood that a putative top-hat plan would qualify for the exemption. This ruling diverges from the 2nd, 6th and 9th Circuits.<sup>5</sup> Some pundits believe this topic is ripe for Supreme Court review. Claims related to top-hat plans are usually covered by most fiduciary policies, and claims concerning the exemption’s validity should be reported to the insurer.



## 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 fiscal year 2017, the EBSA recovered \$1.1 billion on behalf of plans and plan participants, with more than \$680 million recovered via enforcement action. The total amount recovered reflects a 42 percent increase over the prior fiscal year with nearly double the \$352 million recovered from enforcement actions in fiscal year 2016.<sup>6</sup> Experts anticipate that trend will change going forward, with the EBSA becoming less enforcement-minded. Whatever the trend proves to be, most fiduciary liability policies should provide a defense for these claims.

---

<sup>1</sup> <https://www.nytimes.com/2018/08/01/business/nyu-employee-retirement-plans.html>

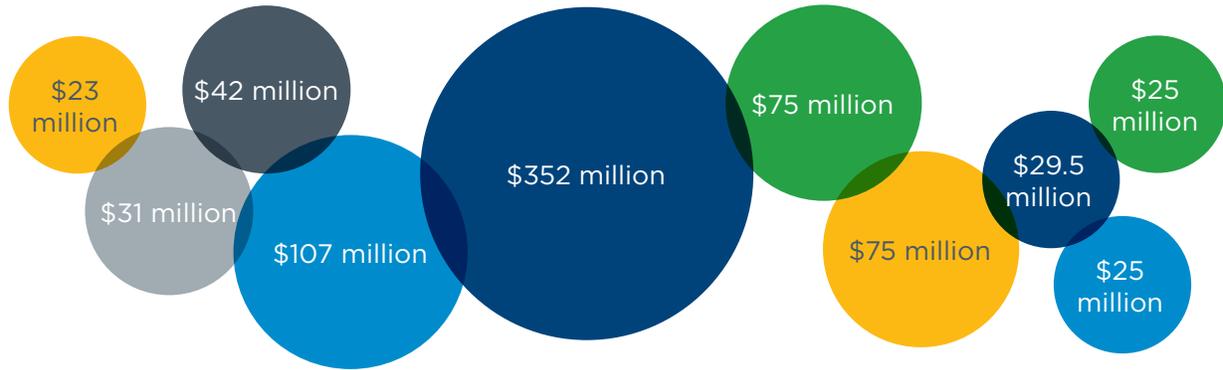
<sup>2</sup> [http://crr.bc.edu/wp-content/uploads/2018/04/IB\\_18-8.pdf](http://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf)

<sup>3</sup> *Saumer v. Cliffs Natural Resources, Inc.*, 853 F.3d 855 (6th Cir. 2017)

<sup>4</sup> *Advocate Healthcare Network v. Stapleton*, 137 S. Ct. 1652 (2017)

<sup>5</sup> *Sikor v. UPMC*, 876 F.3d 110 (3d Cir. 2017)

<sup>6</sup> <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2017.pdf>



## SELECT SETTLEMENTS

- **\$352 MILLION SETTLEMENT** in Washington by Providence Health Services for alleged ERISA violations related to the “church plan” exemption. (2016)
- **\$107 MILLION SETTLEMENT** in Connecticut by Saint Francis Hospital for alleged plan mismanagement. (2016)
- **\$75 MILLION SETTLEMENT** in New York by JP Morgan Stable Value Fund for alleged mismanagement and breaches of fiduciary duty. (2017)
- **\$75 MILLION SETTLEMENT** in Maryland by Trinity Health for alleged ERISA violations related to the “church plan” exemption. (2016)
- **\$42 MILLION SETTLEMENT** in New Jersey by St. Joseph’s Hospital & Medical Center for alleged ERISA violations related to the “church plan” exemption. (2017)
- **\$31 MILLION SETTLEMENT** in Illinois by Holy Cross Hospital for alleged mismanagement of pension plan. (2017)
- **\$29.5 MILLION SETTLEMENT** in Illinois by Wheaton Franciscan for alleged ERISA violations related to the “church plan” exemption. (2017)
- **\$25 MILLION SETTLEMENT** in Pennsylvania by Wawa, Inc., for alleged ERISA violations. (2018)
- **\$25 MILLION SETTLEMENT** in Florida by Merrill Lynch for alleged excessive fee violations. (2017)
- **\$23 MILLION SETTLEMENT** in West Virginia by Century Aluminum for alleged failure to pay benefits. (2017)
- **\$19.8 MILLION SETTLEMENT** in Utah by Larsen, Inc., for alleged overpayment by ESOP plan for stock. (2016)
- **\$17 MILLION SETTLEMENT** in Illinois by Philips North America for alleged excessive fee violations. (2018)
- **\$16.8 MILLION SETTLEMENT** in California by Northrup Grumman for alleged excessive fee violations. (2017)
- **\$11 MILLION SETTLEMENT** in Alabama by Baptist Health System for alleged ERISA violations related to the “church plan” exemption. (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 ESOP plan 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)
- **\$5 MILLION SETTLEMENT** in New York by TIAA-CREF for alleged proprietary fund conflicts and excessive fee violations. (2017)
- **\$4.75 MILLION SETTLEMENT** in Georgia by SunTrust Banks for alleged proprietary fund mismanagement. (2018)
- **\$3 MILLION SETTLEMENT** in New York by New York Life for alleged proprietary fund mismanagement and excessive fee violations. (2017)

# PRINCIPAL AUTHOR

Atlanta



**Mark Weintraub**  
Vice President  
Insurance and Claims Counsel

# CONTRIBUTING AUTHORS

Kansas City



**William Boeck**  
Senior Vice President  
Insurance and Claims Counsel  
LFS Claims Practice Leader

Los Angeles



**Raymond Dion**  
Senior Vice President  
Insurance and Claims Counsel



**Maryam Rad**  
Senior Analyst  
Insurance and Claims Counsel

New York



**Marie-France Gelot**  
Senior Vice President  
Insurance and Claims Counsel

Chicago



**Don Glazier**  
Senior Vice President  
Claims Counsel



**Mark Gamboa**  
Vice President  
Insurance and Claims Counsel



**Garry Whiter**  
Assistant Vice President  
Insurance and Claims Counsel

San Francisco



**Meredith Ponce**  
Insurance and Claims Counsel

Dallas



**Jennifer Gaither**  
Insurance and Claims Counsel



**Sydney Bowen**  
Project Manager



**August Swanson**  
Paralegal



**Betsy Carpenter**  
Senior Vice President  
Claims Practice Leader

Washington, DC



**Tim Monahan**  
Senior Vice President  
Insurance and Claims Counsel



**Hunter Stoycos**  
Insurance and Claims Counsel

St. Louis



**Noël Oleska**  
Assistant Vice President  
Insurance & Claims Counsel

Denver



**Deanna Cook**  
Claims Consultant





**LOCKTON®**

- 
- RISK MANAGEMENT
  - EMPLOYEE BENEFITS
  - RETIREMENT SERVICES



[LOCKTON.COM](http://LOCKTON.COM)