



NEWS OF VALUE

FIDUCIARIES OF RETIREMENT PLANS—PERSONAL LIABILITY AN ISSUE

A recent decision by the Supreme Court exposes community associations to lawsuits from participants of 401(k) plans. The decision, announced Feb. 20, 2008, allows individual participants in 401(k) plans to sue plan administrators for breaching their fiduciary duties.

The Employee Retirement Income Security Act of 1974 (ERISA) spells out the duties and responsibilities of those who administer employee benefits plans and imposes personal liability on plan fiduciaries if those duties are breached.

Even if a community association's plan investment activities are handled by a bank, insurance company, professional investment firm, or other third party administrator, the responsibilities of plan fiduciaries cannot be transferred to another party. Although fiduciaries can take steps to mitigate their personal liability exposure by hiring a competent team of experts, the fiduciary remains ultimately responsible for the management and administration of the benefit plans. Simply put, the fiduciaries may still be "on the hook" if the plan administrator does something wrong.

[What are the details of the Supreme Court decision?](#)

In the case before the Supreme Court, James LaRue of Southlake, Texas, said the value of his stock market holdings declined by \$150,000 when administrators of his plan failed to follow his directions to switch to safer investments.

The decision marks a turning point in the interpretation of ERISA. It allows individual account holders to bring suits against plan administrators under a fiduciary breach claim. The language of the law refers to recovering money for the "plan," rather than for the individual. Justice John Paul Stevens, in his opinion for the court, said a participant can sue solely for himself.

Again, under ERISA, a plan fiduciary can be held PERSONALLY LIABLE. The unanimous Supreme Court decision covers 50 million U.S. workers who have invested upwards of \$2.7 trillion in 401(k) retirement plans.

[What insurance is available?](#)

Fortunately, insurance is available to protect community associations. Subject to the terms of the policy, fiduciary liability insurance protects the fiduciaries of employee benefit plans for sums they are legally obligated to pay as a result of an actual or alleged wrongful act or breach of their fiduciary duties. The policy can also provide coverage for defense expenses to defend a claim made against the fiduciary for an actual or alleged wrongful act.

The burden of proof for compliance with all provisions of ERISA lies with the sponsor/employer. With average attorney fees of \$250/hour, even an allegation will be costly to defend. Fiduciary liability insurance can protect both individual fiduciaries and plan sponsors for claims made for actual or alleged breach of fiduciary duty.

Fiduciary liability exposures related to claims under ERISA are generally excluded from Directors and Officers Liability insurance policies.

[Where can I get more information?](#)

Although many agents, brokers, and companies offer insurance, only a few specialize in the complex area of community association insurance and fiduciary liability insurance. If you have any questions or need further information, please contact Steve Dickerson (703-205-8788 or Steve.Dickerson@usi.biz) or Theresa Melson (703-205-8753 or Theresa.Melson@usi.biz).