Scribner, Hall & Thompson, LLP

Extension of the NOL Carryback Period Also Applies to Life Companies

BY LORI JONES & DAVE RIFKIN

The Worker, Homeownership, and Business Assistance Act of 2009 allows taxpayers to elect to carry back an "applicable" net operating loss (NOL) or loss from operations up to 5 years, for a loss for a single taxable year ending after December 31, 2007, and beginning before January 1, 2010. For life insurance companies, this extends the 3-year carryback for losses from operations under I.R.C. § 810(b) to 4 or 5 years, to offset taxable income in those preceding years. An amount carried back 5 years is limited to 50% of the taxpayer's taxable income for that year, and the excess can be carried forward to later taxable years. Also, an "applicable NOL" includes a consolidated NOL.

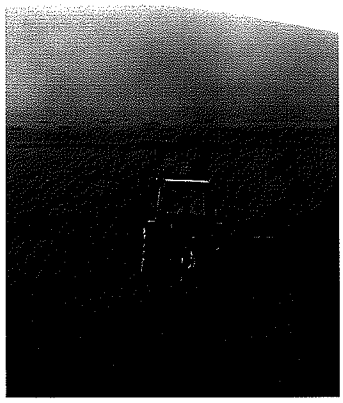
Rev. Proc. 2009-52, 2009-49 I.R.B. 744, indicates that the same rules apply to NOL and operations loss elections. The election must be made by the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009, either by attaching an election statement to the taxpayer's return (or amended return) for the taxable year of the applicable loss or by attaching an election statement to an appropriate form (i.e., Form 1139 or Form 1120X). A taxpayer that elected to forgo carrying back a loss for a taxable year ending before the Act's enactment – November 6, 2009 – may revoke such election before the due date.

Although the IRS guidance answers some questions, it leaves others unanswered. For example, is a life/nonlife consolidated group having both an "applicable" NOL and loss from operations limited to making the election for only one type of loss? If an election can be made for both, must the "applicable" NOL and loss from operations carryback be from the same year? Also, a point for companies to consider is, if the applicable loss would be carried to closed years, whether the carryback could be offset by otherwise-closed issues, thereby negating any carryback benefit.

Supreme Court Denies Certiorari in 401(k) Fee Suit

BY MICHAEL VALERIO

On January 19, 2010, the U.S. Supreme Court denied plaintiffs' petition for a writ of certiorari in the *Hecker v. Deere & Co.* 401(k) fee case. (see *Expect Focus*, Vol. II, Spring 2009). The Court's denial marks the latest–and, most likely, ultimate–defeat for the plaintiff retirement plan participants in this putative class action originally filed in December 2006 in the Western District of Wisconsin.



Failure to state claim plows down case against Deere

In February 2009, a Seventh Circuit panel affirmed the district court's dismissal of plaintiffs' complaint alleging breach of fiduciary duty claims under ERISA. The plan participants' claims were brought against the plan sponsor (Deere), the plan recordkeeper (Fidelity Management Trust), and the investment adviser to the mutual funds offered in the Deere plan (Fidelity Management & Research). While the claims against Deere focused on its alleged imprudence in selecting allegedly higher-cost "retail" mutual funds rather than institutional funds, the claims against the Fidelity defendants were directed to their allegedly improper receipt and distribution of "revenue sharing" fees drawn from the asset-based charges imposed on fund shares.

In affirming the dismissal as to Fidelity, the panel held that revenue sharing fees are not plan assets for purposes of ERISA's fiduciary rules and need not be disclosed where the total fees charged by each mutual fund are disclosed. Moreover, despite the Department of Labor's amicus support for plaintiffs, the panel held that plaintiffs failed to state a fiduciary breach claim against Deere and, in any event, Deere was protected by ERISA's section 404(c) safe harbor because Deere provided plan participants with a sufficient mix of investment options with varying fees. After the Seventh Circuit denied plaintiffs' requests for panel rehearing and rehearing *en banc*, plaintiffs petitioned the Supreme Court for review of the panel's affirmance of the Deere dismissal, but not the Fidelity dismissals. Despite the ostensibly narrowed request, the Court denied the petition.