

# Market Conditions

FEBRUARY 2020

## Fiduciary Liability

By Rebecca Dauparas

Fiduciary liability renewals were stable but firming in 2019, and this coverage line continues to be the least affected in management liability. There have been sizable settlements in this line over the past 12 months that are noteworthy. We anticipate a slight impact in the market condition as markets begin to adjust for loss trends across all management liability lines.

### FIDUCIARY LIABILITY LITIGATION TRENDS

401(k) lawsuits continue to be driven primarily by fee and expense litigation, which has replaced employer stock drop claims in predominance. Historically the majority of fee and expense lawsuits were filed against large defined contribution plans; however, beginning in 2017, the focus shifted to and has stayed on proprietary fund cases and university fee cases.

**401(k) Proprietary Fund Cases:** A variation of excessive fee cases, lawsuits are brought by plan participants against plan sponsors who are financial institutions. The allegations are similar to the plan sponsor cases, but also allege that the plan sponsors utilized proprietary or affiliated funds or services to increase the financial institution's revenue. Plaintiffs claim this self-serving action is a breach of fiduciary duty and/or an ERISA prohibited transaction. Significant proprietary fund settlements in 2019 include M&T Bank (\$20.85 million), Franklin Resources (\$13.85 million), Massachusetts Financial Services (\$6.9 million), SEI Investments (\$6.8 million) and Eaton Vance (\$3.5 million).

**403(b) University Fee Cases:** Since 2016, more than 20 class-action lawsuits were filed against university sponsors of 403(b) defined contribution plans. The allegation is the university plan fiduciaries breached their ERISA duties by offering a large number of complex investment options that were duplicative, expensive and poorly performing. To date, seven cases have been dismissed and six cases settled. Four cases were settled in 2019 for sizable amounts including MIT (\$18.1 million), Vanderbilt University (\$14.5 million), Johns Hopkins University (\$14 million) and Brown University (\$3.5 million). We anticipate additional lawsuits will be filed in 2020 given the settlement values in 2019.

As a growing number of plaintiff attorneys expand into fee and expense litigation, we are starting to see an increase in fee and expense lawsuits brought against plans with \$100 million or less in plan assets. Historically 401(k) plans over \$1 billion were considered targets. The other emerging trend is a second fee and expense lawsuit brought against a plan sponsor who already settled/resolved an earlier fee and expense case, or double dipping. The second lawsuit is brought against a defined contribution plan not named or for breaches of duty not alleged in the initial lawsuit.

**ERISA Company Stock Cases:** While ERISA stock-drop complaints are still infrequent in comparison to 2002–2011, it is notable that a handful of ERISA stock-drop cases were filed in 2019 in conjunction with D&O securities class actions. Cases filed include Boeing (737 MAX), Kraft Heinz (goodwill impairment) and Johnson & Johnson (baby powder litigation).

**Defined Benefit Cases:** Beginning in 2018 and throughout 2019, a number of lawsuits were filed alleging defined benefit plans improperly used mortality tables in converting a standard form of benefit to optional benefit forms available under the plan. The outcome of the pending cases will determine if this is a viable emerging litigation trend.

### ERISA CLASS-ACTION SETTLEMENT TRENDS

#### Value of Top 10 ERISA Class-Action Settlements



Source: Seyfarth Shaw 16th Annual Workplace Class-Action Litigation Report—2020 Edition

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ERISA class-action settlements in 2019 were slightly greater than in 2018, but still well below prior years. In 2019, the majority of the top 10 ERISA settlements were related to fee and expense claims.

## Key Fiduciary Liability Settlements in 2019

Company	Judgment/Settlement	Allegation
SSM Health	\$60 million	Improperly claimed its plan was exempt as a “church plan”
ABB, Inc.	\$55 million	Excessive fee and expenses
Anthem	\$24 million	Excessive fee and expenses
Massachusetts Institute of Technology	\$18.1 million	Excessive fee and expenses—university
Vanderbilt University	\$14.5 million	Excessive fee and expenses—university
Johns Hopkins University	\$14 million	Excessive fee and expenses—university
Franklin Resources	\$13.85 million	Excessive fee and expenses—proprietary funds

Source: Seyfarth Shaw 16th Annual Workplace Class-Action Litigation Report—2020 Edition

## ERISA AND THE SUPREME COURT

The U.S. Supreme Court will hear arguments on at least three significant ERISA class-action cases during the 2019–2020 term. Decisions on the cases are expected in June 2020.

*Retirement Plans Committee of IBM et al. vs. Larry Jander et al.* was heard November 2019. IBM revisits the *Fifth Third Bancorp et al. vs. Dudenhoefffer et al.* decision regarding a fiduciary’s obligations to use information gained in a corporate capacity in a fiduciary capacity in respect to actions involving employer securities held in an employee stock ownership plan. The outcome will determine the future viability of ERISA stock-drop lawsuits.

*Intel Corp. Investment Policy Committee et al. vs. Sulyma* was heard December 2019. It addresses the scope of responsibility of defined contribution plan sponsors to communicate plan investment lineup features to participants, the participant’s responsibilities for understanding them and the time frame in which participants have to raise challenges. Depending on the outcome, this ruling could significantly impact employers’ obligations to participants and establish the time frame in which participants can file an ERISA class action.

*Thole vs. U.S. Bank, N.A.* was scheduled for argument before the Supreme Court in January 2020. This case addresses the question of whether a fully funded pensions can be sued for harming retirees without demonstrating actual or imminent financial loss.

## REGULATORY OUTLOOK

The Affordable Care Act continues to be challenged by the Trump administration and various states. Given the pending 2020 election, it is not expected this issue will be resolved in the coming year.

The Setting Every Community Up for Retirement (SECURE) Act was passed by Congress in December 2019. The act broadens the options in which employers can band together in a multiple employer plan (MEP) or open MEP, expanding access to retirement plans for small and midsize businesses. The legislation also expands opportunities for workers to obtain guaranteed lifetime income products, repeals the age limit for IRA contributors and increases the age at which required minimum distributions must be taken from retirement accounts.

## PRIVATE/NOT-FOR-PROFIT MARKET

The claimant of significance for ERISA cases in the private/not-for-profit segment continues to be the Department of Labor/Employee Benefit Security Administration (EBSA).

In fiscal year 2019, EBSA recovered over \$2.5 billion for direct payment to plans, participants and beneficiaries.<sup>1</sup> More than 1,100 civil investigations were closed by EBSA during 2019, with 770 or 67% of these cases resulting in losses restored to employee benefit plans or other corrective actions. Recoveries on behalf of terminated vested participants in defined benefit plans represented nearly \$1.5 billion of recovered amounts. EBSA typically pursues voluntary compliance as the preferred means to correct violations and restore losses to employee benefit plans. In cases where voluntary compliance and correction efforts have failed or are not appropriate, EBSA will refer the case to the solicitor of labor to initiate litigation. In 2019, 89 cases were referred for litigation. During fiscal year 2019, EBSA closed 275 criminal investigations; 80 or 29% were closed with guilty pleas or convictions. Additionally, 76 individuals were indicted, including plan officers, corporate officers and service providers, for offenses related to employee benefit plans. Most fiduciary liability policies, whether purchased monoline or in a package, offer a sublimit for fees, including fines and penalties, defense, and compliance costs associated with the Voluntary Fiduciary Correction Program (VFCP).

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## 2020 MARKET FORECAST

Given the long-term profitability of the fiduciary liability product line, we expect to see flat to modest increases in renewal premiums (0–7.5%) in 2020 and stable coverage. Companies with heightened exposures such as a large concentration of company stock in defined contribution plans and ESOPs may see adjustments to retentions and/or increased premiums. Certain types of sponsors, such as higher education, church plans and financial institutions with proprietary fund investments in their 401(k), may encounter changes in carrier appetites, including but not limited to higher premiums, increased retentions and restrictive endorsements. As always, stressed risks (poor claims history, underfunded plans and plan sponsors in financial distress) should prepare for increases larger than those previously mentioned, with potentially restrictive exclusions also included.

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## Endnotes

<sup>1</sup><https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf>