

# Fiduciary Liability Bulletin September 2011

Fiduciary Liability is designed to protect you and your business from financial disaster. It is one of the most under utilized lines of insurance. It is also one of the least understood. Unfortunately, some directors and officers do not realize that they are fiduciaries until it is too late and a claim has been filed. Many businesses confuse the coverage with their fidelity bond although they do completely different things, have different triggers, and protect different parties.

## What is Fiduciary Liability insurance?

It is insurance designed to protect overseers of a pension and benefit plan covered by ERISA (Employee Retirement Income Security Act of 1974) from claims that they breached their obligations to the plan. Plans that are subject to ERISA include 401ks, ESOPs, medical insurance, and life insurance.

ERISA requires that a fiduciary of an employee benefit plan act solely in the best interests of participants and beneficiaries. An important feature of ERISA is that Fiduciaries can be held *personally* liable for any breach of their responsibilities. This means that your personal assets can be at risk (house, bank accounts, etc) and this exposure has been reaffirmed by courts in various jurisdictions.

## What does fiduciary insurance cover?

Breach of duties; negligent errors and omissions; improper disclosure to plan participants; poor investment advice; inadequate supervision of third party service providers; faulty advice of counsel and amendments to plan documents that are not in the best interests of plan participants are some situations that you may be exposed to. Fiduciary liability coverage will protect you in these situations.

## Do Fiduciary Claims Really Happen?

Simply put, yes. There are more fiduciary claims than employment practice claims. The average claims cost is over \$800k and more than 90% of the claims are filed by plan participants. Almost 50% of the claims arise out of benefit disputes, but other high value payouts come from administrative errors and deficiencies in the communication of participant benefits.

### **Claims Examples:**

A company was sued by a group of participants in an employee stock ownership plan (ESOP) alleging improper valuation of the company's stock which was not publicly traded. A significant shareholder of the corporation had sold his shares back to the company the prior year at a price that was determined to be fair by the trustees of the ESOP. The participants alleged that the stock was grossly overvalued in order to effectuate the buyout of the major stockholder. The stock was re-valued a year later and was found to be worth significantly less on a per share basis than what was paid out to the previous stockholder. The lawsuit settled for \$1.5 million.

A health plan sponsor allegedly did not monitor the performance of its third-party administrator (TPA) in spite of employee complaints. \$230,000 for breach of contract.

Plan sponsors of a pension plan accused of failing to inform the employees of the penalties for withdrawing from the annuity plan or the excessive surrender charge on the life insurance policy. \$72,000 in defense costs.

It does not matter if you are right or if you are incredibly careful- a claim of any kind will create an expensive lawsuit.

### **Does my other insurance protect me and my company from claims?**

Most other policies will explicitly **exclude** fiduciary liability including Directors and Officers policies. It needs to work in conjunction with your ERISA bond, Directors and Officers insurance (D&O) and Employment Practices Liability insurance as many claims of this type will allege multiple torts.

Compliance with ERISA bond requirements and 404c rules are also part of a proactive Risk Management plan.

### **How can I protect my company and how much does it cost?**

Typical policies run about \$400 to \$800 per 1 million dollars of coverage subject to an underwriting review.

Unsure what do next? Talk to us about a complimentary fiduciary review.



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For additional information or a risk assessment contact us at [DEFENSE@RWOINSURANCE.COM](mailto:DEFENSE@RWOINSURANCE.COM)

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