

Insurers: ERISA lawsuits a growing concern

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NEW YORK — Breach of fiduciary duty claims are on the rise and of growing concern to professional liability insurers, attendees at the 2003 PLUS Employers Professional Liability Symposium were told.

An educational session on “Enron: Securities Claims Dressed-Up to Look Like Fiduciary Breaches” featured a panel of leading benefits attorneys.

In the wake of corporate scandals like Enron and WorldCom, fiduciary liability has moved to the forefront. Litigation involving a wide range of retirement plans, including 401(k) plans, is skyrocketing and the potential targets of liability are broadening, the panel noted.

Session moderator John Bayley, vice president and claims counsel of Chubb & Son, said companies facing multi-billion dollar securities claims are also facing related but separate federal litigation alleging ERISA (Employee Retirement Income Security Act) breaches of fiduciary duty.

This new wave of ERISA lawsuits often targets the same corporate defendants as those found in securities fraud cases and are based on similar allegations. They attempt to expand ERISA fiduciary liability into areas regulated by federal securities laws, and to widen the corporate defendant net.

“Cases where employees have seen their retirement benefits evaporate can trigger separate towers of insurance, in addition to fiduciary liability policies,” Bayley said.

ERISA litigator Howard Shapiro, of Shook Hardy & Bacon, said any pension plan where company stock is an investment option is one of the basic issues under ERISA which is giving rise to claims.

A concentration of employer stock in a company’s pension plan and any tumble in the value of that stock could lead to allegations that a company and its officers breached their fiduciary duties by misrepresenting the facts or failing to disclose the accurate financial condition of the corporation.

ERISA fiduciaries have a duty to disclose relevant information about the company’s securities and to tell the truth about the company’s financial plight, Shapiro said.

“There is an effort to transform ERISA into another type of securities disclosure type case,” he commented.

In the fallout from corporate collapses like Enron and WorldCom, the range of individuals and entities charged with prudently managing a retirement plan’s assets under ERISA is expanding.

In addition to plan trustees and administrators, members of the boards of directors, and corporate officers, like chief operating officers and chief financial officers, increasingly are considered to have fiduciary responsibilities under ERISA.

Gary Tell, employee benefits counsel at O’Melveny & Myers LLP, explained: “You may not be a fiduciary 24/7 when on the board of directors, but if you know the fiduciaries are not performing their duties well you ought to do something about it.”

Tell suggested that key questions which underwriters should be asking include whether the investment committee includes a high level executive with access to the company’s financial condition and future prospects.

“A committee that contains the company’s chief financial officer or treasurer raises more significant concerns than a committee that includes investment personnel or human resources officers,” Tell said.

Whether retirement plan communication materials were explicit about the risks of the employer stock fund and informed participants that it was the most volatile option available is another consideration for underwriters, as is whether there is a securities suit pending against the plan sponsor. “If there is, then it is quite likely an ERISA suit is not far behind,” he added.

While case law is still in its infancy, panelists agreed that the potential increased exposures and costs arising from these lawsuits is a growing concern for professional liability underwriters and their insureds.

In defending these cases, they said the importance of detailed plan documentation should not be underestimated.

“One of the most important things going forward in defending these cases is a really well-defined plan document. The better the plan document, the better the chance we have in getting people out of the case before there is a trial.

“There are things you can do with the plan document to minimize liability,” Shapiro said. □