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# ERISA Fiduciary Liability Insurance: Limiting Exposure for Breach of Duty Claims

## Negotiating the Policy, Overcoming Coverage Challenges, and Responding to Enforcement and Litigation

### A Live 90-Minute Teleconference/Webinar with Interactive Q&A

#### Today's panel features:

Jonathan Evan Goldberg, Partner, **Seyfarth Shaw**, New York  
Lawrence Fine, Senior Vice President, Chief Technical Officer of Financial Lines Claims, **Chartis**, New York  
Christine A. Dart, Vice President, **Chubb & Son**, Simsbury, Conn.  
Howard Pianko, Partner (Moderator), **Seyfarth Shaw**, New York

### Tuesday, December 22, 2009

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**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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# **ERISA Fiduciary Liability Insurance: Limiting Exposure for Breach of Duty Claims**

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Challenges, and Responding to  
Enforcement and Litigation**

December 22, 2009

# The Panel

## **Moderator**

Howard Pianko  
Partner, Seyfarth Shaw LLP (New York office)

## **Speakers**

Christine A. Dart  
Vice President, Global Fiduciary Product Manager, Chubb & Son

Larry Fine  
Senior Vice President, Chief Technical Officer of Financial Lines Claims, Chartis

Jonathan Evan Goldberg  
Partner, Seyfarth Shaw LLP (New York office)

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# Fiduciary Liability Insurance

Presented by  
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Chubb & Son  
Global Fiduciary Product Manager  
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# What is fiduciary liability insurance?

Unique form of insurance coverage that is written on a claims made basis and helps to protect the personal assets of company fiduciaries, as well as the financial assets of the company and its employee benefit plans against lawsuits

# Interplay with contractual protection for fiduciaries

- ERISA Bond does not protect against litigation due to negligence or breach of fiduciary duty
- Employee Benefits Liability protects against E&O in administration but typically does not cover ERISA
- D&O policy contains an ERISA exclusion however, Side A policies may provide coverage
- Indemnification

# Why might indemnification be an issue?

- Often times indemnification provisions are inadequate
- An employer may become insolvent or not have adequate cash flow to pay the losses
- Due to some statutory limitations, some claims may be insurable but not indemnifiable
- *Section 410 ERISA* Exculpatory Provisions
- (Johnson v. Couturier (E.D. Ca.)

# Critical coverage issues

- What is a claim
- When must a claim be reported
- Who is Insured
- What acts are covered
- What's excluded
- Definition of loss
- Defense agreement

# What is a claim?

- Written demand for monetary damages or non-monetary relief
- Civil proceeding commenced by a service of a complaint or similar pleading
- Criminal proceeding commenced by a return of an indictment or information
- Formal civil administrative or civil regulatory proceeding commenced by a filing of a notice of charges
- Written notice of commencement of a fact finding investigation by the DOL, the PBGC or similar governmental authority located outside the U.S.
- Voluntary Settlement Program Notice

# Notice and reporting

- Claims first made against the Insured *during* the policy period, or if exercised, during the extended reporting period
- Specific reporting provisions amongst carriers
  - Notice “*as soon as practicable*” and within the policy period in which the claim is first made
  - Notice “*as soon as practicable*” when key positions first become aware but in no event later than 60 days after the expiration of the policy if coverage is not renewed
  - Notice “*as soon as practicable*” when key positions become aware but in no event later than 30 days after the end of the policy period as long as the claim was made during the final 30 days of the policy period
  - Notice of circumstances

# Who is an insured

- Organization or Sponsor Organization and its subsidiaries
- Directors & officers
- Employees
- Natural person trustee of the plan
- Board of managers, general partner
- Plan
  - ERISA plans, fringe benefit, excess benefit, plans outside the U.S.
  - Some policies exclude ESOPs unless specifically underwritten
  - Some contracts require written notice of sold, spun-off or terminated plans
  - Understand the reporting requirements regarding acquisition of another organization and that organization's plans

# What is a wrongful act

- Breach of the responsibilities, obligations or duties imposed by ERISA upon fiduciaries of a Plan
- Errors or omissions in the administration of the plan

# Standard exclusions

- Prior notice given under another policy
- Pending & prior litigation
- Pollution exclusion
- BI/PD
- Failure to comply with work comp, disability, unemployment, social security
- Fraud/Personal profit
- Failure to collect contributions or failure to fund
- Wrongful acts as respects a plan when the Sponsor Org did not sponsor such plan

# Standard exclusions

- Benefits due (some carriers build this into the definition of Loss)
  - The company shall not be liable for Loss which constitutes benefits due or to become due under the terms of a benefit program unless,
    - an insured is a natural person and the benefits are payable by such insured as a personal obligation, and recovery for the benefits is based upon a covered wrongful act; or
    - a claim made against an insured alleges a loss to the plan and/or to the accounts of such plan's participants by reason of a change in the value of the investments held by such plan, regardless of whether the amounts sought or recovered by the plaintiffs in such claim are characterized by plaintiffs as "benefits" or held by a court as "benefits"; or

# Definition of loss

- Damages, judgments, settlements, pre-judgment and post-judgment interest, and defense costs
- Some carriers provide sublimit for EPCRS and DOL VFCP fees
- Loss will typically exclude
  - Matters deemed uninsurable
  - Taxes, fines, penalties
    - Coverage may be provided for 502(i) and (l), UK civil penalties, punitive or exemplary damages if insurable

# Defense agreement

- Right and Duty to Defend
- Many firms utilize panel counsel
- Some carriers will allow the Insured to select counsel for claims other than those brought by a government entity, class action or voluntary compliance loss
- Pre-approved counsel may be added by endorsement in some cases

# Underwriting factors

- Driven by types of benefit plans
  - Employer securities
  - Retiree medical benefits
  - Funding issues
  - Plan terminations/mergers
- Size of total assets under management and participant count
- Financial strength of the sponsor and the plans
- Investment options and returns
- Service providers
- Quality of plan management
- Merger/acquisition/divestiture history
- Reductions in workforce
- Claims history

# Differentiating your risk during negotiations for coverage

- Understanding how the plan is designed and the structure to differentiate between fiduciary and non-fiduciary functions
- How authority is delegated and what the process is for monitoring
- Periodic review of plan documents for compliance
- Reservation of rights clause to terminate the plan in all plan documents and communications

# Differentiating your risk during negotiations for coverage

- Documentation of committee meetings and fiduciary decisions
- Oversight of investment management and advisory agreements including fee structure
- How investment options are selected and monitored
- Communication procedures
- Education process for fiduciaries

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# **Best Practices for Fiduciaries When a Potential Claim Arises or a Government Audit or Enforcement Action is Possible**

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# Understand how policy operates

Now that you have a situation, think back to the earlier presentation because you . . .

- Need to understand what is a “claim” and what “should” trigger the policy
- Need to understand whether the ERISA Fiduciary Liability policy is the *only* policy triggered (e.g., possible D&O policy coverage when securities law claims are also brought, but note that D&O policies usually exclude ERISA claims and ERISA policies usually don’t cover securities claims; private employee-owned companies may need manuscripted policies.)
- Need to understand who is an Insured- Plans? Sponsors? Natural Person Insureds? Third-parties endorsed on?
- Need to understand whether the “claim” falls within the policy period
- Need to understand how to file a claim with the insurer
- Need to understand the time limits for filing
- Need to understand retention amount, policy limits
- Need to understand the differences between “duty to defend” and “duty to indemnify”
- Need to understand whether the policy provides for “panel” counsel and, if so, what firms/lawyers are on the panel

# When and how to advise the insurer

- Timely submit notice to the insurance company of claims
- Pros and cons of submitting notices of “circumstances” which may lead to a claim
- Need to understand how to present the claim or notice of circumstances to the insurer
- Oral communications versus written communication

# What to disclose to the insurer

- Need to be mindful of the tone and substance of communications with the insurer
- Use of broker to provide notice
- Use of counsel to provide notice
- Stick with the facts (who, what, where, when)
- Be accurate/honest/truthful. Do not misrepresent facts to the insurance company.
- If the “claim” is in the form of a written “complaint” or other document, enclose the document

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# Practical Considerations in the Insurer Relationship When Litigation or Regulatory Enforcement Action Follows

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# Selection of counsel

- Panel counsel vs. non-panel counsel (some insurance companies have panel firms, others have loose panels, others no panels)
- How the tripartite relationship works, and who is the real client
- Independent counsel/insurance coverage counsel
- Consider the relationship between defense counsel and coverage counsel (do they know each other? Will they be able to collaboratively help the client?)
- When is it helpful and when is it counter-productive for insureds to hire coverage counsel?

# Reservation of rights letter

- Sets forth the insurer's position as to assumption of defense or payment of defense costs, as well as coverage reservations
- It should identify coverage defenses and policy defenses
- It should be sent timely
- The letter should be analyzed by counsel and client
- When is a response to the insurer's letter necessary or appropriate?

# Coverage disputes

- Reasons to sue or invoke arbitration requirements (e.g., strong case that claim should be covered, complete denial of coverage, bad faith by insurance company, and little to no possibility of settlement with insurance company prior to filing suit)
- Reasons not to sue or invoke arbitration requirements (e.g., weak case that claim should be covered, partial coverage, settlement with insurance company possible)
- Timing of such a suit
- Where to bring

# Insurance litigation guidelines- what is typical?

- No reimbursement for inter- or intra-office communications
- No reimbursement for basic legal research (should seek prior approval before conducting legal research)
- Status Reports (which may need to include some or all of the following:
  - summary of facts, chronology of events, and relationships of parties;
  - summary of plaintiffs' claims and relief requested;
  - a copy of the discovery schedule and any orders pertaining thereto where applicable;
  - liability and damages analysis of the factual and legal issues in relation to the relevant statutory and case law;
  - plans for handling the case and alternative courses of action, with a description of the advantages and risks of each;
  - deposition summaries including analysis of the creditability of each deponent;
  - preliminary assessment of exposure and the likelihood of prevailing;
  - if the case is tried, daily reports as to developments during trial;
  - the e-discovery plan and strategy.

# Scope of contact during motion practice, setting of defense strategy

- Keep insurer informed (including status letters if required)
- Should discuss motion practice and other defense strategy with insurer and, if the insurance analyst is experienced, consider sending drafts of motion papers and other legal documents sufficiently in advance for their comments
- Bear in mind that the insurance analyst may have as much, if not more, expertise than counsel handling the defense and their input may help limit, if not eliminate, the client's potential liability
- When there are strategy conferences with the insurance company, you do not have to say everything, *but do not lie to them*
- Do not delay forwarding bills (and make sure they have the correct rates)
- Bills from counsel should be sent first to client with cc to insurance company; after retention amount is met, bills should be sent to insurance company with cc to the client; client and insurer should both know what defense counsel is doing and what they are charging

# The settlement process

- To settle or not to settle?
- At what junctures should settlement be considered and what criteria should be used?
- What is in the best interest of the client?
- Seat at the table for the Insurer? Does the answer depend on coverage, including whether the case is seeking “benefits”?
- Regardless, must keep insurer informed of mediation and other settlement meetings; insurance analyst may have valuable experience and insight with mediators and mediations

# Liability limits and appeals

- What to do when liability limits are approached (or surpassed)?
- Excess insurance and how to communicate with and obtain meaningful participation from excess carriers
- Appeals – will insurance cover?
- What counsel will handle the appeal?
- What, if anything, can be done to limit the threat of "double jeopardy" – i.e., successive claims by participants and the DOL

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