

Duty to Defend under Fiduciary Responsibility Policy Includes Claims Unrelated to ERISA

November/December 2002

A federal appeals court, applying California law, recently held that an insurer had a broad duty to defend a pension trust fund under a claims-made fiduciary responsibility insurance policy for fiduciary claims that were unrelated to ERISA. *Pension Trust Fund for Operating Eng'rs. v. Fed. Ins. Co.*, Nos. 00-17055 & 00 - 17223, 2002 U.S. App. LEXIS 20712 (9th Cir. Oct. 1, 2002).

A pension trust fund was sued, *inter alia*, for breach of fiduciary duties in connection with real estate investments that it had made in a country club. The pension trust fund sought coverage under a policy provision that provided coverage for a "breach of fiduciary duty," which the policy defined as "the violation of any of the responsibilities, obligations or duties imposed upon fiduciaries by the Employee Retirement Income Security Act of 1974 or amendments thereto or by the common or statutory law of the United States of America or of any state or other jurisdiction therein."

The Ninth Circuit rejected the insurer's argument that there was no coverage for non-ERISA claims, reasoning that the literal language of the policy provided coverage for claims alleging violations of common law, Federal law or state law, which necessarily included breaches of fiduciary duty. The court also rejected the insurer's argument that it did not have a duty to defend because the policy term requiring a defense for claims "as a result of any actual or alleged breach of fiduciary duty," required a narrow causal connection between the alleged breach and the damages prompting the claim. Noting that while causal connection is a significant issue in first party insurance disputes, it is not a critical issue for third-party duty to defend cases, the court explained that "California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty." Thus, the potential that a claim might allege covered conduct, is sufficient to create a duty to defend. Finally, the Ninth Circuit rejected the insurer's argument that it was relieved of the duty to defend because of late notice. The court held that because the policy at issue was not a "claims-made-and-reported" policy, the notice prejudice rule applied, and it remanded to the trial court to determine whether the insurer was prejudiced by the pension trust fund's delay in providing notice.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130