Ullico

EXPERTS' CORNER

SPRING 2016

The Current Outlook for Fiduciaries

By Tina Fletcher, Vice President, Ullico Casualty Group, Inc.

Tina Fletcher is the Vice President for Ullico Casualty Group. Ms. Fletcher oversees the daily activities of Ullico's professional liability insurance department, which includes supervising underwriters and monitoring both renewal and new business policies.

Trustees and other fiduciaries of multiemployer funds face significant personal liability in their daily duties due to responsibilities as imposed by the Employee Retirement Income Security Act (ERISA). As a trustee, you need a fiduciary liability policy to protect yourself from losses. But no two policies are the same!

Tina Fletcher, Vice President of Ullico Casualty Group, Inc., reviews basic considerations when choosing a fiduciary liability policy and examines trends in claims that may affect the coverage you choose now and in the future.

Understanding Your Policy

Fiduciary liability policies typically reimburse a benefit fund or other claimant for losses caused by violations of the trustees' fiduciary responsibility under ERISA, non-fiduciary duties such as settlor responsibilities (e.g. making changes to the plan document), administrative duties (e.g. paying benefits), and some fines and penalties that are insurable by law.

Since all policies are not the same, it is important to understand what your policy covers. Some key areas in your policy that you should understand, at a minimum are:

1. Insuring Agreement: This is the key paragraph that explains the scope of coverage.

2. Definitions of Claim, Loss or Damages, Wrongful Act, and Insured: These definitions provide

Coverage	Limits Available
Pre-Claim/Investigatory Expense Coverage	Most carriers are providing either full limits or a sub-limit ranging from $50,000 to $250,000 for smaller plans or funds.
Benefit Overpayments	Some carriers are offering sub-limits ranging from $25,000 to $100,000 to replenish the plan or fund if an attempt has been made to collect from the participant and a claim has not been brought against the plan or fund.
Voluntary Compliance	Most carriers offer sub-limits ranging from $50,000 to $250,000; make sure your carrier extends coverage under this program for reasonable expenses and interest.

Ullico Casualty Group, Inc. is a subsidiary of Ullico Inc., the holding company. Ullico Casualty Group, Inc.: In CA, Ullico Insurance Agency Inc. Lic# 0E16939; in NY, Ullico Casualty Agency. Products may not be available in all states.

additional details as to what is covered and who is covered.
3. Exclusions: limitations in coverage.
4. Conditions that impact how your claims are handled: choice of counsel, duty to defend, and when claims need to be reported.
An insurance broker that specializes in fiduciary liability will be able to help you determine coverages and limits that are appropriate for your plan or fund.

Trends in Fiduciary Liability

1. First Party Coverages
These coverages are payments made by the insurer before a Wrongful Act or Claim even exists.

- **Pre-Claim Coverage:** provides expenses related to investigations, including interviews, by governmental agencies. The coverage has many names such as Investigatory Expense, Gap Coverage and Interview Coverage.

Review the coverage to make sure it does not limit the types of governmental agencies investigating your fund. Typically, you will always find the coverage extends to investigations brought by the Department of Labor (DOL). Other agencies that can investigate your funds include but are not limited to Health and Human Services (HHS), Pension Benefit Guarantee Corp (PBGC), Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC).

Example: *The DOL sends a letter to a health and welfare (H&W) fund, requesting documents to determine if the fund is compliant with ERISA. The DOL has also asked to interview specific fiduciaries of the plan. While the DOL has not imposed a charge yet, and therefore there is no claim, the costs associated with the investigation could be covered by pre-claim coverage.*

Now say the fund received a letter stating that the Trustees of the H&W fund breached their fiduciary duties. That letter triggers a covered claim.

- **Benefit Overpayment:** Under ERISA, fiduciaries are responsible to make the plan or fund whole if there has been a miscalculation in benefits and a participant or their estate has been overpaid. Typically, trustees will withhold future benefit payments or sue the fund or their estate to recover these amounts owed to the plan or fund. Some carriers are now offering a sub-limit to replenish the plan or fund if the trustees were not successful in collecting the amounts owed to the plan or fund from the participant or their estate if a suit has not been brought against the plan of fund.
- **Voluntary Compliance:** Regulatory correction programs that allow Plans or Funds to correct inadvertent non-compliance through Employee Plans Compliance Resolution System (EPCRS) with the IRS. The Employee Benefits Security Administration (EBSA) of the DOL administers the voluntary fiduciary correction program and delinquent filer voluntary compliance program. The carrier will typically pay the penalties along with interest to the appropriate parties before damages are brought against the Plan or Fund.

2. Regulatory Agency Investigations
Investigations are leading to penalties, fines and taxes from the DOL, IRS and HHS.

Regulation	Description	Limits Available
IRS 4975 and 4976	Excise tax on prohibited transactions when an employer does not pay contributions or elective deferrals timely	Find a carrier that provides full limits and does not sub-limit this important coverage
502 (c) Reporting Violations	Trustees have a duty to respond to requests for information in a timely fashion.	Most carriers offer sub-limits ranging from $50,000 to $250,000
HIPAA/ HITECH	Protects individually identifiable health information that a fund creates or receives	Find a carrier that provides full limits and does not sub-limit this important coverage
PPACA /Obamacare	Amended ERISA by incorporating ACA coverage mandates for health plans (section 715); Health plan participants can sue under sections 502(a)(1)(B) (benefits) and section 502(a)(3) (equitable relief); The DOL has stated they intend to focus on ACA requirements in its health plan audit process.	Find a carrier that provides full limits and does not sub-limit this important coverage
502 (a) (3) Equitable Relief	Surcharges can be awarded under this section of ERISA; similar to punitive damages and can be costly	Find a carrier that definitively provides full limit coverage since some carriers have claimed that damages does not include surcharges

3. Healthcare Information Privacy and Security Rules

The HHS Office for Civil Rights is expected to begin a permanent random audit program to ensure compliance with healthcare information privacy and security rules. The DOL will be making sure plans and funds are compliant with these rules and the IRS can impose significance penalties.

- May impose penalty of $250 per return not to exceed $3 million for the calendar year under IRS section 6055 or 6056.
- May impose penalty of $100 per statement not to exceed $1.5 million for failure to provide a correct individual statement to full-time employees under IRS section 6055 or 6056.

The best solution is to look for a carrier that will provide full limits of liability and not limit coverage for these penalties and taxes.

4. Other Important Coverages to Consider

- Cyber Insurance: Trust funds have access and ownership of the personal information, such as social security numbers and home addresses, of their participants. If this data is lost, most states mandate that the entity must respond in a timely manner by notifying potentially affected individuals, regulators, and the press.

Consider a cyber liability policy to cover breach notifications, system damage, regulatory actions, and lawsuits due to breach of security.

Some fiduciary carriers can offer some limited coverage as part of their forms but they are not experts in this complex risk, which eliminates the most important part of a standalone cyber policy — the risk management and team of experts that walk you through the process of sending notifications, recreating damaged data and providing forensic solutions when needed.

- Wrongful Employment Practices: If you are a large plan or fund or a training fund, it is likely that you will have employees.

Harassment and discrimination claims may be brought by employees, students or miscellaneous third parties. It is important to make sure you have coverage in place that protects the plan or fund, the trustees and instructors of the training fund.

Example: *A large H&W fund administers its own plan by providing benefits to its participants and employs five individuals to process claims. One of the employees is out on Family Medical Leave Act (FMLA) multiple times but is now back to work with a note from the doctor that he is able to perform all tasks as assigned. The employee continuously shows up to work late. The fund terminates the employee for multiple days of tardiness. The individual sues and claims it is because he had health issues that the fund terminated him. This would trigger the discrimination coverage.*

- **Failure to Educate:** Failure to educate claims are typically brought by past, present or potential apprentices, journeymen or students against training funds. The most common claims include a form of discrimination by the student.

Example: *A training fund provides a drug test and determines that a female is ineligible to continue the training program. The female claims that the fund treated her unfairly because she is a woman and she will not be able to keep her job without the training. This charge triggers both a discrimination claim and failure to educate.*

The fiduciary liability policy was not designed to include coverage for harassment, discrimination or failure to educate claims. Some carriers may add these coverages to your fiduciary liability policy for an additional cost. Depending on the number of employees or students, you may want to consider purchasing a separate policy that specifically fits your needs with your broker. ✪

When determining the right coverage for your needs, always work with your broker. Here are some questions that will get the conversation going:

- Do I have the coverages I need to protect fund assets and me?
- What policy exclusions should I be concerned about?
- Will my carrier force me to settle (hammer clause)?
- Does my policy sub-limit important coverages?
- Does my fund have adequate limits?
- If we get a claim, can we pick the defense attorney?
- Does my fund need cyber liability insurance? If we have it already, does my policy include risk management services?