



Important Developments for ESOP Fiduciaries

Employment, Labor & Benefits Practice Group

Foster Swift Employment, Labor & Benefits Quarterly
Spring 2010

ESOP fiduciaries, generally the ESOP committee or the ESOP trustees, must make several decisions on behalf of the ESOP and may be subject to legal exposure if their decisions are not consistent with ERISA. In order to serve as an ESOP fiduciary, indemnification of the fiduciary by the employer plan sponsor is often agreed to and set forth in an indemnification agreement. While indemnification agreements have been a long time practice between ESOP fiduciaries and the ESOP plan sponsor, recent case law developments call into question the degree to which an indemnification agreement might be honored.

The ninth circuit, in two court cases, invalidated indemnification agreements between the ESOP fiduciary and the plan sponsor. In *Johnson v. Couturier*, the Ninth Circuit Court of Appeals held that indemnification agreements were invalid because the agreements would relieve the ESOP fiduciaries of their fiduciary duties under ERISA and because the ESOP would bear the financial burden of the agreements. Thereafter, a district court (also in the ninth circuit) extended the *Couturier* reasoning and invalidated an indemnification agreement, noting that (1) since the agreement imposed liability on the company and, (2) it was the company's shares that constituted the ESOP's sole asset, the ESOP would be adversely affected should the indemnification agreement be honored.

It is important to keep in mind that the facts of the *Couturier* case are extraordinary. The *Couturier* court noted that the indemnification agreements relieved the ESOP trustees of liability absent deliberate wrongful acts or gross negligence, a standard that violated ERISA's prudent-person standard and essentially acted as full exculpation of the fiduciaries' actions. The court's holding, however, seems to suggest that indemnification agreements would likely be valid if the actions by the ESOP fiduciaries are consistent with ERISA, which is a stricter standard than the "deliberate wrongful acts or gross negligence" standard struck down by the court.

PRACTICE AREAS

Employee Benefits

Employee Stock Ownership Plans
(ESOPs)



Michigan sits in the sixth circuit and is not technically bound by the decisions of the ninth circuit. However, indemnification agreements should be reviewed and possibly revised in light of these recent court decisions.
