



Protecting Yourself from Personal Liability as a Trustee

6th Annual PAPERS
Fall Workshop
September 19, 2012

EUCLID SPECIALTY MANAGERS, LLC
Labor Affinity and Commercial Programs



Lessons from the San Diego Pension Fund Crisis:

- **First:** Volunteer trustees face serious personal liability when events go badly.
- **Second:** Indemnification from governmental entities is not guaranteed.

Agenda



- The **first part** of this presentation will demonstrate the fiduciary liability of governmental plan trustees.
- The **second part** of this presentation will discuss fiduciary liability claim trends.
- The **final part** will outline how to protect yourself, including purchasing fiduciary liability insurance.

Common Misconceptions



- Fiduciaries of Governmental Plans often believe that they are immune from personal fiduciary liability for several misplaced reasons:
 - (1) They believe they do not face liability since governmental plans are exempted from ERISA;
 - (2) They believe that sovereign immunity protects them; and
 - (3) They otherwise believe that they will be indemnified for their volunteer service.

(1) Liability for Governmental Plan Trustees



- ERISA Title I does not apply, **BUT**:
 - **ERISA Title II tax provisions apply**, imposing the exclusive benefit rule;
 - **State and local law applies**: Pennsylvania law imposes the “prudent person” or prudent man” rule;
 - **Common law rules apply** – such as the duty of loyalty and duty of prudent investment.
 - These laws generally mirror the fiduciary standards contained in ERISA.

The Basics of Fiduciary Liability for Governmental Plans



- **Personal Liability** for any plan losses resulting from the breach and for any profits that were attained through the misuse of plan assets.
- **Penalties:** Fiduciaries may also be liable for statutorily imposed penalties and reasonable attorney fees and costs incurred by the plaintiff.
- **Parties with Standing:** A lawsuit to establish the liability of a fiduciary may be brought by (1) any plan participant or beneficiary, (2) **co-fiduciary liability** by another plan fiduciary, or (3) a governmental entity.

Four Basic Fiduciary Duties for Investing Plan Assets



- Duty of Loyalty (Exclusive Purpose Rule)
- Duty to Act with Prudence
- Duty to Diversity Plan Assets
- Duty to Follow Plan Documents

Misconceptions

(2) Sovereign Immunity is Limited



- Most states have sovereign immunity statutes
- But state agent immunity is a qualified immunity:
 - limited to scope of authority and employment;
 - no protection for willful conduct;
 - In Pennsylvania, retirement systems may not be considered state instrumentalities for 11th Amendment protection.

(3) Express Limits on Indemnification



Indemnification is Extremely Limited

- Limited to “*good faith*” – liability for bad faith, willful, wanton or grossly negligent conduct.
- Who determines whether the act was taken in good faith: the attorney general; the board of trustees; or the courts?
- Limited to scope of employment.
- Scope of indemnification limited:
 - What costs are covered?
 - When can defense costs be reimbursed?
 - Who can be indemnified? Just trustees?

Fiduciary Liability Claim Trends



- (1) Imprudent Investments
- (2) Benefit Claims
- (3) Funding Claims
- (4) Service Provider Claims
- (5) Social Investing
- (6) Prohibited Transactions/Alleged Dishonesty/Conflicts of Interest

How to Protect Yourself



- Maximize Indemnification Protection from the Sponsoring Organization
- Delegate to Qualified Service Providers
- Require Indemnification from All Service Providers to the Plan
- Purchase Fiduciary Liability Insurance

Questions & Contact Information



Daniel Aronowitz, Managing Principal
571-730-4811; daronowitz@euclidmanagers.com

John O'Brien, Chief Marketing Officer
440-714-5832; jobrien@euclidmanagers.com

Euclid Specialty Managers, LLC

2701 Prosperity Avenue, Suite 220

Fairfax, VA 22031

571-730-4810 (main)

571-730-4813 (fax)

www.euclidspecialtymanagers.com