

Fiduciary Liability Policies Afford No Coverage for Breach of Contract Claims and Payment of Stock Option Plan Benefits

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The Appellate Division of the New Jersey Superior Court held that fiduciary liability policies afforded no coverage for four lawsuits arising out of allegations that plaintiffs had not received the full economic value of their stock options. *AT&T Corp. v. Certain Underwriters at Lloyd's London*, 2009 WL 2356545 (N.J. Super. Ct. App. Div. Aug. 3, 2009).

The plaintiffs in the underlying lawsuits were former officers, directors and employees of an entity later acquired by the insured pursuant to a merger agreement. Prior to the acquisition, plaintiffs had received stock options under a non-qualified Employee Retirement Income Security Act (ERISA) Employee Stock Ownership Plan (ESOP) (the 1994 Plan) sponsored by the acquired entity, which provided that each participant's share value would be preserved in the event of future corporate mergers or divestitures. The merger agreement provided that the insured would honor the terms of the 1994 Plan after the acquisition. The insured later undertook additional corporate transactions, including a spin-off and a merger, when the stock options were adjusted. Following a 2004 merger, plaintiffs alleged that they had been paid less than full value for certain stock options and other stock options had been cancelled without compensation in violation of the terms of the 1994 Plan.

The insured sought coverage under two sets of fiduciary liability policies: primary and excess fiduciary liability policies for the period of 2001 to 2007 (the 2001 Policies) and primary and excess fiduciary liability policies for the period of 2004 to 2005 (the 2004 Policies). By endorsement, the 2001 Policies afforded coverage for "any negligent act, error or omission . . . in the administration of" certain plans, including non-qualified ERISA plans. Moreover, the 2001 Policies' definition of "Loss" carved out "any Plan benefits, or that portion of damages arising out of any judgment, settlement or award in an amount equal to such Plan benefits, unless . . . such benefits [are] based upon a covered Breach of Fiduciary Duty or any negligent act, error or omission in Administration"

The court held that the 2001 Policies afforded no coverage because the insured's alleged acts, errors and omissions were not "in the administration" of the 1994 Plan, but rather in violation of its contractual obligation

under the merger agreement to honor the terms of the 1994 Plan. Furthermore, the order in one of the underlying lawsuits awarded damages for Plan benefits or an amount equal to such Plan benefits. Such amount therefore did not fall within the definition of Loss.

The 2004 Policies afforded coverage for Loss arising from Claims against an Insured for Wrongful Acts. The 2004 Policies defined Wrongful Acts with respect to Plans, which were in turn defined to include "any qualified plan, fund, trust or program . . . or Non-qualified Plan," subject to a provision that any ESOP be added to the definition of Plan by specific written endorsement attached to the policies. The 2004 Policies did not contain an endorsement for the 1994 Plan. The court held that the 2004 Policies afforded no coverage for the underlying matters because no endorsement extended coverage to the 1994 Plan.