ERISA at 40: Fiduciary Liability Forecast
ERISA AT 40: FIDUCIARY LIABILITY FORECAST

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Overview

- Current ERISA Litigation Landscape
- Managing and Resolving Fiduciary Liability Claims
- Placing and Underwriting Fiduciary Liability Insurance
Current ERISA Litigation Landscape – Employer Securities Litigation

  - Issue 1: Is there a statutory argument that the “special purpose” of an ESOP—allowing employees to invest in their employer—warranted application of a presumption of prudence?
  - Issue 2: Do fiduciaries need to second guess the market price of securities that are traded in an efficient market?
  - Issue 3: Does the duty of prudence trump plan terms?
Current ERISA Litigation Landscape – Employer Securities Litigation

• Post-Dudenhoeffer
  – Key legal issues in litigation
  – Plan sponsor/fiduciary reaction
  – Impact on litigation management
Current ERISA Litigation Landscape – 401(k) Excessive Fee Cases

• Types of Cases & Legal Theories
  – Nonproprietary – Claims against plan sponsor fiduciaries for imprudent selection of investment options and administrative services.
  – Proprietary – Claims against plan sponsor fiduciaries for selecting affiliated funds and service providers.
  – Service Provider – Claims against service providers for 401(k) plans.
Current ERISA Litigation Landscape – 401(k) Excessive Fee Cases

• Litigation Scorecard
  – *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014)

• Current Settlement Landscape
  – Prior settlements in $9M-$15M range
Current ERISA Litigation Landscape – Emerging Issues in Other ERISA Litigation

• Church Plan Litigation – ERISA’s Church Plan Exemption Under Attack
• Retiree Medical Litigation – Predictions for Tackett v. M&G Polymers USA
• Extending ERISA to Medical Provider Litigation
Managing and Resolving Fiduciary Liability Claims

- Effective Litigation Management Practices
- Case / Exposure Evaluation
- Key Resolution Strategies
- Common Coverage Issues & Impact on Settlement Dynamics
Placing and Underwriting Fiduciary Liability Insurance

- State of the Market
  - Pricing
  - Capacity
  - Limits and retentions
  - Coverage extensions
Placing and Underwriting Fiduciary Liability Insurance

• Key Program Design Considerations
  – Coordination with other coverages
  – Specific fiduciary liability insurance design issues
• Broker’s Perspective – Managing the Placement Process
• Underwriter’s Perspective – Risk Evaluation & Profiles
Predictions and Q&A

ERISA at 50 – What will be the key issues in 2024?