Fiduciary Responsibility: What Could Go Wrong?

A small insured suffered a charged penalty when it moved assets of its 401(k) plan from one financial group to another, and it resulted in a Market Valuation Adjustment (MVA) that was deducted from each member's account. The insured argued the MVA was improperly charged by the prior fund manager. Subsequently, the Trustees of the plan were accused of breach of fiduciary duty for failing to read the contract that disclosed the penalty. The administration error resulted in a loss payment of more than **$45,000**.

The insured was party to litigation when an employee was forced into collections by a medical provider after the provider's bills were largely denied. After amassing significant neonatology bills, the employee alleged the insured was negligent in processing the invoices that were allegedly for services covered under the health plan. The delay purportedly resulted in her wage garnishment and collection action against her, for which she filed a third-party action against the employer and health plan. Ultimately, the matter resolved for the insured's agreement to cover a significant portion of the invoices. Approximately **$5,000 was spent in defense costs**.

A lawsuit was filed over a loan taken out by the plaintiff from his 401(k) plan. The plaintiff claimed the insured employer and benefits administrator made errors in the paperwork associated with the loan, causing him to incur tax liabilities, penalties and interest of approximately $18,000. The plaintiff also claimed that the insured refused to fix the problem or provide him with required documentation about the Plan so he could resolve the matter himself. While the relief sought was not large, the costs of defense to defend the matter exceeded **$140,000, with an eventual settlement of $25,000**.

The Department of Labor (DOL) conducted an investigation after the former president of the insured allegedly undervalued the stock when he sold his shares to the ESOP, to the detriment of the ESOP of more than $2.5 million. At the time of the transaction, the former president was the only person on both sides of the transaction, and he used the same attorney on both sides of the transaction. Because of this, the DOL was aggressive in its investigation. Ultimately, the former president, the insured, the ESOP and its trustee and the DOL mediated the matter and were able to settle for **$2 million**.

The DOL investigated an insured's Profit Sharing Plan investments and purported losses of $1.6 million. The DOL concluded its investigation with finding that the insureds violated ERISA by breaching their fiduciary obligations. The DOL findings stated that the Trustee did not have the requisite education or experience needed to act as a Trustee, and the Trustee did not have the investment opportunities translated into his primary language for review and consideration. Parties entered into a consent judgment that included termination of the Plan and distribution of remaining assets. The judgment also permanently enjoined the Plan Trustee from serving in a fiduciary role with any other employee benefit plan. The insured was required to restore **$463,000 to the Plan as "lost opportunities," and up to an additional 20% of the amount in 502(l) penalties**.

Litigation arose after a dispute over the management of a manufacturing company's ESOP and Trust. Employee plan participants alleged the defendants (ESOP plan and individual directors and officers) engaged in various breaches of fiduciary duties and prohibited transactions in violation of Section 408 of ERISA. The plaintiffs alleged that certain "Incentive Agreements" benefitting the former company president were unreasonable, secretive and excessive, and that defendants breached their fiduciary duties in approving such agreements. Plaintiffs claimed payout to the president on his shares after he was made the largest beneficial owner of ESOP shares, to the detriment of the company and ESOP participants and diluted the value of the ESOP. The plan was explained to participants and approved by a majority, but they claim they weren't told of the benefits to the insiders at the time. The plaintiffs sought the imposition of a constructive trust, disgorgement of profits, removal of the plan trustee, attorney's fees and costs. After settlement demands remained in the millions, the **$5 million** limit of liability was exhausted in costs of defense payments.

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