

**MEMORANDUM TO CLIENTS****RE: Ohio District Court Rejects Negligence and ERISA Claims Against Milliman**

In *Tiboni v. Excavating, Building Material and Constr. Drivers Union Local No. 436 Pension Fund v. Milliman, Inc.*, 1:08-cv-01642 (N.D. Ohio Aug. 10, 2010), the United States District Court for the Northern District of Ohio granted summary judgment in favor of Milliman, Inc. (“Milliman”). As discussed below, the Court concluded that the actuarial services Milliman provided to the Excavating, Building Material and Construction Drivers Union Local No. 436 Pension Fund (the “Pension Fund”) did not violate professional standards, the parties’ contract or the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

**Background**

Milliman served as the Pension Fund’s actuary from 1989 to 2005 and prepared the annual actuarial valuation used to determine the annual amount required to be contributed to the Pension Fund under ERISA and the Internal Revenue Code. Milliman’s annual actuarial valuations were prepared based on service and other participant data supplied by the administrator for the Pension Fund. In its Complaint, the Pension Fund acknowledged that the data supplied to Milliman was “bad” or “flawed,” but claimed that it was Milliman’s responsibility to ensure the accuracy and comprehensiveness of the data. The Pension Fund alleged that, because Milliman did not discover the defects in the data, Milliman underestimated the Pension Fund’s liabilities. The Pension Fund further alleged that the Pension Fund’s Trustees, in turn, approved a benefit increase in 2001 that they purportedly would not have approved otherwise had the Trustees known the true funding condition of the Pension Fund.

In July 2008, the Pension Fund brought a seven count Complaint against Milliman, alleging (among other things) that Milliman committed malpractice, breached its contract with the Pension Fund, and violated ERISA. The Pension Fund sought to recover nearly \$500,000 in fees that Milliman had billed the Pension Fund during its sixteen year engagement, as well as \$2.75 million in generalized damages.

**District Court Decision**

With regard to the Pension Fund’s state law claims, the Court ruled that the claims for misrepresentation, negligence and breach of contract were time-barred. The Court further found that, even if the claims were timely brought, no reasonable juror could find in favor of the Pension Fund.

Specifically, the Court concluded that Milliman’s work did not fall below acceptable professional standards. In support of this conclusion, the Court pointed out that the Pension Fund’s own expert witness conceded in his report that “the professional standards assign responsibility for the accuracy of data on the ones who supply the data (in this case the Fund), not on the actuary who relies on the data, so long as the reliance is disclosed (as it was in this case).” The Court further noted that, while the actuary must review data for reasonableness and consistency, there was no evidence that Milliman failed to do so. Indeed, according to the opinion, the Pension Fund’s expert acknowledged that he had taken “no steps” to determine whether Milliman could have detected flaws in the Pension Fund’s data had Milliman followed

the expert’s recommendations. According to the Court, what the evidence did show is that Milliman repeatedly asked the Pension Fund’s administrator to verify and update the data, but the Pension Fund failed to do so. Thus, the Court concluded: “[t]here is surely no requirement in the contract that Milliman create or obtain its own data, only that it seek to identify and correct errors. If the Fund was unresponsive to Milliman’s efforts to update and verify the data, Milliman cannot be held responsible for the resulting misinformation.”

With regard to the ERISA claims, the Court ruled that the Pension Fund’s claim for an accounting under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), was moot because Milliman already had provided the Pension Fund with the records it had requested. Likewise, the Court dismissed the Pension Fund’s claim for restitution on the grounds that the Pension Fund conceded that Milliman’s bills were appropriate and reasonable.

### **Observations**

As highlighted by *Tiboni*, actuarial malpractice cases often stem from data disputes. While not specifically identified in the opinion, Actuarial Standard of Practice (“ASOP”) No. 23 makes clear that the actuary “may rely on data supplied by others,” and “[t]he accuracy and comprehensiveness of data supplied by others are the responsibility of those who supply the data.” *Id.* § 3.3. Still, as recognized in *Tiboni*, an actuary must “disclose reliance” on such data and must “review the data for reasonableness and consistency.” *Id.* The record in *Tiboni* revealed that Milliman had disclosed its reliance on the Pension Fund’s data and that there was no evidence that Milliman had not conducted a reasonable review.

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If you have any questions regarding the *Tiboni* decision, please contact your regular Groom contact or any of the attorneys listed below:

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